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November 30, 1981

Mr. Francis J. Conners
Vice-President
National Association of
Letter Carriers
100 Indiana Avenue, N.W.
Washington, D.C. 20001

Dear Frank:

I enclose a letter that I have written today to James Edgemon which should be of general interest. Unless you disagree, I think it would be appropriate to distribute copies of this letter to all the NBA's and resident officers.

Sincerely yours,

Keith E. Secular

KES/ms

cc: Vincent R. Sombrotto

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November 30, 1981

Mr. James Edgemon
National Association of
Letter Carriers
2300 Oakmont Way, #211
P.O. Box 1269
Eugene, Oregon 97440

Re: Role of Shop Stewards During Interrogation of Employees by Postal Inspector

Dear Jim:

This is to follow up on our telephone conversation today concerning a grievance you are handling. The grievance involves an interrogation of a letter carrier by postal inspectors. During the interrogation the interrogator required the carrier's shop steward to remain silent. The carrier had earlier requested representation by the steward during the interrogation.

As we discussed, the conduct of the inspector that you described was clearly unlawful under the National Labor Relations Act. Recent decisions of the National Labor Relations Board and the United States Court of Appeals for the Ninth Circuit established that: (1) when an employee being interviewed by an employer is confronted by a reasonable risk that discipline would be imposed, the employee has a right to the assistance of - not mere presence of - a union representative; and (2) that an employer violates the Act when it "refus[es] to permit the representative to speak, and relegat[es] him to the role of a passive observer."

Enclosed are copies of these recent decisions.

Sincerely yours,

Keith E. Secular

Keith E. Secular

KES/ms

Enclosures

cc: Vincent R. Sombrotto
Francis J. Conners

cause she requested representation at the investigatory interview. He found it unnecessary to pass on the allegation, since, in finding the Weingarten violation, he ordered the same make-whole remedy which he would have ordered if the discharge itself were found to be unlawful. In our view, the Administrative Law Judge should not have refused to pass on the independent 8(a)(1) allegation simply because the remedy for it would be the same as the remedy for the violation he found. Our review of the evidence, however, leads us to conclude that the General Counsel has not shown that Hatfield was discharged because she requested a representative. Rather, the evidence shows that her discharge was motivated by Respondent's belief that she had improperly adjusted telephone calls. Accordingly, the complaint with respect to this allegation is dismissed.

Finally, Respondent and the General Counsel have both excepted to the Administrative Law Judge's recommended remedy wherein the Administrative Law Judge ordered backpay and reinstatement for Hatfield. The General Counsel urges that the Administrative Law Judge should also have ordered Respondent to strike and remove from its records and files the statement given by Hatfield to Lawshe as well as all references to any disciplinary action arising out of the events of March 1, 1978. Respondent, on the other hand, argues that reinstatement and backpay are improper, since there is no finding that Hatfield was discharged for requesting representation, or even that the discharge violated Section 8(a)(1) of the Act. We therefore reach the question of the proper remedy for Respondent's unlawful refusal of Hatfield's request for a representative at an investigatory interview.

We think the answer to the question is a simple one. The Board has authority to restore the status quo ante where restoration is necessary to "undo the effects of violations of the Act,"[16] and where the remedy is "well designed to promote the policies of the Act."[17] Here, Respondent's unlawful interview of Hatfield resulted in a confession which Respondent then used as the basis for discharging Hatfield. Accordingly, we think it appropriate, in order to rectify the harm which resulted from the unlawful interview, to grant the remedy of reinstatement and backpay. In so doing, we hold that, where the General Counsel shows that an unlawful investigatory interview has occurred and that the employee was disciplined or discharged for conduct which was the subject of the interview, the burden then shifts to the employer to show that its decision to discipline or discharge was not based on information which it obtained at the interview.[18]

In the instant case, the General Counsel showed that an unlawful interview had occurred, and that Hatfield was discharged for conduct which was the subject of the interview. Respondent in fact admitted that it based its decision to discharge Hatfield on her oral admissions at the interview with Lawshe. Accordingly, it failed to meet its burden of showing that the decision to discharge was not based upon information obtained at the unlawful interview.[19] We therefore find that an order of reinstatement and backpay is the proper remedy in this proceeding.[20] Furthermore, we agree with the General Counsel that, as part of the make-whole remedy, Hatfield's statement at the interview, as well as any references to any disciplinary action arising out of the events of March 1, 1978, should be expunged from Respondent's files and records.

JENKINS, MEMBER, concurring:

[Text] I join the majority in ordering that Respondent reinstate Cary Ann Hatfield with backpay and expunge any records dealing with her discharge. I would, however, grant the requisite make-whole remedy for a Weingarten violation where the General Counsel shows that an unlawful interview has occurred, and that the employee was disciplined or discharged for conduct which was the subject of the unlawful interview. Since such was the case here respecting Hatfield, the remedy provided in this Decision is the appropriate one.

TEXACO—

TEXACO, INC., Anacortes, Wash. and OIL, CHEMICAL & ATOMIC WORKERS, LOCAL 1-591, AFL-CIO, Case No. 19-CA-9950, August 27, 1980, 251 NLRB No. 63

William T. Grimm, for General Counsel; John R. Tadlock, Denver, Colo., for union; William D. Evans, Los Angeles, Calif., for employer; Administrative Law Judge George Christensen.

Before NLRB: Fanning, Chairman; Jenkins, Penello, and Truesdale, Members.

INTERFERENCE Sec. 8(a)(1)

—Employee interview ▶ 50.728

Employee was entitled to union representation at meeting with supervisor.

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[16] Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 216, 57 LRRM 2609 (1964), quoting N.L.R.B. v. Seven-Up Bottling Company of Miami, Inc., 344 U.S. 344, 346, 31 LRRM 2237 (1953).

[17] Fibreboard Corp., 379 U.S. at 216.

[18] In Fibreboard, the respondent also had the burden of establishing that the remedy was unwarranted. Ibid. Member Jenkins regards this statement as too broad, but otherwise concurs in the decision herein. See his dissent in Kraft Foods, Inc., 251 NLRB No. 6, 105 LRRM 1233 (1980).

[19] Because the circumstances of the interview and discharge were fully litigated, and because Respondent did come forward with the evidence as to the basis for its decision, we find it unnecessary to reopen and remand this case to the Administrative Law Judge for a hearing on this issue.

[20] That does not mean, however, that, if Hatfield accepts reinstatement, Respondent is forever foreclosed from discharging her for improperly adjusting the prisoners' calls. It cannot, however, do so on the basis of any information obtained from the interview of March 1. This procedure remedies the unfair labor practice, while preserving Respondent's right to discipline and discharge its employees, so long as its actions do not contravene the Act.

(1) In the view of Members Jenkins and Truesdale, an employee is not entitled to union representation at meetings that have sole purpose of imposing predetermined discipline, but here employer went beyond act of imposing discipline when it sought and secured employee's admission of possible misconduct; (2) Chairman Fanning and Member Penello find that employee was entitled to union representation regardless of whether interview is termed "disciplinary" or "investigatory."

—Employee interview ▶ 50.728

Employer that was conducting employee interview of the sort that entitles employee to have union representative present violated LMRA when it permitted union representative to attend on condition that he remain silent throughout interview.

ORDER Sec. 10(c)

—Reprimand — Remedy ▶ 56.01

Employer that gave employee reprimand after conducting interview at which employee was unlawfully denied union representation is ordered to expunge all references to reprimand from its records.

INTERFERENCE Sec. 8(a)(1)

—Employee interview ▶ 50.728

Employer did not violate LMRA when it permitted union representative to be present during meeting between employee and supervisor but insisted that representative remain silent. (1) In the view of Members Jenkins and Truesdale, supervisor did not go beyond simple, ministerial act of imposing discipline that had been determined in final and binding manner prior to interview, and therefore employer was not required to furnish employee with union representation at interview; (2) Chairman Fanning and Member Penello find that supervisor did not engage employee in any form of dialogue or interchange that could be termed an "interview."

JENKINS and TRUESDALE, Members:

[Text] The Administrative Law Judge found that Respondent, by ordering the union representatives of employees Richard Deutsch and Travis Slater to remain silent at their disciplinary conferences with Respondent, violated Section 8(a)(1) of the Act. The Administrative Law Judge concluded that Section 7 of the Act not only assures the employee the right, upon request, to union representation at an interview which he reasonable expects may result in discipline, but also assures the employee that the representative present at such an interview will have the opportunity to provide effective assistance to the employee. For this conclusion, the Administrative Law Judge cited the Supreme Court's decision in International Ladies' Garment Workers' Union, Upper South Department, AFL-CIO v. Quality Manufacturing Co. et al., 420 U.S. 276, 88 LRRM 2698 (1975), and the Board's decision in Certified Grocers of California, Ltd., 227 NLRB 1211, 94 LRRM 1279 (1977).[3]

Respondent excepts to the Administrative Law Judge's finding that it violated Section 8(a)(1) of the Act, contending, inter alia, that the Supreme Court's decision in N.L.R.B. v. J. Weingarten, Inc.,[4] does not support the Administrative Law Judge's conclusion that Section 7 extends the right of representation to an employee's participation in a purely disciplinary interview; i.e., one in which discipline has already been determined. We find merit in this exception with respect to the interview conducted with employee Slater. However, for the reasons set forth below, we affirm the Administrative Law Judge's finding that Respondent violated Section 8(a)(1) by its conduct of the interview with Deutsch.

The Deutsch Incident: In late September 1977, Richard Deutsch, a pipefitter, was assigned to install piping in a cooling tower at Respondent's facility in Anacortes, Washington. Working on the tower at the same time was another employee, Ron Robinson. While Deutsch was still working, Robinson moved down to the tower floor and removed his locking device covering the tower's electrical fan switch.[5] Soon after Robinson's departure from the tower, Jim Tracey, a boilermaker's helper, asked Deutsch's supervisor, Ed Linnell, whether he could turn on the tower's fan to see if it was working properly. Linnell replied that he could if there was no locking device on the fan switch. On approaching the tower, Tracey observed that Deutsch was working on the tower, although there was no locking device on the electrical switch. Tracey brought this matter to the attention of Gene Vaughn, an assistant foreman. Vaughn in turn notified Linnell that Deutsch had been found working on the tower without having attached his locking device to the tower's fan switch. Prompted by Vaughn's report, Linnell personally investigated the matter, and interviewed Tracey and Robinson regarding their accounts of the incident. According to Linnell, Robinson stated that on leaving the tower he told Deutsch to place his locking device on the tower switch.[6] Apparently satisfied

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[3] The Administrative Law Judge also cited the Board's decisions in Climax Molybdenum Company, a Division of Amax, Inc., 227 NLRB 1139, 94 LRRM 1177 (1977), and Mobil Oil Corporation, 196 NLRB 1052, 80 LRRM 1183 (1972).

[4] 420 U.S. 251, 88 LRRM 2689 (1975).

[5] Each craftsman carried a locking device for use in preventing the operation of equipment while work was being performed thereon.

[6] The Administrative Law Judge, noting that neither Tracey nor Robinson testified, credited Linnell's testimony only to the extent that a conversation occurred between Robinson and Linnell concerning the Deutsch incident. He did not credit Linnell that Robinson had in fact told Deutsch he was leaving the tower.

with the results of his investigation. Linnell then summoned Deutsch to his office for the purpose of orally reprimanding Deutsch for failing to attach his locking device to the tower switch as required by company operating instructions.[7]

After receiving Linnell's directive to come to his office, Deutsch, apparently aware of Linnell's investigation and anticipating the possibility of discipline, requested the assistance of the acting union steward, John Guidinger. Linnell, after securing the approval of the employee relations department, agreed to allow Guidinger to attend the meeting, but stated that his role was limited to that of a silent observer. Should Guidinger attempt to speak at the meeting, Linnell warned that he would be asked to leave. According to Guidinger's credited testimony, Linnell began the meeting by reading Respondent's standing instruction to Deutsch. Linnell then criticized Deutsch for not locking out, secured an admission that he had not locked out, and emphasized the seriousness of his misconduct.[8]

The Slater Incident: On October 26, 1976, Travis Slater was assigned by Assistant Foreman Gaylord Greenough to grease the valves in the catalytic reforming unit and the hydrotreater unit. Greenough, who had gone to the operator's shack at approximately 2:40 that afternoon to pick up another employee, noticed that Slater was inside the shack with a coffee cup in his hand. Returning approximately 20–30 minutes later,[9] Greenough again saw Slater in the shack, this time with his helper. Greenough asked Slater whether he had completed his assignment. Slater replied in the negative, adding that there was plenty of work yet to be done. Greenough called Slater out of the shack and asked him why he and his helper were not working on the greasing assignment. Slater replied that they had been lugging a heavy grease gun up and down the tower ladder and had decided to rest for a minute at the shack. Greenough directed them to return to work, stating that the operator's shack was not a place for lounging and sitting around drinking coffee. Slater and his helper thereupon returned to work and Greenough reported the matter to his superior, Foreman Charles Fair. Based on Greenough's report and satisfied that a three-day suspension was warranted under the circumstances,[10] Fair prepared a three-page letter to Slater in which he recited a number of earlier incidents of misconduct and closed with a statement that Slater was suspended for three days and with a warning that more severe discipline, including discharge, would follow if there were any further incidents of misconduct.

On October 28, 1977, Fair summoned Slater to his office for the purpose of imposing the three-day suspension. When Slater arrived at Fair's office, Slater asked if the meeting involved discipline. Fair replied that it did. Slater then asked for union representation and specifically requested Frank Mann of the Union's Workmen's Committee to represent him. Fair granted the request, but stated that Mann would not be allowed to participate actively in the meeting — a condition repeated to Mann when he arrived. Fair began the meeting by handing Slater the suspension letter and stating that he was suspended for three days. Slater read the letter and commented that he had been drinking water, not coffee, as reported in the letter. Fair started to ask Greenough whether there was water rather than coffee in the cup, but stopped, saying that it had no bearing on the issue. Slater also said that he had rested in the shack only a few minutes. Fair, however, reiterated the three-day suspension and told Slater to take it up with the Union if he so desired.[11]

As noted, the Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by refusing to allow Union Representatives Guidinger and Mann to lend effective assistance to employees Deutsch and Slater at their disciplinary meetings. Although characterizing those meetings as having the "elements of both an investigation and assessing of discipline," the Administrative Law Judge nevertheless concluded that the alleged purpose of the meetings was irrelevant to the consideration of whether a violation had in fact occurred. In his view, it is sufficient to support a violation of Section 8(a)(1) of the Act that Respondent denied effective representation to employees Deutsch and Slater at a time when they entertained a reasonable belief that the interviews would result in disciplinary action.

In response to the allegations in the complaint,[12] and excepting to the Administrative

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[7] Respondent's standing instruction 31 requires craftsmen to place their locking device on any operating equipment they are currently servicing.

[8] Guidinger's account of the meeting is essentially corroborated by Deutsch. According to Deutsch, Linnell "went through it all . . . explained what happened . . . asked me what happened (and) told me his side and my side."

[9] Greenough testified that he returned 20 minutes later, whereas Slater placed the time closer to 30 minutes.

[10] Slater had been the subject of several earlier complaints and warnings concerning his work conduct.

[11] The matter of union representation at disciplinary meetings was discussed in a subsequent meeting between company representatives and the Union's Workmen's Committee. At that session, Respondent reaffirmed its position taken previously at the disciplinary conferences with Deutsch and Slater that union representatives could attend disciplinary discussions, but would not be permitted to lend active assistance to their client-employee. The Union replied that it was not only entitled to attend such conferences, but could actively participate on behalf of the employee. Respondent replied that it was not willing to change its policy.

[12] In its brief, Respondent, noting that the Administrative Law Judge found both investigatory and disciplinary elements in the Deutsch and Slater interviews, contends that the complaint only encompasses allegations relating to disciplinary interviews. Any violation predicated on denial of Weingarten rights at an investigatory interview is, according to Respondent, outside the scope of the complaint. We find no merit in Respondent's contention. The complaint broadly refers to a refusal "to allow union representatives to participate in interviews of employees at which discipline was handed out." The essence of a Weingarten violation is the denial, upon request, of union representation at an investigatory interview which the employee reasonably believes would result in discipline. Whether discipline is in fact imposed is not critical to the finding of a violation under Weingarten. The complaint's unambigu-

Law Judge's finding that it violated Section 8(a)(1) of the Act by curbing the representatives' role at the disciplinary discussions with Deutsch and Slater. Respondent argues that the Administrative Law Judge misinterpreted the thrust of Weingarten by overlooking the Court's critical limitation of the representation right to interviews of an investigatory nature. Respondent contends that the Administrative Law Judge mischaracterized the Deutsch and Slater meetings as having disciplinary and factfinding elements, inasmuch as the decisions to impose discipline had been determined prior to the meetings, and Deutsch and Slater were summoned to those meetings solely for the purpose of imparting those decisions to them. Respondent further argues that, even assuming Section 7 of the Act, as interpreted by the Board in Certified Grocers, supra, extends the right to representation to disciplinary interviews, there is no basis in the Weingarten decision for construing Section 7 as creating a right to effective representation at a disciplinary or investigatory interview. This conclusion, Respondent asserts, is supported not only by the Court's admonition that the employer has no duty to bargain with the union representative at an investigatory interview,[13] but also by its statement that "[t]he employer . . . is free to insist [at an interview] that he is only interested, at that time, in hearing the employee's own account of the matter under investigation."[14] This latter statement, Respondent contends, clearly indicates that an employer may demand the silence of a representative during an interview at which discipline is discussed. Additionally, Respondent argues that its policy of free discussion with the Union's Workmen's Committee and the availability of the contractual grievance mechanism obviates the need for union representation at interviews where the employee is confronted with the possibility of disciplinary action. Finally, Respondent contends that the Administrative Law Judge's make-whole remedy with respect to Slater is contrary to Section 10(c)'s prohibition against backpay to an employee suspended for cause.[15] In this connection, Respondent notes that the decision to discipline Slater had been made prior to the interview and was based on evidence obtained from sources independent of the interview.

Analysis: The proper disposition of this case turns on the Supreme Court's decision in Weingarten, and its explication of the nature and scope of an employee's right to representation under Section 7 of the Act. According to the Court, Section 7 guarantees an employee the right to union representation at an investigatory interview with the employer when the employee reasonably fears it may result in disciplinary action. Section 7's mandate that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" necessarily included, in the Court's view, the right to have the assistance and support of a union representative during a confrontation with the employer where the employee reasonably perceived a threat to his job security. The right, however, is not absolute.[16] The Court noted that the employer may forgo the interview rather than submit to one in the presence of a union representative and may thereafter act on the basis of information obtained from other sources.[17] Likewise, the employee whose request for union representation is denied has the option of refusing to participate in the interview, thereby giving up any benefits that may accrue therefrom, or of proceeding without representation.

In Certified Grocers,[18] cited by the Administrative Law Judge, the Board held that the Supreme Court's decision in Weingarten applied to any interview, whether labeled "investigatory" or "disciplinary," which the employee reasonably believes may result in disciplinary action being taken against him. The United States Court of Appeals for the Ninth Circuit denied enforcement of the Board's Order in that case, holding that Weingarten did not extend the right to representation to an interview conducted solely to inform the employee of predetermined discipline.[19] We have recently reconsidered our decision in Certified Grocers, concluding that it was wrongly decided on its facts and overruling it to that extent. Thus, in Baton Rouge Water Works Company,[20] which issued subsequent to the Administrative Law Judge's Decision herein, a majority of the Board held that the right to representation

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our reference to denial of union representation at an interview in which discipline is imposed clearly placed Respondent on notice that the General Counsel was alleging a violation of Sec. 8(a)(1) of the Act under Weingarten. Therefore, the complaint fully apprised Respondent of the violation charged, litigated, and ultimately found by the Administrative Law Judge.

[13] Weingarten, supra at 259–260.

[14] Id. at 260.

[15] Sec. 10(c) of the Act provides in pertinent part:

"No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged *for cause.*" (Emphasis supplied.)

[16] Both the Board and the Court have expressed the view that the right to representation does not extend to certain ordinary industrial situations.

"We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative." (420 U.S. at 257, 88 LRRM 2689 (quoting Quality Manufacturing Company, 195 NLRB 197, 199, 79 LRRM 1269 (1972).)

See also Roadway Express, Inc., 246 NLRB No. 180, 103 LRRM 1050 (1979), wherein the Board held that no entitlement to representation arises until the employee is actually confronted with and asked to participate in an interview which he reasonably fears may result in discipline.

[17] If an employer exercises his prerogative to dispense with the investigatory interview, and thereafter imposes discipline, the employee or his representative is not thereby foreclosed from raising the matter with the employer in another context, such as the grievance process.

[18] 227 NLRB 1211, 94 LRRM 1279.

[19] N.L.R.B. v. Certified Grocers of California, Ltd., 587 F.2d 449, 100 LRRM 3029 (1978); see also Alfred M. Lewis, Inc. v. N.L.R.B., 587 F.2d 403, 99 LRRM 2841 (9th Cir. 1978); Mt. Vernon Tanker Company v. N.L.R.B., 549 F.2d 571, 94 LRRM 3054 (9th Cir. 1977).

[20] 246 NLRB No. 161, 103 LRRM 1056 (1979).

under Weingarten does not extend to those employer-employee meetings where the sole purpose is the imposition of predetermined discipline:

"[A]s long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation exists under Weingarten when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline."[21]

However, the Board also stressed that it was not holding that there was no right to the presence of a union representative at a "disciplinary" interview. Nor was the right to representation necessarily foreclosed because the decision to discipline the employee antedated the interview. As the Board stated in Baton Rouge:

"[I]f the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under Weingarten may be applicable. Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach."[22]

In light of the foregoing, it is incumbent upon us first to determine whether Deutsch and Slater were entitled to representation under Weingarten. Turning to Deutsch's interview, we find that Respondent's meeting with Deutsch was clearly of the kind envisioned by the Court in Weingarten as warranting the presence of a union representative. Thus, Guidinger credibly testified that Linnell sought and secured an admission from Deutsch that he had failed to attach his locking device to the tower's fan switch. This testimony was essentially corroborated by Deutsch, who testified that Linnell inquired as to his account of the incident. It is clear therefore that Respondent went beyond the act of imposing discipline and sought and secured an admission of possible misconduct. Such an inquiry indicated that Respondent was continuing, on a substantive basis, its investigation of the incident. In these circumstances, Deutsch was entitled to representation.

Although Deutsch was entitled to representation, Respondent, as noted, did provide such representation, conditioned on the representative's remaining silent throughout the interview. The representative's role was, in effect, circumscribed to that of a passive observer, rather than an active participant. We are therefore presented with the issue of whether the right to representation under Weingarten includes the right not only to the presence of a representative, but to the active assistance of that representative during a confrontation with the employer which threatens the employee's employment security.

We have recently addressed this issue in Southwestern Bell Telephone Company, 251 NLRB No. 61, 105 LRRM 1246 (1980). There we held that the Court in Weingarten intended to strike a balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role of the representative present at such an interview. While we noted the Court's admonition that the presence of a representative "need not transform the interview into an adversary contest,"[23] we nevertheless recognized that the Court limited the employer's right to regulate the role of the representative at the interview. In short, such regulation cannot exceed that which is necessary to ensure the "reasonable prevention of such a collective-bargaining or adversary confrontation with the statutory representative."[24] In Southwestern Bell the employer also demanded the silence of the union's representative at the outset of the interview. We held that in so doing the employer had gone beyond the bounds of regulation reasonably necessary to avoid such a confrontation with the statutory representative. Accordingly, in agreement with the Administrative Law Judge, we likewise hold here that Respondent violated Section 8(a)(1) of the Act by denying to Deutsch the assistance of his union representative. We also hold that the appropriate remedy for a Weingarten violation in these circumstances is, as found by the Administrative Law Judge, the expungement from Respondent's records of all references to the reprimand received by Deutsch.[25]

However, unlike the Administrative Law Judge, we do not find that Respondent violated Section 8(a)(1) of the Act by demanding the silence of Union Representative Mann at Slater's interview. In sharp contrast to the Deutsch interview, Respondent engaged in the simple, ministerial act of imposing upon Slater discipline which has been determined in a final and binding manner prior to the interview. Thus, it is uncontroverted that Pair began the interview by handing Slater the letter informing him of his three-day suspension and the reasons therefor. At no time did Pair cross the line between an investigatory interview and one solely for the purpose of imposing discipline by seeking or securing information from Slater concerning his alleged misconduct. Accordingly, Respondent was not statutorily obligated to furnish representation to Slater at the interview and thus it is irrelevant that Respondent effectively muted the representative's

[21] Id. at sl. op., p. 8.

[22] Id. at sl. op., pp. 7–8. In Baton Rouge, the Board, to avoid obscuring the issue by continued reference to the labels "investigatory" and "disciplinary," simply held that the right to representation included not only those interviews of a purely investigatory nature, but those in which discipline is meted out so long as the employer is still actively pursuing information during the interview bearing on th alleged misconduct, such as seeking an admission of misconduct.

[23] Id. at sl. op., p. 8 (citing Weingarten at 263).

[24] Id. at sl. op., p. 8.

[25] For the reasons set forth in his dissenting opinion in this case, Member Truesdale would not order Respondent to expunge from its records all references to the reprimand received by Deutsch.

role at the interview. We therefore find that with regard to the Slater interview Respondent committed no Weingarten violation.

Having found that Respondent did not violate the Act with regard to Slater, we hereby dismiss the complaint in that respect and shall modify the Administrative Law Judge's remedy accordingly.

FANNING, Chairman, and PENELLO, Member, concurring:

(Text) Although we are in accord with the result reached by our colleagues, we disagree with certain portions of the rationale expressed in the majority opinion. In essence, our disagreement centers upon the majority's continued maintenance of a substantive distinction between investigatory interviews and disciplinary interviews regarding an employee's right to the presence of his union representative.

As we expressed in our respective dissenting opinions in Baton Rouge Water Works Company,[24] it is our view that an employee's right to union representation at a disciplinary interview was firmly established in Board law prior to the Supreme Court's decision in Weingarten, and a close reading of Weingarten reveals that that decision simply extended previously existing employee rights in disciplinary interviews to investigatory interviews. Thus, we believe that the excessively narrow reading of Weingarten engaged in by the Baton Rouge majority served to eliminate the very right to representation from which the Weingarten right sprang. Therefore, unlike the majority in both Baton Rouge and the instant case, it is our position that an employee is entitled to union representation upon his request at both investigatory and disciplinary interviews.

In the instant case, we believe that Deutsch was plainly entitled to a union representative regardless of whether his interview was termed investigatory or disciplinary. Although Deutsch was provided with a representative, Respondent conditioned the representative's presence upon his remaining silent at the interview. We agree with the majority that such circumscription of the representative's role violated Section 8(a)(1) of the Act.[27]

With respect to the Slater interview, the majority finds that the condition of silence placed upon Slater's union representative was irrelevant since Slater's was a disciplinary interview within the meaning of Baton Rouge to which no Weingarten protections attach. Since, as noted above, we do not subscribe to such distinctions, we do not agree with the majority's rationale.

Rather, we find that the Slater incident was similar to the situation presented in Amoco Oil Company.[28] In that case, the Board found no violation of Section 8(a)(1) of the Act since the facts revealed that the respondent "made no attempt to question [the employee], engage in any manner of dialogue, or participate in any other interchange which could be characterized as an interview."[29] Similarly, in the instant case, Respondent did not engage Slater in any form of dialogue or interchange which could be termed an interview.[30] Consequently, Respondent did not act in contravention of the requirements of Weingarten, and, therefore, the condition of silence placed upon Slater's representative was not a violation of Section 8(a)(1).[31] Accordingly, we would dismiss that portion of the complaint.

Finally, we agree with the majority that Deutsch should be accorded a make-whole remedy, since, as is found by the majority, Respondent "sought and secured an admission" from Deutsch that he had engaged in wrongful conduct.[32]

In addition, even without reference to other decided cases, we find Member Truesdale's dissent from the remedy to be plainly at odds with the majority decision on the merits in which he joins. For in discussing the Deutsch interview, the majority states:

"It is clear therefore that Respondent went beyond the act of imposing discipline and sought and secured an admission of possible misconduct. Such an inquiry indicated that the Respondent was continuing, on a substantive basis, its investigation of the incident."

Having so found, Member Truesdale then concludes in his dissent from the remedy that Respondent did not rely on information obtained at the unlawful interview in its decision to discipline.

It is extremely difficult to discern how an employer could (1) decide to continue its investigation of employee misconduct through an interview of the accused employee, (2) affirmatively solicit from the employee information relating to the misconduct, and (3) in fact succeed in obtaining perhaps the most telling information available to merit a decision to discipline and yet be found not to

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[24] 246 NLRB No. 161, 103 LRRM 1056 (1979).

[27] Southwestern Bell Telephone Company, 251 NLRB No. 61, 105 LRRM 1249 (1980).

[28] 238 NLRB No. 84, 99 LRRM 1250 (1978). See also K-Mart Corporation, 242 NLRB No. 140, 101 LRRM 1406 (1979).

[29] Id. at sl. op., p. 4.

[30] See also Member Penello's concurring opinion in Texaco, Inc., 247 NLRB No. 56, 103 LRRM 1212 (1980).

[31] We do note, however, that, had Respondent engaged Slater in some form of dialogue or interchange which could be termed an interview, the requirement that Slater's representative remain silent would, in our view, violate Sec. 8(a)(1) of the Act. See Southwestern Bell Telephone Company, supra, sl. op., p. 7, fn. 14.

[32] See Illinois Bell Telephone Company, 251 NLRB No. 128, 105 LRRM 1236 (1980), where the Board, including Member Truesdale, ordered a make-whole remedy in a situation where the employer sought and obtained an admission of misconduct from the employee subjected to an unlawful interview.

have based its disciplinary decision, in any way, on the information it was so successful in securing.[32]

TRUESDALE, Member, dissenting in part:

[Text] I agree with my colleagues that Respondent violated Section 8(a)(1) of the Act by denying to employee Richard Deutsch the active assistance of his union representative at an investigatory interview. I do not agree, however, that — under the circumstances of this case — the proper remedy for that violation is to order Respondent to expunge from its records all references to the reprimand received by Deutsch at that interview. In its recent decision in Illinois Bell Telephone Company, 251 NLRB No. 128, 105 LRRM 1236 (1980), the Board set forth the remedial standard appropriate for Weingarten violations. There the Board held that:

"[W]here the General Counsel shows that an unlawful investigatory interview has occurred and that the employee was disciplined or discharged for conduct which was the subject of the interview, the burden then shifts to the employer to show that its decision to discipline or discharge was not based on information which it obtained at the interview."[34]

Although my colleagues agree in theory with this wording of the remedial test, in practice they apply a different standard for determining the appropriate remedy for a Weingarten violation. Thus, their approach to formulating the appropriate remedy is simple: When an employer has conducted an unlawful interview, the Board will assume, without further inquiry, that the information obtained by the employer at the unlawful interview had a direct and casual relationship to the employer's disciplinary decision. Based on this assumption, the Board will impose a make-whole remedy and rescind the discipline.

The obvious effect of this approach is to order a make-whole remedy in nearly all cases where a Weingarten violation is found. My colleagues attempt here to minimize the per se nature of their approach by characterizing the admission secured from Deutsch as "the most telling information available to merit a decision to discipline." That may be true but it does not answer the critical question of whether Respondent in fact relied on that admission in reaching its decision to discipline Deutsch. Instead, they merely restate what is essentially the legal predicate for a Weingarten violation: An employer must have sought substantive, as opposed to trivial or irrelevant, information during the interview bearing on the subject of the interview.

The remedial approach adopted by my colleagues is appealing from the standpoint of simplicity and ease of application. But steadfast adherence to such an approach runs counter to the Board's normal case-by-case determination of the appropriate remedy and, in cases like this one, transgresses the statutory admonition that our remedies be compensatory rather than punitive. While the language of Section 10(c)[35] of the Act is not directly applicable to the factual situation here, i.e., discipline short of suspension or discharge, the logic of that section is nevertheless applicable and mandates that a make-whole remedy not be ordered when the employer, as here, has met its heavy burden of showing that it would have imposed discipline in the absence of the unlawful interview.[36] In short, the Board must resist the temptation, to which my colleagues have succumbed, of adopting a remedial approach whose only appeal lies in its simplicity. Instead, the Board should come to grips with the difficult, but critical, issue of determining whether the employer has satisfied its burden of establishing that, in the absence of the unlawful interview, it would have taken the disciplinary action it did.

My colleagues' misapprehension of the remedial issue in these cases and their misapplication here of the Illinois Bell test is exemplified by their comparison of this case with the facts and remedy provided in Illinois Bell, a case clearly distinguishable on its facts. In Illinois Bell, the employer, based solely on the information obtained at the unlawful interview, made the decision to suspend an employee for improperly adjusting long-distance telephone bills for the inmates of a prison. The Board ordered the employer to reinstate the employee and to expunge from its records any reference to the suspension because it was clear that, absent the employee's admission of misconduct at the interview, the employee would not have been suspended.

Here, by contrast, Respondent had made the decision to discipline Deutsch prior to the interview based on information obtained during a preinterview investigation. Thus, Supervisor Linnell already had information — bases on his own investigation — that Deutsch had failed to attach his locking device to the tower's fan switch as required by Respondent's standing instructions. Based on this information, Linnell had already determined prior to the interview that discipline was appropriate. In these circum-

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[32] Member Truesdale's accusation that, in ordering a make-whole remedy for Deutsch, we have applied a standard different from that set out in Illinois Bell Telephone Company, 251 NLRB No. 128, 105 LRRM 1236 (1980), is somewhat puzzling. Since, consistent with Illinois Bell, he likewise requires a respondent to prove that it did not rely on information obtained during an unlawful interview, we must assume that he likewise considers restoration of the status quo ante to be the prima facie appropriate remedy. Thus, to the extent there is disagreement as to the appropriate remedy for Respondent's violation of Deutsch's rights, it is necessarily a disagreement on the facts, rather than the legal principle. Unlike Member Truesdale, we do not find that Respondent met its burden.

[34] Id. at sl. op., p. 10.

[35] Sec. 10(c) of the Act provides in pertinent part:

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

[36] The burden is upon the respondent to establish clearly that it would have imposed the discipline it did in the absence of the unlawful interview. Any doubt revealed in the record in this regard would be resolved against the respondent.

stances, to order Respondent to expunge from its records any references to the reprimand received by Deutsch would do more than return the employee to the status quo; it would put Deutsch in a better position than he would have been in had no unlawful interview occurred. The proper remedy is simply to order Respondent to cease and desist from unlawfully restricting the representative's role at a Weingarten-type interview. Accordingly, I dissent from the remedy imposed here.

SOUTHWESTERN BELL TEL.—

SOUTHWESTERN BELL TELEPHONE COMPANY, Houston, Tex. and COMMUNICATIONS WORKERS, LOCAL 12222, AFL-CIO, Case Nos. 23-CA-7024, -7072, and -7157, August 27, 1980, 251 NLRB No. 61

Guadalupe Ruiz, for General Counsel; Greg Frazer and Joe L. Randle, Houston, Tex., for employer; Neta Frazier Seiber (William N. Wheat & Associates), Houston, Tex., for union; Administrative Law Judge Marion C. Ladwig.

Before NLRB: Fanning, Chairman; Jenkins, Penello, and Truesdale, Members.

INTERFERENCE Sec. 8(a)(1)

—Investigatory interview ▶ 50.728

Employer violated LMRA when, at investigatory interview that employee reasonably feared might result in discipline, it denied employee union representation by requiring union steward to remain silent. (1) Employer attempted from outset of interview to stifle any participation by steward during interview; (2) when security supervisor demanded steward's silence, there was no indication that steward had sought or would seek to turn interview into collective bargaining or adversary confrontation; (3) employee was confronted at interview by supervisor who was trained in interrogation techniques and who used those techniques to procure employee's confession that he had stolen company property.

—Union representation at interview ▶ 50.728

Employer did not violate LMRA when it required union representative to remain silent at meeting in which supervisor informed employee of her discharge. (1) In Baton Rouge Water Works (103 LRRM 1056), majority of NLRB held that employee has no statutory right to union representation at meeting held solely to inform employee of, and act on, previously made disciplinary decision; (2) Members Jenkins and Truesdale find that final decision to discharge employee had been reached prior to meeting, that decision was based on facts and evidence obtained prior to meeting, and that sole purpose of meeting was to inform employee of discharge; (3) Chairman Fanning and Member Penello, who dissented in Baton Rouge Water Works, would find that meeting rose to level of interview requiring Weingarten (88 LRRM 2689) protection and that employer therefore violated Act.

REFUSAL TO BARGAIN Sec. 8(a)(5)

—Refusal to furnish information ▶ 54.5235 ▶ 54.5237

Employer that suspended driver for allegedly lying about his traffic violations when he filled out employment application violated LMRA when it denied union's request for copy of application as well as copy of driver's driving record that employer had received from state authorities. (1) Requested documents were relevant and necessary for performance of union's statutory function in representing driver; (2) no merit is found in employer's contention that denial of union's request was lawful because driver had not authorized release of information from his personnel file.

ORDER Sec. 10(c)

—Reinstatement and back pay ▶ 56.4212

Employee who unlawfully was deprived of union representation at investigatory interview that resulted in his suspension and termination is entitled to reinstatement and back pay, where employer's decision to discharge employee was based on information that it obtained at interview.

[Text] The Administrative Law Judge found, inter alia, that the Respondent: (1) violated Section 8(a)(1) of the Act by requiring employee Gottschalk's union steward to remain silent during an investigatory interview concerning Gottschalk, thereby depriving him of his union representative's counsel and assistance during the interview; (2) did not violate Section 8(a)(1) by allegedly depriving employee Brooks of union representation at an interview at which she was informed of her discharge; and (3) did not violate Section 8(a)(5) by refusing to furnish the Union with copies of certain documents from employee Martin's personnel file without Martin's written request. The Respondent has excepted, inter alia, to the Administrative Law Judge's finding that it is not permitted to require a union representative to remain silent during an investigatory interview of an employee. The General Counsel has excepted to the Administrative Law Judge's finding that Brooks was not denied

stances, to order Respondent to expunge from its records any references to the reprimand received by Deutsch would do more than return the employee to the status quo; it would put Deutsch in a better position than he would have been in had no unlawful interview occurred. The proper remedy is simply to order Respondent to cease and desist from unlawfully restricting the representative's role at a Weingarten-type interview. Accordingly, I dissent from the remedy imposed here.

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union representation at the interview at which she was informed of her discharge, as well as to the finding that the Respondent was not required to furnish the Union with certain documents from Martin's personnel file. In addition, the General Counsel has excepted to the Administrative Law Judge's failure to order the Respondent to offer Gottschalk reinstatement and backpay as a result of the unlawful denial of union representation found by the Administrative Law Judge. We find no merit in the Respondent's exception nor in the General Counsel's exception regarding the denial of representation to Brooks, for the reasons discussed below. However, we do find merit in the General Counsel's exception to the Administrative Law Judge's failure to find a violation of Section 8(a)(5) for the refusal to furnish the Union with the requested information from Martin's personnel file, and to the failure to order the reinstatement and backpay of Gottschalk, for the reasons discussed below.

As more fully set forth in the Administrative Law Judge's Decision, the facts concerning Gottschalk indicate that the Respondent arranged for a meeting with Gottschalk in order to question him about certain property which had been stolen from the Respondent. The meeting was attended by Gottschalk, Hataway (first line supervisor), Garner (third line supervisor), and Hubbard (security supervisor). When Hubbard displayed the stolen property (which had been recovered from a pawn shop) and began asking Gottschalk about his involvement in the alleged theft, Gottschalk requested union representation. Union Steward McQuiller was called in and informed of the allegations against Gottschalk. Hubbard then informed McQuiller that he did not want him to say anything, and that he wanted Gottschalk to answer in his own words.[1] Hubbard then questioned Gottschalk further, informing him that if he did not confess to stealing the property he would be arrested by a policeman who was already on his way to the Respondent's offices.[2] Gottschalk became very upset and began to cry, and shortly thereafter he confessed to the theft of the Company's property as well as to several other thefts of company property. After a written confession was signed, Hubbard asked McQuiller if he had anything to say. Thereafter, Garner suspended Gottschalk, pending termination.

The Administrative Law Judge found that by requiring the union steward to remain silent throughout Gottschalk's interview the Respondent had reduced Gottschalk's right under the Supreme Court's decision in N.L.R.B. v. J. Weingarten, Inc.[3] to the mere presence of a union representative rather than the assistance of that representative during the interview. The Administrative Law Judge relied upon repeated references in the Weingarten decision to the statutory right of employees to seek the assistance of their statutory representative at investigatory interviews which the employee reasonably fears may result in his discipline. The Administrative Law Judge specifically noted the Supreme Court's extensive elaboration on the role to be played by a statutory representative during a Weingarten interview.[4] Nevertheless, the Respondent asserts herein, as it did before the Administrative Law Judge, that the Supreme Court intended to permit employers to demand the silence of a statutory representative during an investigatory interview when the Court stated that "[t]he employer . . . is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation."[5] However, the Administrative Law Judge noted that immediately preceding that statement the Supreme Court stated that:

"The employer has no duty to bargain with the union representative at an investigatory interview. 'The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them . . . .'"

Thus, viewing the decision as a whole, the Administrative Law Judge rejected the Respondent's contention that an employer could demand the silence of the statutory representative throughout a Weingarten interview.

In agreeing with the Administrative Law Judge's findings and conclusions on this issue, it is our view that the Supreme Court, in the course of its Weingarten decision, intended to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role to be played by a statutory representative who is present at such an interview. It is clear from the Supreme Court's decision that the role of the statutory representative at an investigatory interview is to provide "assistance" and "counsel" to the employee being interrogated. However, the Supreme Court made it equally clear that the presence of the statutory representative "need not transform the interview into an adversary contest,"[6] or indeed, any type of collective-bargaining confrontation. Clearly, then, an employer's right to regulate the role of the statutory representative at an investigatory interview is limited to a reasonable prevention of such a collective-bargaining or adversary confrontation with the statutory representative.

In the instant case, the Respondent, by demanding the silence of Gottschalk's union steward until after Gottschalk had confessed to the charges, did not engage in a reasonable prevention of a collective-bargaining or adversary confrontation with the statutory representative. Rather, the Re-

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[1] Hubbard testified that he intended his statement to McQuiller to mean that McQuiller could not ask any questions until the interview with Gottschalk was over, but that McQuiller was free to seek clarifications during the interview. Hubbard also testified that following his statement to McQuiller the latter said nothing during and after the interview.

[2] Although a policeman was in fact on his way to the Respondent's offices while the interview was in progress, the Respondent had decided prior to the interview not to file criminal charges against Gottschalk.

[3] 420 U.S. 251, 88 LRRM 2689 (1975).

[4] Id. at 262-263, 265.

[5] Id. at 260.

[6] Id. at 263.

spondent attempted from the very outset of the interview to stifle any participation by the union steward during the interview. At the time that Hubbard demanded McQuiller's silence, there was no indication that McQuiller had sought or would seek to turn the interview into a collective-bargaining or adversary confrontation.

We note, further, that the interview itself, as well as its outcome, demonstrates the critical need for the rights granted to employees under Weingarten. For as the Supreme Court stated in Weingarten, often "an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques."[7] Similarly, Gottschalk was confronted at the interview by Hubbard, a security supervisor and former FBI agent who was trained in interrogation techniques and who used those techniques to procure a total written confession from Gottschalk. Obviously, the mere silent presence of Gottschalk's union steward at the interview was insufficient to alter the imbalance which the Supreme Court sought to alleviate in its Weingarten opinion.

Accordingly, we agree with the Administrative Law Judge that the Respondent, by requiring Gottschalk's union representative to remain silent, denied Gottschalk union representation at an investigatory interview which Gottschalk reasonably feared might result in his discipline, in violation of Section 8(a)(1) of the Act.

With regard to Brooks, the facts reveal that on the morning of March 9 the Respondent's manager of operator services, Ruth Reese, was instructed to discharge Brooks because of excessive absences. When Brooks reported to Reese's office that morning in order to present Reese with a doctor's excuse for her latest absence, Reese told her that she (Reese) wanted to meet with her. Brooks requested that they wait for the arrival of her union steward, Brown. Upon Brown's arrival, Reese informed Brooks that the decision had been made to discharge her, and provided Brooks with precise reasons for the discharge. When Brown sought to intervene in the discussion, Reese told Brown that she could say nothing until after Brooks left the meeting. At that point, Brooks accepted the discharge and left the meeting.

The Administrative Law Judge, relying on Amoco Oil Company,[8] Texaco, Inc.,[9] and K-Mart Corporation,[10] found no unlawful denial of union representation because the Respondent merely informed Brooks of the discipline "that had been decided upon prior to the session, and thus did not engage in any other type of interchange which could be characterized as an interview."[11] However, subsequent to the Administrative Law Judge's Decision, the Board issued its Decision in Baton Rouge Water Works Company.[12] A majority of the Board there held that, under the Supreme Court's decision in Weingarten, an employee has no Section 7 right to union representation at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision.[13]

In the instant case, the record is clear that the Respondent had reached a final decision to discharge Brooks prior to the March 9 meeting at which she was informed of her discharge. The record is also clear that the Respondent had reached that decision based upon facts and evidence which it had obtained prior to the March 9 meeting, and it is undisputed that the sole purpose of the meeting was to inform Brooks of her discharge. Accordingly, we find that the Respondent did not violate Section 8(a)(1) of the Act as a result of the March 9 discharge meeting.[14]

With regard to the information requested by the Union from employee Martin's personnel file, the facts reveal that on March 22 Staff Supervisor Pat Burke informed Martin, a mail driver, in the presence of Martin's union steward, LaBorde, that Martin was suspended for lying on his employment application. Apparently, Martin had indicated on his employment application that he had three or four moving traffic violations, whereas his driving record received from the State indicated eight speeding convictions and two negligent collisions. Martin was told that he would be discharged at noon the next day unless he resigned before that time. LaBorde then requested copies of Martin's employment application and driving record, and Burke indicated that he saw "no problem" with that request, but he would have to check with his supervisor first. Martin

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[7] Id. at 265, fn. 10.

[8] 238 NLRB No. 84, 99 LRRM 1250 (1978).

[9] 242 NLRB No. 60, 101 LRRM 1167 (1979).

[10] 242 NLRB No. 140, 101 LRRM 1406 (1979).

[11] Amoco Oil Company, supra, sl. op. at p. 4.

[12] 246 NLRB No. 161, 103 LRRM 1056 (1979). Chairman Fanning and Member Penello dissenting separately.

[13] The Board majority reasoned that:

"[A]s long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation exists under Weingarten when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline." [246 NLRB No. 161 at sl. op., p. 3, 103 LRRM 1056]

The Board majority also emphasized that "the fact that the employer and employee thereafter engage in a conversation at the employee's behest or instigation concerning the reasons for the previously determined discipline will not, alone, convert the meeting to an interview at which the Weingarten protections apply." (Id.)

[14] Chairman Fanning and Member Penello, each of whom dissented in Baton Rouge Water Works, would find that the Respondent violated Sec. 8(a)(1) by requiring Brooks' union steward to remain silent at Brook's discharge interview. Thus, they disagree with the Administrative Law Judge's application of Amoco Oil, Texaco, and K-Mart. The facts, as found by the Administrative Law Judge, reveal that during the meeting, Reese discussed with Brooks the doctor's excuse, previous absences and disciplinary action, the reasons Brooks had given for those absences, and Brooks' attendance record as compared to that of other employees. Reese herself testified that there was "some interchange" between her and Brooks about the latter's record. Since the discharge meeting rose to the level of an interview requiring the Weingarten protections, Chairman Fanning and Member Penello would find that the Respondent, by requiring Union Steward Brown to remain silent until after the interview with Brooks was over, unlawfully denied Brooks union representation at the interview.

turned in his key and ID card, and left the premises. At 7:30 the next morning, Burke informed LaBorde that he could not provide LaBorde with copies of the documents without written authorization from Martin. LaBorde was unable to contact Martin, and Martin resigned later that morning.

The Administrative Law Judge, inadvertently finding that the events above occurred on May 22 rather than on March 22, concluded that pursuant to a settlement agreement between the Respondent, the Union, and the Board, which was enforced by the United States Court of Appeals on May 16, the Respondent was under no obligation to supply the Union with copies of the requested documents without Martin's written authorization. Since the Administrative Law Judge erroneously relied upon the settlement agreement to resolve this allegation, we must determine whether the Respondent violated the Act based upon our own review of the facts.

It is undisputed that the Respondent refused to provide copies of the documents as requested by the Union, and that the information contained in the documents was relevant and necessary for the performance of the Union's statutory function in representing Martin. For example, had the Union been able to review the documents, it might have been able to advise Martin as to whether he should resign from the Respondent, or allow himself to be discharged and pursue his remedy through the grievance arbitration system.

In addition, the sole reason relied upon by the Administrative Law Judge for finding no violation was the Respondent's defense that Martin had not authorized in writing the release of the information from his personnel file. We note, however, that this defense has been repeatedly rejected by the Board.[15] Accordingly, we find that the Respondent, by refusing to furnish the Union with copies of designated documents from Martin's personnel file, violated Section 8(a)(5) and (1) of the Act.[16]

The Remedy: Having found that the Respondent has engaged in certain unfair labor practices, we shall recommend that it cease and desist therefrom and take certain affirmative action set forth below designed to effectuate the policies of the Act.

We have found, in agreement with the Administrative Law Judge, that the Respondent violated section 8(a)(1) of the Act by depriving Charles Gottschalk of union representation at an investigatory interview which Gottschalk reasonably believed might result in his discipline. Since the Respondent's unlawful interview with Gottschalk resulted in a confession and Gottschalk's immediate suspension and termination, we deem it appropriate, in order to rectify the harm caused by the unlawful interview, to grant the remedy of reinstatement and backpay.[17] We shall order the Respondent to offer Gottschalk immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. We shall also order the Respondent to make Gottschalk whole for any loss of earnings he may have suffered by reason of the Respondent's discrimination against him, by paying to him a sum of money equal to the amount he normally would have earned as wages from December 13, 1977, to the date of the Respondent's valid offer of reinstatement, less net earnings during said period. The amount of backpay due shall be computed in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289, 26 LRRM 1185 (1950), with interest as prescribed in Florida Steel Corporation, 231 NLRB 651, 96 LRRM 1070 (1977).[18] Furthermore, as part of the make-whole remedy, we shall order that Gottschalk's written confession obtained at the interview, as well as any references to any disciplinary action arising out of the interview, be expunged from the Respondent's files and records.[19]

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[15] Cf. The Electric Auto-Lite Company, 89 NLRB 1192, 1196-99, 26 LRRM 1062 (1950).

[16] N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 435, 64 LRRM 2069 (1967).

[17] Illinois Bell Telephone Co., 251 NLRB No. 128, 105 LRRM 1236 (1980). We note that in the instant case, as in Illinois Bell, the General Counsel has shown that an unlawful investigatory interview occurred and that the employee was discharged for conduct which was the subject of the interview. However, unlike Illinois Bell, the Respondent did not come forward with evidence as to the basis for its decision to discharge Gottschalk. Nevertheless, we deem it unnecessary to reopen and remand this case to the Administrative Law Judge for a hearing that would provide the Respondent with an opportunity to show that its decision to discharge Gottschalk was not based on information which it obtained at the interview. In this regard, we note Security Supervisor Hubbard's testimony that "the purpose of obtaining the written statement from Mr. Gottschalk was so that there wouldn't be any question as to what was true and what was not true," and that his "intent and purpose . . . prior to going into the meeting [was] to obtain a written confession from Mr. Gottschalk." Hubbard further testified that the only evidence the Respondent had prior to the interview implicating Gottschalk in the theft of company property was the name, address, and physical description of the man who pawned the company property, which information was obtained by the pawn shop operator directly from the driver's license presented by the man pawning the property. Hubbard admitted that "anybody could have gone up there with Mr. Gottschalk's driver's license and pawned the equipment . . . ." Finally, we note that Gottschalk was suspended immediately after he signed the written confession and prior to the end of the interview. Under these circumstances, we deem it highly improbable that the Respondent did not rely on Gottschalk's written confession in its decision to suspend and terminate him.

Member Jenkins joins in this result, for the reasons expressed in his concurrence in Illinois Bell, that the reason for Gottschalk's discharge was related to the subject matter of the interview.

Member Penello, who did not participate in Illinois Bell, relies on that decision only insofar as it discusses the issue of the appropriate remedy for a Weingarten violation.

[18] See, generally, Isis Plumbing & Heating Co., 138 NLRB 716, 51 LRRM 1122 (1962). Member Jenkins would compute the interest due on backpay in accordance with his partial dissent in Olympic Medical Corporation, 250 NLRB No. 11, 104 LRRM 1325 (1980).

[19] Nevertheless, if Gottschalk does accept reinstatement, the Respondent is not foreclosed from disciplining him for theft of company property so long as such action is not taken on the basis of any information obtained at the December 13 interview. As noted in Illinois Bell Telephone Co., "this procedure remedies the unfair labor practice, while preserving Respondent's right to discipline and discharge its employees, so long as its actions do not contravene the Act."

We have also found, contrary to the Administrative Law Judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with copies of certain documents from Mickey Martin's personnel file. Therefore, we shall order the Respondent to furnish the requested copies of Martin's employment application and driving record from the Texas Department of Public Safety. In addition, in order to restore Martin and the Union to the status quo ante, we shall order the Respondent to waive any grievance procedure time limitations so that the Union may have the opportunity to file a grievance over Martin's termination.

REFUSAL TO BARGAIN Sec. 8(a)(5)

—Refusal to furnish information ▶ 54.5230 ▶ 54.5234 ▶ 54.5237

Telephone company violated LMRA by refusing to furnish union with certain requested documents that were relevant and necessary to union's evaluation of grievance concerning company's elimination of Monday as non-scheduled day for teletype crew. (1) No merit is found in company's contention that it timely gave union, first orally and then in writing, all information needed to effectuate intelligent resolution of grievance, where it (a) repeatedly refused to furnish any company documents to union concerning grievance, (b) notified union that it would only furnish company documents if they were in employees' personnel history files, and (c) furnished summaries representing three-month and twelve-month averages of daily customer reports that were of little or no value to union; (2) company asserted shifting positions concerning its obligations to furnish documents.

LAND O'FROST—

LAND O'FROST OF ARKANSAS, INC., Searcy, Ark. and FOOD HANDLERS, LOCAL 425, a/w FOOD & COMMERCIAL WORKERS, AFL-CIO, Case No. 26-RC-6179, September 9, 1980, 252 NLRB No. 1

Before NLRB: Fanning, Chairman; Jenkins and Penello, Members.

ELECTION Sec. 9(c)

—Election interference ▶ 62.5597

Employer did not interfere with election when supervisors spoke with at least half of eligible voters, at their work stations on day of election, and told them that they should vote and that if they were undecided a "no" vote would be appreciated.

[Text] As found by the Regional Director, the Employer's personnel director, Robert W. Bohannon, and various supervisors told employees at their work stations on the day of the election that they should vote and that if they were undecided a "no" vote would be appreciated. It is undisputed that at least half the eligible employees were contacted in this matter.

In finding this conduct not to be objectionable, the Regional Director relied on our recent decision in Electro-Wire Products, Inc., 242 NLRB No. 144, 101 LRRM 1271 (1979). In that case we held that the employer's conduct in making brief comments individually to employees at their work stations and telling them that the employer hoped that they would vote "no" did not amount to a speech to a massed assembly of employees and therefore did not fall within the proscription of such speeches within 24 hours prior to an election enunciated in Peerless Plywood Company, 107 NLRB 427, 33 LRRM 1151 (1953). Inasmuch as the facts herein are almost identical to those in Electro-Wire Products, Inc., supra, we find that case controlling and that the conduct of Bohannon and the other supervisors was not objectionable. We shall therefore certify the results of the election.

FANNING, Chairman, dissenting:

[Text] For the reasons stated in my dissent in Electro-Wire Products, Inc., 242 NLRB No. 144, 101 LRRM 1271 (1979), I would not adopt the Regional Director's recommendation that Petitioner's Objection 1 be overruled.

The facts herein are essentially undisputed. On the day of the election, Robert W. Bohannon, the Employer's personnel manager, talked to at least half of the eligible voters at their work stations adjacent to the polling place on two occasions, preceding and during the conduct of the election. Individual supervisors, including James Mylam, also spoke to employees on the production lines on the day of the election. They all conveyed the same message that, inter alia, a "no" vote in the election would be appreciated, if the employee was undecided how to vote in the election. These facts are similar to those in Electro-Wire Products, Inc., supra, where I emphasized that talks by management to individual employees at their work stations within 24 hours of an election was tantamount to an address to a captive audience and as such violated Peerless Plywood.[1] My colleagues here, as in Electro-Wire Products, Inc., supra, in adopting the Regional Director's recommendation to overrule the Petitioner's Peerless Plywood based objection, have mistakenly permitted again an employer to accomplish indirectly precisely that which Peerless Plywood directly proscribes. For this reason, I would sustain the objection, set aside the election, and direct a second election.

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[1] Peerless Plywood Company, 107 NLRB 427, 33 LRRM 1151 (1953).

DECISION OF NINTH CIRCUIT IN NLRB v.TEXACO, INC.
(TEXT)

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

TEXACO, INC., Respondent.

No. 80-7692.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 6, 1981.

Decided Oct. 16, 1981.

Petition for Enforcement of an Order of the National Labor Relations Board.

Before SCHROEDER and ALARCON, Circuit Judges and HATFIELD *, District Judge.

SCHROEDER, Circuit Judge:

The NLRB found that respondent, Texaco, Inc., violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) when it refused to permit a union representative to participate in an interview with an employee which culminated in discipline of the employee. 251 NLRB No. 63, 105 LRRM 1239 (1980). The Board here seeks enforcement of its order requiring Texaco to expunge its records of the reprimand issued to the employee. Texaco's principal contentions are, first, that the interview was not an "investigatory" interview for which employees have the right to a union representative under *NLRB v. Weingarten*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975) and, second, that even if the employee was entitled to have a representative, Texaco fulfilled all of its obligations by permitting the representative to attend the interview and that the company was not required to permit the representative to speak. We enforce the Board's order.

The episode giving rise to the unfair labor practice charge began when a Texaco foreman, Linnell, discovered that a safety device of one employee, Deutsch, had not been activated. Linnell questioned other employees about the incident and then asked Deutsch to report to the office. Deutsch asked the acting union steward in his department to accompany and represent him at the meeting, but when they arrived, Linnell advised the union steward that he would not be permitted to say anything during the interview. Linnell then asked Deutsch whether he had violated the plant safety regulations. Upon Deutsch's affirmative reply, Linnell issued Deutsch a reprimand for failure to follow the rule and ended the meeting.

One of the goals of national labor policy is to protect workers' free association, self organization and choice of representatives for mutual aid or protection. *NLRB v. Weingarten*, 420 U.S. 251, 261–62, 95 S.Ct. 959, 965–66, 43 L.Ed.2d 171 (1975). For that reason, the Supreme Court has held that employees possess the right to have a union representative present at investigatory interviews with their employer where "the risk of discipline reasonably inheres." *Id.* at 262, 95 S.Ct. at 966. The right to the presence of a union representative does not, however, extend to a meeting which is held *solely* for the purpose of informing an employee of a disciplinary decision. *NLRB v. Certified Grocers of California, Ltd.*, 587 F.2d 449 (9th Cir. 1978); *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403 (9th Cir. 1978); *Mt. Vernon Tanker Co. v. NLRB*, 549 F.2d 571 (9th Cir. 1977); *Baton Rouge Water Works Company*, 246 NLRB No. 161, 103 LRRM 1056 (1979).

The Board in this case found that the interview was "clearly of the kind envisioned by the Court in *Weingarten* as warranting the presence of a union representative." The Board emphasized that the employer sought and secured an admission from Deutsch during the course of the interview. The Board thus found that the employer was "continuing, on a substantive basis, its investigation of the incident." Its findings are amply supported by the evidence and its legal conclusion that union representation was required is fully in accord with the law in this Circuit. *NLRB v. Certified Grocers, supra; Alfred M. Lewis, Inc. v. NLRB, supra.*

As a corollary Texaco asserts that, even if the interview was investigatory, the reprimand should remain in Deutsch's record because the decision to discipline was made before the interview and did not in fact rest to any degree on the interview itself. Although this position was adopted by one member of the Board, the findings of the Board majority as to a continuing investigation render Texaco's position here untenable. We also reject the contention that Texaco was not sufficiently apprised of the charge prior to the hearing before the Board. The Board correctly concluded that the complaint clearly put the company on notice that the General Counsel was alleging a violation of section 8(a)(1) of the Act under *Weingarten*.

The more novel and significant contention advanced by Texaco is that the right to a union representative at an investigatory interview does not encompass any right to have the union representative speak. Texaco cites language from *Weingarten*, in which the Court, after noting that the employer has no duty to bargain with the union representative at an interview, stated:

> "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." Brief for Petitioner, at 22.

420 U.S. at 260, 95 S.Ct. at 965. We agree with the Board here that this language, (taken by the Court from the Board's brief in *Weingarten*) is directed toward avoiding a bargaining session or a purely adversary confrontation with the union representative and to assure the employer the opportunity to hear the employee's own account of the incident under investigation. The passage does not state that the employer may bar the union representative from any participation. Such an inference is wholly contrary to other language in the *Weingarten* opinion which explains that the representative should be able to take an active role in assisting the employee to present the facts.

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.

420 U.S. at 262–63, 95 S.Ct. at 966. *See also Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d at 409–10, where this Court quoted the latter passage as central to the holding of *Weingarten*. *Accord, Southwestern Bell Telephone Co.*, 251 NLRB No. 61, 105 LRRM 1246 (1980) (pet. for review pending, 5th Cir., No. 80-2072).

In refusing to permit the representative to speak, and relegating him to the role of a passive observer, the respondent did not afford the employee the representation to which he was entitled. The Board properly found that Texaco violated section 8(a)(1) of the Act.

Order enforced.

-- End of Text --

* Honorable Paul G. Hatfield, United States District Judge for the District of Montana, sitting by designation.