United States Postal Service *and* National Association of Letter Carriers, Branch 753, AFL–CIO. Case 25–CA–29340

December 28, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

On June 30, 2006, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

1. The General Counsel moves to strike the Respondent's exceptions on the basis that, even though the Respondent also filed a separate brief in support of exceptions, the exceptions contain argument and citations of authority and are therefore contrary to Section 102.46(b)(1) of the Board's Rules and Regulations. The General Counsel also moves to strike the Respondent's brief on the ground that it violates Section 102.46(c) because it lacks a clear and concise statement of the case and does not specify or argue the relevant questions in an orderly fashion.

We agree with the General Counsel that the Respondent's exceptions are defective. Section 102.46(b)(1) states, inter alia: "If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief." However, Section 102.46(b)(2) provides that any exception that fails to comply with the requirements of Section 102.46(b)(1) "*may* be disregarded" (emphasis added). In exercising the discretion afforded by Section 102.46(b)(2), the Board "usually accepts exceptions that contain argument if the number of pages of argument in the exceptions, when added to the pages in the brief, do not cause the brief to total more than 50 pages, or other page limit set by the Board." *Hotel del Coronado*, 344 NLRB 360 (2005). That is the case here: the Respondent's exceptions and supporting brief together total far fewer than 50 pages. Thus, we will deny the General Counsel's motion to strike the Respondent's exceptions.

Turning to the General Counsel's motion to strike the Respondent's brief, although that brief is not in precise conformity with Section 102.46(c), we find that it substantially complies with that rule, and we will exercise our discretion to accept it on that ground. See, e.g., *Metta Electric*, 338 NLRB 1059 (2003), enfd. in relevant part sub nom. *JHP & Associates, LLC v. NLRB*, 360 F.3d 904 (8th Cir. 2004).

2. In adopting the judge's conclusion that the Respondent violated Section 8(a)(1), we rely, in addition to the cases cited by the judge, on *Lockheed Martin Astronautics*, 330 NLRB 422 (2000). In that case, the employee's Weingarten representative was prevented from speaking at a certain point during an investigatory interview, and then permitted to participate later on.[1] The Board adopted the judge's finding that the representative's subsequent participation "[did] not excuse [the respondent's] effort to confine his participation during the interview." 330 NLRB at 429. *Lockheed Martin Astronautics* is on point here. Respondent's agent, Irma Miranda, asked employee Robert Kuch if he was aware of the penalties for willfully delaying the mail. Miranda admitted at the hearing that she would have taken an affirmative answer as an admission of willful delay. Kuch's *Weingarten* representative, Michael Daly, attempted to challenge Miranda's question with respect to the implication of "willful," but Miranda precluded Daly from speaking. Later, Miranda asked Daly if he wanted to add anything, but the fact remains that Daly's participation was improperly limited at a crucial juncture of the interview. Thus, we agree with the judge's finding that the Respondent violated Section 8(a)(1).

Our concurring colleague says that *Lockheed Martin Astronautics* and this case depart from the Board's position as presented to the Supreme Court in *Weingarten* itself. He notes that in its brief to the Court, the Board stated that, in response to a representative's attempt to "clarify the facts . . . . [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." Here, however, Miranda did not insist on hearing Kuch's factual account. Rather, she insisted that Kuch answer a loaded question.[2] Thus, contrary to our colleague's view,

[1] *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

[2] Our concurring colleague finds it significant that Daly had the option of later arguing that an affirmative answer by Kuch acknowledged only that he was "aware" of the penalties for willfully delaying the mail. However, in view of Miranda's admission that she would have taken such an answer as an actual confession of willful misconduct, that after-the-fact lawyer's option would have been no substitute for clarifying the meaning of Miranda's question at the time. Cf., *Weingarten* supra,at 263 (rejecting employer's argument that postdiscipline representation is sufficient, because "[a]t that point, it becomes increasingly difficult for the employee

finding the Weingarten violation here is not inconsistent with Weingarten itself. To the contrary, the *Weingarten* Court recognized the importance of enforcing the right to a union representative "when it is most useful to both employee and employer." *Weingarten*, supra, 420 U.S. at 262. The moment of maximum usefulness may arrive, as it did here, in the middle of the employer's questioning—particularly when one considers, as did the *Weingarten* Court, that the employee under investigation "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." Id. at 263.[3] Afraid of losing his job, Kuch could hardly be expected to detect the trap Miranda was setting. But Daly saw it. To vindicate Kuch's Section 7 rights, his union representative's right to intervene in a timely manner must also be protected. Neither an employer's right to conduct the interview, nor any other legitimate prerogative, extends to entrapping an employee into unknowingly confessing to misconduct without objection from his representative.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United States Postal Service, Valparaiso, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. December 28, 2007

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KIRSANOW, concurring.

I agree with my colleagues that, under *Lockheed Martin Astronautics*, 330 NLRB 422 (2000), the General Counsel has made out a *Weingarten* violation in this case. I question, however, whether both Lockheed and this case depart from the Supreme Court's original understanding of the *Weingarten* rule, and also from the Board's own understanding as presented to the Court. In *Weingarten*, the Court quoted approvingly the following passage from the Board's brief to the Court: "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." *NLRB v. Weingarten, Inc*., 420 U.S. 251, 260 (1975). That is what happened here. Miranda asked Kuch a question, Daly attempted to object, and Miranda insisted on hearing Kuch's answer before permitting Daly to speak. This would be comparable, in a courtroom, to a judge overruling an objection and requiring the witness to answer the objected-to question. If parties to a court proceeding, where constitutional protections attach, do not have a right to be heard any time they choose to speak, I question whether such a right should be extended to *Weingarten* representatives.[1]

My colleagues say that their finding is not inconsistent with *Weingarten* because Miranda was not insisting on hearing Kuch's own account of the matter under investigation, but rather on getting his answer to a loaded question. However, I take the Court to have been making a broader point, namely, that the employee's right to a representative does not derogate from the employer's right to conduct the investigatory interview. Indeed, the Court stated that the employee's "exercise of the right [to a representative] may not interfere with legitimate employer prerogatives." Id. at 258. My colleagues say that such prerogatives do not extend "to entrapping an employee into unknowingly confessing to misconduct without objection from his representative." But there is no need to reach that issue here because, although Miranda believed her question was loaded, in fact it was not. Had Kuch admitted knowledge of the penalties for willfully delaying the mail, that would not have been an admission of willful delay and thus would not have been a confession of misconduct. Daly could have pointed out that obvious fact when Miranda invited him to speak and might thereby have prevented Miranda from imposing a discipline that never could have survived the grievance process (and in fact, no discipline was imposed). Thus, although there may well be instances when the right to an immediate response from a *Weingarten* representative must be protected, I do not think this is such

to vindicate himself, and the value of representation is correspondingly diminished"). Our colleague's analogy between a disciplinary interview and a legal proceeding conducted by an impartial judge is not convincing. If anything the analogy is much closer to a police interview with a suspect represented by counsel. And in that situation, the lawyer could certainly participate as Daly tried to do.

[3] As the *Weingarten* Court explained:

> Participation by the union representative might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent.

420 U.S. at 264 fn. 7 (internal citation omitted).

[1] I disagree with my colleagues' bleak view of a workplace investigatory interview as comparable to a police station criminal interrogation.

a case. Nonetheless, because *Lockheed* is not distinguishable, I somewhat reluctantly concur with my colleagues' 8(a)(1) finding.

Peter N. Kirsanow, Member

NATIONAL LABOR RELATIONS BOARD

Derek Johnson, Esq., for the General Counsel.
Scott A. Mayer, Esq. and *Stuart J. Blenner, Esq.,* for Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Valparaiso, Indiana on May 4, 2006. The charge was filed by the National Association of Letter Carriers, Branch 753, AFL–CIO (the Union), on September 23, 2004[1] and the complaint was issued February 9, 2006. The complaint alleges that about September 13, 2004, the United States Postal Service (Respondent), denied the request of Robert Kuch to be represented by the Union during an interview by refusing to allow a union representative to participate and assist Kuch during the interview. The complaint further alleges that although Kuch had reasonable cause to believe that the interview would result in disciplinary action being taken against him, the Respondent denied the request to be represented as described above and conducted the interview on September 13,[2] 2004. Respondent filed a timely answer denying the essential allegations in the complaint, and asserting certain defenses.[3]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

i. jurisdictionWe have amended the caption to reflect the disaffiliation of UNITE HERE from the AFL–CIO effective September 14, 2005.

Respondent provides postal services for the United States and operates various facilities throughout the United States, including the facility located in Valparaiso, Indiana, which is the subject of this proceeding. The Board has jurisdiction of this matter pursuant to Section 1209 of the Postal Reorganization Act, 39 U.S.C. Section 1209. Respondent admits, and I find and conclude, that the United States Postal Service is an employer within the jurisdiction of the National Labor Relations Board. Respondent admits, and I further find that the National Association of Letter Carriers, Branch 753, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Michael Daly has been employed by Respondent for 30 years. For almost the entire period of his employment, he has been a member of the Union. Over the course of the last 25 years, Daily has served as president, vice president, and steward for the Union. Daly testified that as a union officer, he has received guidance as to the application of employees' *Weingarten*[4] rights through the joint contract administration manual that was prepared by the Union and the Respondent. The introduction to the existing manual provides that the manual was published in order to educate the local parties and to facilitate the resolution of disputes concerning issues on which the national parties are in agreement. The manual includes a specific section identified as "*Weingarten* Rights" and provides that the *Weingarten*[5] rule gives each employee the right to representation during any investigatory interview which he or she reasonably believes may lead to discipline. The manual further provides:

> In a *Weingarten* interview the employee has the right to a steward's assistance—not just a silent presence. The employer would violate the employee's *Weingarten* rights if it refused to allow the representative to speak or tried to restrict the steward to the role of a passive observer.

B. Issues

It is undisputed that Customer Service Supervisor Irma Miranda conducted an investigatory interview with employee Robert Kuch on September 14, 2004. Michael Daly attended the meeting as Kuch's union representative. Supervisor Sharon Swart also attended the meeting as a management witness. The parties do not dispute that Kuch had reasonable cause to believe that the investigatory interview could result in disciplinary action. Counsel for the General Counsel maintains that "at a critical juncture in the interview, Kuch was effectively denied his right to union representation when Miranda refused to let Daly speak and clarify a question that had just been asked." Respondent asserts that it fully complied with all of Kuch's *Weingarten* rights and that Miranda had the right to get the answers to her questions "untainted by Daly's interruption."

C. The Events Prior to the September 14, 2004 Meeting

Irma Miranda has been employed with Respondent for 21 years. On September 13, 2004, Miranda worked in Respondent's Valparaiso, Indiana, facility as supervisor of customer service and her duties included the supervision of the city carri-

[1] All dates are in 2004 unless otherwise indicated.
[2] During the hearing, the parties stipulated that the investigatory interview occurred on September 14, 2004.
[3] In Respondent's initial answer to the complaint, Respondent raised the affirmative defense that the matter should be deferred to the parties'grievance-arbitration procedures consistent with the Board's policy as embodied in *Collyer Insulated Wire*, 192 NLRB 837 (1971) and pursuant to Arbitration Deferral Policy Under Collyer-Revised Guidelines issued by the General Counsel on May 10, 1973. Prior to the hearing in this matter, Respondent filed an amended answer to the complaint withdrawing its affirmative defense as described above.
[4] *NLRB v. J. Weingarten, Inc*., 420 U.S. 251 (1975).
[5] The section references the case citation for *Weingarten*.

ers. On September 13, 2004, Miranda completed her workday and left the facility at approximately 3 to 3:30 p.m. Prior to leaving, she saw two trays of DPS or Delivery Point Sequence mail that had been scheduled for delivery by two carriers on their respective routes. DPS mail is mail that is machined first class mail that is not cased by the carriers and is designated to go straight to the street with the carrier's cased mail. Robert Kuch was one of the carriers who had left the DPS mail.

Miranda testified that normally if a carrier discovers that he or she has left mail behind at the facility, they will call back to the facility. Prior to leaving for the day, Miranda left the two trays of DPS mail with the evening supervisor and explained that the carriers would return for their mail that had been left behind. She explained that while she had not spoken with Kuch, she had just assumed that he would return to the facility to pick up the mail that he had left behind. When Miranda began her work day on September 14, 2004, she noticed that Kuch's DPS mail from the following day was still at the facility. Miranda told Union Steward Michael Daly that she planned to conduct an investigatory interview with Kuch concerning the undelivered DPS mail.

Daly recalled that Miranda spoke with him between 7:30 a.m. and 10 a.m. on September 14 and told him that she planned to conduct an investigatory interview with Kuch. While Daly could not recall what Miranda specifically told him, he confirmed that Miranda told him the subject matter of the upcoming meeting. Both Daly and Kuch testified that prior to Miranda's meeting with Kuch, Kuch was given an opportunity to speak with Daly. Kuch recalled that he and Daly were allowed to speak for an unlimited period of time in the bathroom/locker room area and outside the presence of other employees.

D. Daly's Description of Miranda's Meeting with Kuch

Daly recalled that Miranda began the meeting by telling Kuch that she was conducting an investigatory interview that might or might not lead to discipline up to and including his removal from service. She asked him if he wanted union representation and Kuch stated that he did. While Daly could not recall with specificity all the questions asked by Miranda, he recalled that she asked Kuch why he left the mail and what time he discovered that he had done so. Daly recalled that Miranda asked Kuch if he was aware of the penalties for willfully delaying the mail. Daly testified: "And at that point, I tried to—I tried to say something because I didn't like the question. He did not willfully delay the mail. The mail wasn't in order properly and he left it there. And I started to say something and she wouldn't let me speak, told me I could speak later, and just let Bob answer the questions." Daly further recalled that Miranda told him, "[J]ust let Bob answer the question, I'll let you talk later." He further acknowledged that Miranda told him that he just couldn't talk while she was trying to get an answer to the question. Daly recalled that Kuch had not begun to answer the question when Miranda made this statement to Daly. Daly acknowledged that while his initial comment had been in a normal tone of voice, his voice may have "raised a little" when Miranda had not allowed him to speak. Daly also recalled that he told Miranda that she was violating Kuch's *Weingarten* rights by not allowing Daly to speak when he tried to do so. Daly recalled that after Miranda told him that Kuch needed to answer the question, Kuch did so. After asking Kuch two or three additional questions, she asked Daly if he had anything to add. Daly stated that he did not. Miranda then asked Kuch if he had anything to add. Kuch asked Miranda what time she had discovered that the mail had been left behind and if she had taken any action to get the mail delivered when she had discovered the mail.

Daly maintained that while he had not wanted Kuch to answer Miranda's question, he had not interrupted Kuch while he was answering. He also asserted that while Miranda had given him the opportunity to speak, it had not been when he wanted to speak and he initially declined.

E. Kuch's Description of his Meeting with Miranda

Kuch recalled that Miranda told him that the interview could lead to discipline up to and including his removal from employment. In response to her inquiry, he told her that he desired union representation. Kuch recalled that the tray of mail that had been left behind on September 13 was positioned on Miranda's desk during the interview. Miranda asked him the standard operating procedure for a mail carrier when the carrier discovers that mail is missing. Kuch explained that while he understood that the procedure required him to call the post office; he had not had time to do so. In response to Miranda's question, Kuch acknowledged that he had failed to follow the standard operating procedure by failing to call the postal facility. Kuch recalled that Miranda next asked him if he knew that there were penalties for willfully delaying the mail. Kuch testified that before he "could even get a sentence out," Daly interjected[6] and stated that it had not been a willful delay of mail. Miranda told Daly to let Kuch finish talking. Miranda told Daly that she was going to let him speak; however, he was interrupting Kuch from answering her question. Kuch recalled that when Daly asserted that Miranda was violating Kuch's *Weingarten* rights, she told him that she would allow him to speak at the end of the meeting. In response to Miranda's questions, Kuch continued to explain that DPS mail is often misplaced and that other carriers have left the mail behind and have not been disciplined. Kuch recalled that Miranda then allowed Daly to speak and Daly began asking questions. Daly asked Miranda when she first knew that the mail had been left and was not with Kuch on his route. Miranda told him that she noticed that the mail was not with Kuch at approximately 2 p.m. Daly then explained that since Kuch did not notice that his mail was missing until approximately 4 p.m., Miranda could have sent the mail out to Kuch between 2 p.m. and 4 p.m. Miranda told Daly that it was not her duty to bring out the mail to the carries. Kuch recalled that the meeting essentially ended at that point.

Kuch recalled that when Daly spoke in the meeting, he was loud but he was not screaming. When Miranda permitted Daly to speak, he was not as loud as he was earlier in the meeting and when he was asserting that Miranda was violating Kuch's

[6] Kuch testified that he had opened his mouth to speak; however, Daly's response was faster.

Weingarten rights. Kuch confirmed that Daly participated in the meeting and assisted him during the September 14, 2004, meeting. Kuch acknowledged that other than the time in which Miranda did not permit Daly to speak, both he and Daly were allowed to say everything that they wanted to say before the conclusion of the meeting. Kuch did not recall any point during the meeting when Daly instructed him not to respond to Miranda's questions. Kuch did not recall that Daly requested time to confer with him during the course of the meeting.

F. Miranda's Description of the September 14, 2004 Meeting

Before beginning the meeting, Miranda requested that Customer Supervisor Sharon Swart also attend the meeting. With Daly, Kuch, and Swart present, Miranda began the meeting by informing Kuch that the meeting was investigatory and that it could lead to discipline up to and including termination. In response to her inquiry, Kuch requested the presence of a union steward. She told Kuch that she had found the DPS mail tray and asked him at what point that he realized that the tray was missing. Kuch confirmed that he had discovered the missing tray at approximately 4 p.m. In response to additional questioning, Kuch explained that he had not called the facility to report the missing tray because he would not have been able to finish by 6:30 p.m. Upon inquiry, he also confirmed that he completed the delivery of his mail without the DPS mail tray.

Miranda recalled that she then asked Kuch if he knew the penalty for willfully[7] delaying the mail. Miranda testified that Kuch began to answer the question by stating that he was not the only carrier who had left DPS mail. As Kuch was answering the question, Daly interrupted Kuch's answer. Miranda acknowledged that while Daly interrupted and began speaking, he did not physically stop Kuch from answering. Miranda asked Daly if he could wait and allow Kuch to answer the question. Miranda recalled that Daly asked if she were going to allow him to speak. Miranda told Daly that she would allow Daly to speak; however, she wanted Kuch to finish his answer. When Daly stopped the interruption, Kuch completed his answer. After additional questioning of Kuch, Miranda asked Daly if he had anything to add and Daly shook his head to indicate that he did not. When Miranda asked Kuch if he had anything to add, he told her that he had some of the DPS mail with him. Miranda then showed Kuch the tray in issue and pointed out that he had not delivered any portion of the DPS tray. Miranda recalled that at that point in the meeting Daly asked her when she had discovered that the mail had been left behind. When she told him that it had been about 2 or 2:30 p.m., he asked her if she had then taken the missing mail out to the two carriers. She told him that she had not. While Miranda recalled that Kuch had added something further, she could not recall specifically what he had said.

Miranda testified that she had allowed Daly to participate and to assist Kuch during the meeting. She confirmed that at no time did Daly ever instruct Kuch to refrain from answering a question. She also added that she allowed both Daly and Kuch to say everything that they wanted to say before the meeting ended.

[7] Miranda testified without contradiction that the penalty for willfully delaying the mail is termination.

G. Sharon Swart's Description of the Meeting

Sharon Swart, herein Swart, was employed as a customer service supervisor on September 14, 2004. As supervisor of the clerks, she was the first supervisor on the floor each morning. At approximately 8 a.m. on September 14, Miranda asked her to attend an investigatory interview as a management witness and to take notes. Swart estimated that the meeting lasted for only 10 to 15 minutes. Swart testified that she did not speak during the meeting and she prepared notes contemporaneously with participants' statements.

Swart's notes reflect that the meeting began at 8:15 a.m. She recorded[8] Miranda's initial statement to Kuch as: "On September 13, I left 2 trays of DPS for you and another carrier with another supervisor. What time did you get to that point (when miss DPS)." The conversation continues with Kuch's answer of 4 p.m. When Miranda asked Kuch why he did not call, he told her he did not because he would not have been able to complete the route by 6:30 [p.m.]. Swart records Miranda as responding: "So you went ahead and delivered your cased mail without the DPS?" Kuch confirms that he did so; along with a specific bundled flier. Swart then records Miranda as saying: "Bob, you know there is [are] penalties to willfully delaying the mail?" Her notes reflect that Kuch responded that there had been many other times when the DPS had been missing for other carriers as well as for him. Swart added a star preceding Kuch's response. She testified that she added the star to indicate that she had added a footnote to her notes. Swart's footnote, that is located on the last page of the notes, reflects: "Mike interrupts. Said you are violating his rights. Mike wanted to speak before Kuch answered."[9] Swart also wrote "loudly" above "interrupts." She admitted that her reference to Daly wanting to speak before Kuch spoke and her description of "loudly" were summaries of what happened rather than an exact description of what was said. In her testimony, Swart asserted that Miranda asked Daly to let Kuch finish his answer. Those specific words, however, were not recorded in the notes.

Swart's notes additionally reflect that Miranda asked Kuch an additional question before asking Daly if there was anything else that he wanted to add. Daly declined. Miranda then asked Kuch if he had anything to add and he provided some additional information. Miranda responded to Kuch's comments by showing him the DPS tray in issue. Daly then asked Miranda when she realized that the mail had been left behind and why she did to rectify the situation. Swart's notes end with the following words: "Kuch thought if he left route while someone brought DPS out." Swart testified that she was not sure whether these words referred to a comment by Kuch or Daly. The last sentence in the notes was documented as: "At 4:00 [p.m.] you thought about calling when you saw DPS was missing, but you didn't?"

[8] The wording reflects the words documented in Swart's handwritten notes.

[9] She further acknowledged that while she had testified that Daly wanted to speak before Kuch finished his answer, her notes had only reflected that Daly wanted to speak "before Kuch answered."

III. ANALYSIS AND CONCLUSIONS

A. Applicable Case Authority

In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court held, in agreement with the Board, that an employee has a statutory right to union representation in an interview in which the employee reasonably fears may result in discipline. 420 U.S. at 256. The Board and the courts have also held that even if a union representative is present during the investigatory interview, an employer may nevertheless violate an employee's *Weingarten* rights when the employer requires the representative to be a silent observer; prohibited from speaking. *Barnard College*, 340 NLRB 934, 935 (2003); *Talstol Corp*., 317 NLRB 290, 331–332 (1995), enfd. 155 F.3d 785 (6th Cir. 1998). As discussed above, the parties' existing joint contract administration manual provides that an employee has the right to the steward's assistance during an investigatory interview and not just a silent presence. The manual provides that the employer would violate the employee's *Weingarten* rights if it refused to allow the representative to speak or tried to restrict the steward to the role of a passive observer.

In *Texaco, Inc*., 251 NLRB 633, 636 (1980), the Board addressed the issue of whether the right to a representative 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. The Board referenced its earlier decision in *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980), where it noted:

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," 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.

Counsel for the General Counsel asserts that while Daly was present during the investigatory interview, he was relegated to the role of a passive observer during the "key part of the interview and was not permitted to speak when he felt it was necessary to do so to represent Kuch's interests." In contrast, Respondent argues that while a steward may be present and participate in an investigatory interview, the union representative may not turn the meeting into an adversarial proceeding and prevent the employer from questioning the employee or to interfere with legitimate employer prerogatives. *Weingarten*, supra, 420 U.S. at 258–259, 263. Certainly, the Board has found that in certain instances, a union representative's behavior during an investigative interview exceeded the bounds of *Weingarten* and interfered with the employer's legitimate prerogatives. In *New Jersey Bell Telephone*, 308 NLRB 277, 279, (1992), a union steward advised the employee to answer the employer's questions only once. The Board concluded that *Weingarten* did not grant a union representative the right to preclude an employer from repeating a question to an employee during an investigative interview.

B. Issues and Facts in Dispute

Interestingly, this case seems to involve a limited number of facts in dispute. There is no dispute that Miranda allowed Kuch to confer with Daly prior to the investigative interview. Additionally, there is no dispute that during the course of the meeting, both Kuch and Daly were given the opportunity to provide information they felt to be pertinent. Daly was not only given an opportunity to speak during the interview; he also asked questions of Miranda. There is no allegation that either Daly or Kuch asked for the opportunity to confer during the course of the interview or at the conclusion of the interview or that such request was denied. The only alleged *Weingarten* violation involves Miranda's conduct when Daly attempted to speak in response to one of Miranda's questions. There is, in fact, no dispute that Daly spoke and interrupted Kuch in his response to Miranda. The primary factual dispute seems to be whether Daly interrupted Kuch in the middle of his answer or before Kuch began to answer. Counsel for the General Counsel asserts that Daly spoke before Kuch answered and Respondent maintains that Daly interrupted Kuch while he was answering the question. While the parties agree that Miranda later gave Daly an opportunity to speak, Miranda acknowledges; and both her notes and those of Swart indicate that she asked at least one additional question of Kuch before allowing Daly to speak. Accordingly, inasmuch as Miranda did not give Daly an opportunity to speak until after additional inquiry beyond the question in issue, Daly's interruption before or during Kuch's response is not dispositive.

Respondent maintains that under *Weingarten,* Daly did not have the right to prevent or obstruct Miranda from asking her question. Respondent argues that while "exuberant, discourteous conduct or rude language" engaged in during grievances and arbitrations is tolerated, the same is not true for *Weingarten* situations. As a part of this argument, Respondent cites the Board's decision in *Yellow Freight Systems*, 317 NLRB 115, 123 (1995). As distinguished from the facts in this case, the steward attending the investigatory meeting in *Yellow Freight Systems* disrupted the process by verbally abusive and arrogantly insulting interruptions. The steward's conduct also consisted of shouting obscenities and violent desk pounding, as well as calling the manager a liar and demeaning his managerial status in front of the employee.

In asserting that Daly transformed the meeting into an adversarial meeting, Respondent relies upon the testimony of Daly and Kuch as well as Miranda and Swart. Miranda testified that when Daly told her that she was violating his rights, he spoke in a "very loud" voice. She also asserted that the interruption had lasted for "a couple of minutes." Miranda testified that while she took notes during the interview, those notes were later discarded and she later prepared typewritten notes taken from her discarded notes and the notes written by Swart. Even in these subsequently prepared notes, Miranda included only two statements by Daly to cover the entire period of the interruption. She documented only that he asked if she were going to let him

talk and then he told her that it was a violation of his rights when she told him that he was interrupting. Her notes then included the statement: "After Mike Daly stopped yelling, Bob continued with his answer." There is no description of what Daly said other than the two statements described above. It is not realistic that Daly's exchange with Miranda in making these two statements lasted for 2 minutes. Additionally, the total record evidence does not support Miranda's assertion that Daly was yelling during his interruption. While Daly conceded that he may have raised his voice, neither Kuch nor Swart testified that he yelled or screamed. Kuch testified that when Daly asserted his *Weingarten* rights during the meeting, he was excited and loud, however, not screaming. Swart recalled that when Daly interrupted Kuch's answer, he leaned forward in his chair. I note, however, that she also acknowledged that Daly did not yell at any time during the meeting. She recalled that he had simply spoken in an elevated tone of voice. Accordingly, crediting Swart, Kuch, and, Daly, the record evidence does not support a finding that Daly was engaged in yelling or shouting during this conversation. While Swart recalled that he leaned forward in his chair, there is no allegation that he said or did anything to threaten or intimidate Miranda or Swart. Thus, it appears that while Daly may have raised his voice and leaned forward in his chair at the time that he attempted to participate in the meeting, his conduct did not rise to the level of insubordination, rudeness, or discourtesy that would remove the rights accorded by *Weingarten*. The overall record testimony does not reflect that Daly's statements constituted an attempt to turn the meeting into an adversarial confrontation as alleged by Respondent.

Counsel for the General Counsel submits that before Kuch could answer Miranda's question, Daly attempted to clarify the question. Counsel asserts: "Daly did nothing more than attempt to clarify a single question that Miranda had asked, something which an active representative (as recognized by the Court in *Weingarten*) is entitled to do." Counsel for the General Counsel further submits that Kuch needed the active participation of his union representative at the exact point in which Daly interrupted. Counsel points out that by her own admission, Miranda indicated that if Kuch had answered "yes" to her question, she would have understood that to mean that he had, in fact, willfully delayed the mail, and the penalty for such an infraction was termination.

C. Summary and Conclusions

As reflected above, there were four people who attended this meeting and four separate and unique recollections of what occurred during the meeting. What is especially interesting is the fact that only Kuch seemed to recall what Daly actually said when he made the interruption that is in issue here. Daly testified that because Kuch had not willfully delayed the mail, he had tried to speak. He testified: "And at that point, I tried to—say something because I didn't like the question." He asserted that he started to say something and Miranda had not allowed him to speak. Swart's notes only reflect that Daly wanted to speak before Kuch answered, however, she does not record what he said when interrupting. Miranda's typewritten notes include: "Mike interrupts loudly," however, she does not include what he said to interrupt. Only Kuch testified that when Miranda asked him if he realized that there were penalties for willfully delaying the mail, Daly interjected: "this was not a willful delay of mail." During her testimony, Miranda was asked if she could recall what Daly said when he interrupted Kuch. She admitted that she had no recollection of what he said; remembering only that his interruption stopped Kuch from answering. Inasmuch as only one of the four meeting participants recalled what Daly actually said during the interruption, it would appear that his speaking at that precise time was more significant than his actual words.

In *United States Postal Service*, 288 NLRB 864, 867 (1988), a union steward did not participate as a silent observer during an investigative interview. During the beginning of the interview, the steward asked the manager questions about his investigation into the alleged misconduct. While the manager answered the questions, he asked the steward to refrain from interrupting and to permit the employee to answer the questions directed to her. Later in the same interview, the steward again interrupted with challenging questions and the manager again asked him not to interrupt. In all, the steward spoke up three times during the interview and was accused of interrupting the interview in each instance. The judge concluded that the steward's interruptions did not appear to be those of an obstructionist, but rather reactions to the manager's accusations that the employee had engaged in unlawful conduct. The judge went on to note that the steward seemed to be trying to participate and to assist and protect the employee. The judge also noted that the steward's efforts were low key and conciliatory. The Board affirmed the administrative law judge in finding that the employer denied the steward the right to participate in the employee's interview. Thus, while the facts of this earlier case are not totally analogous to the facts herein, the conduct of the two stewards is similar. As pointed out by counsel for the General Counsel, Kuch's answer to Miranda's question could have triggered a termination. He had already acknowledged that he was aware that he had left the DPS mail at the postal facility and he had opted to finish his route without going back for the mail. Had he then acknowledged that he was aware of the penalty for willfully delaying the mail, he may have put himself in an indefensible position. As it turns out, he didn't really answer Miranda's question and he simply pointed out that other employees had also left the mail behind. Daly's interruption, however, appeared to be an attempt to assist Kuch and to protect him from unwittingly admitting to something that could trigger his discharge. Additionally, because of her particular wording or phrasing, Miranda could have elicited an erroneous answer to her question. Asking Kuch if he were aware of the penalty for willfully delaying the mail is much akin to the age-old loaded and misleading question "Are you still beating your wife." Inasmuch as Miranda acknowledged that if Kuch answered "yes," she would have understood his response to mean that he had willfully delayed the mail. It is reasonable that Daly would have wanted to assist Kuch in responding to this potentially incriminating question.

While the Board's decisions in cases cited above indicate that the employer cannot lawfully preclude the union representative's participation in the interview, there are a limited number of cases dealing with the issue of participation and none that precisely define the boundaries of a representative's participation. Cer-

tainly, because each factual situation differs because of the individual conduct of the supervisor conducting the investigatory interview and the employee representative attending the interview, the boundaries for appropriate participation must vary for each factual situation.

As discussed above, during the majority of the interview, Daly was allowed to participate and was not relegated to the role of a silent observer. The record reflects, however, that for at least one limited and arguably significant portion of the interview, Daly was restricted in his ability to fully represent Kuch's interests and to participate in the interview as contemplated by the Court's decision in *Weingarten*. It should be noted that my finding is based upon a very narrow factual situation. I am also cognizant that the violation as presented in this very fact-specific situation might also be characterized as de minimis inasmuch as Daly again became an active and unrestricted interview participant following a relatively brief period of restriction. While Daly may have had the opportunity to later participate without restrictions, Respondent's lifting of the restriction does not, however, void the earlier restriction imposed upon Daly. Accordingly, I find that Respondent violated Section 8(a)(1) as alleged in the complaint.

CONCLUSIONS OF LAW

1. The United States Postal Service is now, and at all times herein, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The National Association of Letter Carriers, Branch 753, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to allow a union representative to participate and assist an employee during an investigatory interview on September 14, 2004, Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, United States Postal Service, Valparaiso, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Violating Section 8(a)(1) of the Act by refusing to permit the Union's representative to participate and assist an employee during an investigatory interview when the employee has reasonable cause to believe that the interview would result in disciplinary action taken against him or her.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its Valparaiso, Indiana facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 14, 2004.

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

Dated, Washington, D.C., June 30, 2006

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT violate Section 8(a)(1) of the Act by refusing to permit the Union's representative to fully participate and assist in an investigatory interview when the employee has reasonable cause to believe that the interview would result in disciplinary action being taken against him or her.

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

UNITED STATES POSTAL SERVICE

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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