LABOR LAW

**The National Labor Relations Board,
Handling Unfair Labor Practice Charges, and
Union Rights**

August 2010

STRUCTURE OF THE NATIONAL LABOR RELATIONS BOARD

I. Two Primary Functions: Conducting Elections and Enforcing of the NLRA

The National Labor Relations Act (NLRA) gives the National Labor Relations Board (NLRB) jurisdiction over two types of proceedings: 1) representation proceedings; and 2) unfair labor practice proceedings.

II. Representation Proceedings

The NLRB oversees elections among employees to determine whether they wish to be represented by a labor union. Employees at a work site can "petition" the NLRB to hold an election if 30% of the employees who would be involved in the election (bargaining unit) request an election or authorize the union to represent them. The NLRB hears and adjudicates claims arising out of NLRB conducted elections.

III. Unfair Labor Practice Cases

A. Unfair Labor Practices

An unfair labor practice (ULP) is an action by an employer or a union that interferes with the rights of employees under Sections 7 or otherwise contravenes the prohibitions listed in Section 8 of the NLRA. Section 7 of the NLRA guarantees employees the right to support, or not to support, a union, to engage in collective action in support of a union, and to bargaining collectively with their employer.

Common Employer ULPs:

- Harassing, disciplining or terminating an employee in retaliation for being a union leader.
- Failing to provide a union with information necessary for processing a grievance.
- Refusing an employee's request for a union steward during a disciplinary investigation.
- Making a unilateral change in a "mandatory subject of bargaining"—a change in employees' wages, benefits, hours, or other terms and conditions of employment.

Common Union ULPs:

- Breaching the "duty of fair representation" by handling a grievance arbitrarily, discriminatorily, or in bad faith.
- Harassing a non-member because of the employee's non-member status.

B. Enforcement of the NLRA

The NLRB serves as prosecutor throughout the course of a ULP case, *and* serves as judge at the evidentiary hearing and the first appeal.

C. Prosecution of ULPs: Regions and the General Counsel

The Regions throughout the United States, and the General Counsel in Washington, DC, are responsible for prosecuting employers and unions who engage in unfair labor practice conduct.

1. The Regions:

- Point of contact for the public.
- Each Region has a geographic jurisdiction. Most Regions have one office; a handful of Regions also have "Resident Offices" in other cities.
- At the Regions, NLRB Agents and NLRB Attorneys investigate allegations of unfair fair labor practices. After the investigation, the Region decides whether to prosecute an employer or union for the alleged unfair labor practice conduct.
- Regions also investigate whether to seek an injunction to prevent employers and unions from engaging in unlawful conduct while ULP cases are litigated.
- Regions try cases at the trial and during the appeal to the Board.
- The NLRB publishes two "Casehandling Manuals" on its website at www.nlrb.gov. The Casehandling Manuals provide detailed and helpful explanations of how Regions are supposed to handle cases.

2. The General Counsel:

- Appointed by the President with approval of the Senate.
- Located at NLRB headquarters in Washington, DC.
- Oversees the enforcement of the unfair labor practice provisions of the NLRA.
- Determines policy on prosecution of ULPs through memoranda that are binding on the Regions.
- Advises Regions on complicated or novel issues of law.
- Approves Regions' decisions to seek injunctions to prevent employers or unions from engaging in unlawful conduct while ULP cases are litigated.
- Reviews decisions by Regions to dismiss ULP charges and to enter into settlement agreements.
- Handles appeals of ULP cases to federal courts.

D. Adjudication of ULPs: ALJs and the NLRB

If a Region decides to prosecute a ULP, there will be a hearing before an Administrative Law Judge (ALJ). After the ALJ renders a decision, the matter can be appealed to the five-member Board of the NLRB.

1. Administrative Law Judges:

- The "Division of Judges" is independent of the Regions.
- The ALJ creates the record—the only person that hears testimony or accepts other evidence.
- Issues a decision, and if merit found to Region's allegations, issues an order to remedy the unfair labor practice.
- ALJ's decisions can be appealed to the five-member Board of the NLRB.

2. The Board:

- Five-member Board.
- Appointed by President and confirmed by the Senate.
- In ULP cases, reviews ALJ decisions.
- Generally will not upset the finding of fact of the ALJ. Instead, it will only sustain an appeal if there is an error of law.
- Decisions can be appealed to the United States Courts of Appeal, and the Supreme Court.
- Decisions not "self enforcing." If employer or union refuses to comply with order, the General Counsel must go to federal court to get order enforcing the Board's order.

HANDLING UNFAIR LABOR PRACTICE CHARGES

I. Preparation for Filing the ULP Charge

Prior to filing ULP charge:

- Identify when you knew or should have known about the alleged unfair labor practice conduct. *There is a six-month statute of limitations*.
- Investigate your ULP to ensure that you have a good ULP. Everything that is unfair is not an "unfair labor practice." Locals that lose credibility with their Regions by filing numerous meritless ULPs have difficulties when they have good ULPs.
- Have your evidence ready to present. Evidence will most likely be a witness who is willing to give an affidavit, or documents. Regions are evaluated on the number of calendar months they spend investigating ULP charges and often become impatient if your lack of preparation delays the process. Avoid filing a charge at the end of the month if possible.

II. Filing the Charge

Filing a ULP charge with a Region begins the ULP proceeding.

- ULP forms are available at www.nlrb.gov or at Regional offices.
- Language alleging ULP can be one sentence and need not contain a thorough statement of the allegation.
- Generally, allege all claims arising out of same set of facts in same charge. For example: If a discharge was a ULP because it was in retaliation for union activity, and because it was a unilateral change in the discipline policy, you allege both a retaliatory discharge and a unilateral change. If your charge only alleges that the termination was unlawful under one theory, under certain circumstances you will not be able to proceed on the other theory later.
- Call by telephone or visit your Region's "information officer" for assistance in filing a ULP charge.
- You can amend your ULP charge later if necessary.
- Once you have filed your ULP charge, you become the "Charging Party" and the Postal Service becomes the "Respondent."
- You may also include a position statement laying out any pertinent facts or law. A position statement is not necessary.
- You can request that the Region seek a "10(j)" injunction. Under 10(j) of the NLRA, a Region may seek an injunction in federal court to prevent a party from engaging in the alleged unfair labor practice while the parties wait for a trial and a decision. Regions do not routinely seek 10(j) relief.

III. Board Investigation of Charge

The Regional Director will assign a Board Agent or Board Attorney to investigate the ULP charge. Generally, you will hear from the Region within a week of when you filed your charge. The investigator will generally request the union's evidence before he does anything else.

- Timely respond to the requests of the investigator.
- Prepare witnesses' testimony before sending them in to give affidavits. You will normally not be allowed to sit with a witness when the investigator takes the witness's affidavit.
- Tell witnesses to be firm with the investigator if their affidavits mischaracterize their testimony. Lazy investigators may purposefully draw up a bad affidavit so that the Region can dismiss the charge.
- Individuals who give affidavits should ask for a copy of the affidavit so that the union can get a copy.
- Ask the investigator if he wants additional evidence.

Once you have presented your evidence to the Region, the Region will contact the Postal Service.

- Stay in touch with the investigator so that before the Regional Director makes his decision you have an opportunity to respond to any defenses raised by the Postal Service.
- During the course of the investigation, the investigator will usually ask the Postal Service if it wants to enter into a settlement agreement to resolve the ULP charge.

IV. Determination of Merit by Regional Director

After conducting his investigation, the investigator will sit down with the Regional Director to explain the case to him. The Regional Director will then make a finding concerning the ULP charge.

A. Finding of No Merit

If the Regional Director finds that the ULP charge was without merit, the investigator will offer you two options:

- *Withdraw the charge.* Withdrawing the charge is generally without prejudice, so that the union may refile the ULP charge so long as it is within the six-month statute of limitations. The union may choose to withdraw a charge if it believes that it can uncover new evidence that would sway the Region. The union may not appeal the Region's finding of no merit if it accepts a withdrawal.
- *Take a short-form or long-form dismissal.* A short-form dismissal does not explain why the Region found no merit. A long-form dismissal explains why the Region

found that the union's ULP charge was meritless. A party may appeal a Regional Director's finding of no merit to the Office of Appeals in Washington, DC. The success rate is under 3%.

B. Finding of Merit

If the Regional Director finds that the ULP charge was meritorious:

- Before and after the complaint issues, the Region will attempt to settle the case.
- The Region will issue a "complaint" against the Postal Service and set a date for a hearing before an ALJ.
- The Region may also seek 10(j) relief.

V. Settlement of ULP Charges

The Regions are generally eager to settle any charge that it finds meritorious. There are three general types of settlement:

- *Non-Board Settlement.* A settlement between the union and the Postal Service where, as part of the settlement, the union agrees to withdraw its ULP charge. The Regional Director must approve the agreement.
- *Informal Settlement.* A settlement between the NLRB and the Postal Service. But, if the Postal Service violates the settlement, the Region cannot enforce the agreement. The Region's only recourse is to proceed to a trial on the merits.
- *Formal Settlement.* A settlement between the NLRB and the Postal Service. If the Postal Service violates the settlement, the Region may enforce the settlement agreement. The Region does not need to litigate the merits of the ULP charge to prove that the Postal Service engaged in an unfair labor practice.

Regions will generally settle ULP cases with employers with informal settlement agreements. But, if an employer is a recidivist, it may insist on a Formal Settlement. Similarly, a "non-admissions" clause that states that the employer is not admitting guilt by entering into the settlement agreement is not supposed to be included in settlement agreements if the employer is a recidivist.

A Region does not need the consent of the union or other charging party to settle a ULP case. A union or other charging party may appeal a decision by a Region to enter into a settlement agreement to the General Counsel's office. Appeals have a low success rate.

VI. Trial before an ALJ

If a Region issues a complaint and is unable to settle the case, the Postal Service will be required to file an answer responding to the allegations in the Region's complaint. The trial will be heard before an ALJ. An attorney from the Region will handle the case. The union can also

have its own counsel who can make arguments and present witnesses at the trial. As discussed before, any decision may be appealed to the Board, and then to the federal courts.

VII. Deferral of ULP Charge to Arbitration

If a Region determines that a ULP charge is of "arguable merit," it may refuse to resolve the ULP charge, and instead defer the charge to arbitration for resolution by an arbitrator.

Not all ULP charges are appropriate for deferral under NLRB precedent. Regions do not defer to arbitration charges alleging that an employer has refused to provide bargaining or grievance information. Regions do not defer to arbitration charges alleging a limited number of other violations of the NLRA, including retaliation against employees for filing ULP charges. Additionally, Regions do not defer to arbitration charges that are "inextricably intertwined" with charges which are not deferrable. Thus a union seeking to avoid deferral of a unilateral change charge can ask the employer for information concerning the unilateral change—if the employer fails to provide the information and the union alleges the failure as a ULP, the Region may find that the unilateral change allegation is "inextricably intertwined" with the information request allegation, and therefore refuse to defer either allegation to arbitration.

A Region will defer a charge if:

- The allegations in the charge appear to be covered by, and are likely to be resolved through, the contractual arbitration procedure;
- The employer and the union have a collective bargaining agreement currently in effect that provides for final and binding arbitration; and
- The employer is willing to arbitrate the allegation and waive any contractual time limits.

A union may appeal the decision of a Region to defer a charge to the General Counsel in Washington, DC. Such appeals have a very low success rate. The Region will also agree to defer a charge if both parties agree to arbitrate the allegation in the ULP.

If the Region determines that a charge is appropriate for deferral, it will follow up with the union to see that it has filed a grievance and is pursuing arbitration. If the union fails to pursue the grievance, the Region will dismiss the ULP charge. Once the grievance has been filed, the Region will periodically contact the union to inquire into the status of the arbitration.

Once the deferred allegation has been arbitrated, the union can request that the Region review the award. The Region will defer to the arbitration award even if the arbitrator ruled in a way that is inconsistent with NLRB precedent. The Region will defer to the arbitrator's award if the Region finds:

- The allegations tried in the arbitration were parallel to the allegations in the ULP charge and the arbitrator was presented with the facts generally relevant to the ULP charge;

- The arbitration hearing appeared to have been "fair and regular"; and
- The award is not "repugnant" to the NLRA.

If the Region finds that the arbitrator's award does not meet the above three standards, it will revoke the deferral and resume the processing of the ULP charge. If the Region finds the arbitrator's award does meet the above three standards, a union may appeal the finding to the General Counsel in Washington, DC. Such appeals have a very low success rate.

Although the NLRB's deferral policy is often frustrating—after all unions file charges with Regions because they want them to investigate the charges, not because they want to arbitrate the charges—the policy can save an untimely grievance. For example, if an employer ignores a provision of the contract but the union misses the time limit for a grievance, the union can still file a ULP charge alleging a unilateral change in working conditions if the charge is within the NLRA's six month statute of limitations—if the Region finds that the charge is arguably meritorious, it will pressure the employer to arbitrate the allegation and waive timeliness arguments.

A union may file both a grievance and a ULP charge over the same act by an employer where the act violates both the collective bargaining agreement and the NLRA. Even if the union is confident that its ULP charge will be deferred to arbitration, there is still an advantage to filing the ULP charge. First, the Region may put pressure on the employer to settle the ULP charge prior to the Region's decision to defer the charge. Second, the arbitrator will then be charged with examining whether the employer's act violated not just the collective bargaining agreement, but also the NLRA.

WEINGARTEN RIGHTS

I. Employees' Right to a *Weingarten* Representative

If a union-represented employee reasonably believes that an investigatory interview may lead to his or her discipline, the employee is entitled to have a union representative present during the interview. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256-267 (1975); *but see IBM Corp.*, 341 NLRB 1288, 1288 (2004) (holding that non-union represented employees do not have a right to *Weingarten* witnesses). The right to a *Weingarten* representative exists only in investigatory interviews; an employee is not entitled to a *Weingarten* representative in a meeting where management announces discipline if "the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview." *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979); *see also Success Village Apartments, Inc.*, 347 NLRB No. 100, slip op. at 7 (2006).

Although an employee has the right to a union representative under *Weingarten*, an employer is under no obligation to affirmatively advise an employee of his or her *Weingarten* rights. *United States Postal Service*, 241 NLRB 141, 152 (1979). An employee's right to a union representative under *Weingarten*, 420 U.S. at 257, arises only if the employee requests a union representative. When faced with a request for a union representative, an employer has three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. *Id.* at 258-259; *Postal Service*, 241 NLRB at 141; *Meharry Med. College*, 236 NLRB 1396 (1978). But once an employee has requested a union representative, an employer may proceed with an interview only if it grants the request for a union representative, if it informs the employee of his or her right to discontinue the interview, or if the employee is otherwise aware of his or her right to discontinue the interview. *Postal Service*, 241 NLRB at 141; *Meharry*, 236 NLRB 1396.

An employee's right to a union representative at a disciplinary interview extends to investigatory interviews into criminal matters, *see e.g. Weingarten*, 420 U.S. at 256-567, including investigatory interviews conducted by the United States Postal Inspection Service, *United States Postal Service v. NLRB*, 969 F.2d 1064, 1067 and 1072 (D.C. Cir. 1992); *see also United States Postal Service*, 241 NLRB 141, 141 (1979) (holding that even where the Inspection Service provides an employee notice of his or her *Miranda* rights, employees are still entitled to a union representative).

The National Labor Relations Board (NLRB) has held that a Postal Service employee is not entitled to union representation during a "fitness for duty" examination. *See United States Postal Service*, 252 NLRB 61, 61 (1980).

The requesting employee and his or her union are entitled to select which union representative will serve as the employee's *Weingarten* representative, provided that there are no extenuating circumstances and the selected representative is available at the time of the meeting. *Barnard College*, 340 NLRB 934, 935 (2003); *Anheuser-Busch, Inc.*, 337 NLRB 3, 8 (2001) *enfd.*338 F.3d 267 (4th Cir. 2003). When there are two union representatives available to serve

as *Weingarten* representatives, it is the union's prerogative to decide which union representative will serve as the *Weingarten* representative. *Anheuser-Busch*, 337 NLRB at 8 (holding that short delay in availability of one union representative did not justify employer refusal to allow employee the representative of his choice where allegations against employee did not require immediate action).

II. Rights of *Weingarten* Representatives

A *Weingarten* representative has a right to consult privately with an employee prior to the start of a meeting, and to interrupt a meeting to consult privately with the employee. The Supreme Court recognizes that an employee facing a disciplinary interview has a right to a "knowledgeable union representative." *Weingarten*, 420 U.S. at 263. As a result, the *Weingarten* representative and employee may consult privately so that the representative is familiar with the circumstances under investigation and with the employee's view of the matter. *Climax Molybdenum Co.*, 227 NLRB 1189, 1190 (1977), *enforcement denied*, 584 F.2d 360 (10th Cir. 1978); *Postal Service*, 969 F.2d at 1067, 1071.

A *Weingarten* representative has a right to actively assist an employee while the investigatory interview is being conducted. *Weingarten*, 420 U.S. at 263; *Barnard College*, 340 NLRB at 935. An employer may not require a union representative to be a silent observer to the disciplinary interview and it may not prohibit a union representative from speaking out. *Barnard College*, 340 NLRB at 935 (citing *Talsol Corp.*, 317 NLRB 290, 331-332 (1995) *enfd.* 155 F.3d 785 (6th Cir. 1998)). A *Weingarten* representative may present the employee's version of events, clarify the facts, assist the employee in articulating an explanation, advise an employee appropriately of the employee's right to consult with an attorney, and offer justifications and mitigating factors. *See Weingarten*, 420 U.S. at 262-263.

During the course of an investigatory interview, an employer is not required to bargain with a union representative over any discipline that the employer is considering, *Weingarten*, 420 U.S. at 259-260, and the union representative is not entitled to interfere with the employer's right to conduct its investigation. *Weingarten*, 420 U.S. at 258; *Yellow Freight System*, 317 NLRB 115, 123-124 (1995); *see also Barnard College*, 340 NLRB at 935, 942. The Supreme Court and the NLRB have held that employees and their *Weingarten* representatives are not entitled to an "adversarial" hearing during investigatory interviews. *See New Jersey Bell Tele. Co.*, 308 NLRB 277, 279 (1992) (upholding employer's ejection of steward from interview after steward advised employee to refuse to answer the employer's repetitious questions more than once); *see also Weingarten*, 420 U.S. at 263; *Barnard College*, 340 NLRB at 935; *Yellow Freight System*, 317 NLRB 115, 123-124 (1995). Similarly employees and their *Weingarten* representatives are not entitled to present witnesses on an employee's behalf during an investigatory interview. *Coyne Cylinder Co.*, 251 NLRB 1503, 1504 fn.6 (1980). But a *Weingarten* representative may interrupt an employer representative in the course of representing an employee, *see e.g. United States Postal Service*, 288 NLRB 864, 868 (1988), and may object to questions reasonably perceived as harassing, *see New Jersey Bell*, 308 NLRB at 279-280.

SHOP STEWARDS' RIGHTS

I. Rights of Union Representatives

The rights of union representatives extend beyond the rights of *Weingarten* representatives discussed above. The NLRB recognizes that an employee acting in his or her status as a union representative stands on equal footing with an employer representative. *Crown Central Petroleum Corp.*, 177 NLRB 322 (1969), *enfd.* 430 F.2d 724 (5th Cir. 1970); *see also Indiana & Mich. Elec. Co.*, 273 NLRB 1540, 1545 (1985) (holding that "the master-servant relationship does not carry over to the dealings between the employer and the employee when the employee is acting as a union representative.") As a result, an employer generally may not discipline an employee for intemperate comments made in the course of grievance handling. *See e.g. United States Postal Service*, 250 NLRB 4, 4 fn.1 (1980) (holding that discipline of steward for referring to foreman as "horse's ass" during discussion of potential grievance was unlawful); *United States Postal Service*, 251 NLRB 252, 252 (1980).

Although an employer generally cannot discipline a union representative for intemperate comments made in the course of handling a grievance, the NLRB holds that certain conduct "is so opprobrious" as to allow an employer to discipline a union representative. In determining whether an employer can discipline a union representative for conduct occurring the course of representing an employee the NLRB examines several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979); *see e.g. Bloomfield Health Care Cntr.*, 352 NLRB No. 39, slip op. at 3 (2008) (holding discipline unlawful where conduct occurred in break area where work could not be disrupted, parties were discussing right of representative to be in work area, no profanity was used, and representative was provoked by employer's unlawful conduct); *Datwyler Rubber and Plastics, Inc.*, 350 NLRB No. 58, slip op. at 2 (2007).

A union representative also has the protection of a "stewards' privilege." An employer may not interrogate a union representative concerning his or her discussions with an employee the union representative represents, nor may it threaten a union representative who refuses to turn over his or her grievance notes. *Cook Paint & Varnish Co.*, 258 NLRB 1230, 1231-1232 (1981). But the stewards' privilege is not absolute, and a union representative may be subpoenaed and compelled to testify concerning such matter before a grand jury or in court.

INFORMATION REQUEST ULPS

I. The Postal Service Must Provide a Broad Spectrum of Information

Upon a request by a union, an employer must provide information that is necessary for the union to process grievances, administer a collective bargaining agreement, or collectively bargain. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Disney Park and Disney's California Adventure*, 350 NRLB No. 88, slip op. at 2-3 (2007). The obligation to provide information includes information necessary for a union to determine whether it will file a grievance. *Disney Park*, 350 NLRB No. 88, slip op. at 2.

A union is presumptively entitled to information concerning bargaining unit employees' wages, hours, and terms and conditions of work. *Disney Park*, 350 NLRB No. 88, slip op. at 2. A union does not have to justify its request for such information because the information is presumptively relevant to the union's duties as the representative of the bargaining unit. *See e.g. Good Samaritan Hosp.*, 335 NLRB 901, 918 (2001); *Yeshiva University*, 315 NLRB 1245, 1247 (1994). Other information requests are governed by a "broad discovery-type standard." *Disney Park*, 350 NLRB No. 88, slip op. at 2; *Acme Industrial*, 385 U.S. at 437. Under this broad test for relevancy, a union is entitled to any information that is of probable use to the union in carrying out its responsibilities to represent its members. *Sheraton Hartford Hotel*, 289 NLRB 463, 463-464 (1988). If the "information has some bearing on the issue between the parties" it must be supplied. *U.S. Postal Service*, 289 NLRB 942, 942 (1988) *enfd*, 888 F.2d 1568 (11th Cir. 1989). "[T]he legal standard concerning just what information must be produced is whether or not there is a 'a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative.'" *U.S. Postal Service*, 337 NLRB 820, 822 (2002) (quoting *Asarco, Inc.*, 316 NLRB 636, 643 (1995), *enfd. in relevant part* 86 F.3d 1401 (5th Cir. 1996); s*ee also United Postal Service*, 332 NLRB 635, 636 (2000) ("even potential or probable relevance is sufficient to give rise to an employer's obligation to provide information"); *Conrock Co.*, 263 NLRB 1293, 1294 (1982), enf'd, 118 LRRM 2968 (9th Cir. 1984) ("Information of even probable or potential relevance to the union's duties must be disclosed.").

An employer must furnish the requested information in a timely manner absent a valid defense. *Woodland Clinic*, 331 NLRB 735, 736-737 (2000). "An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Id.* Even if an employer intends not to provide a union with information, it must "provide the [u]nion with some timely legitimate explanation for its refusal." *U.S. Postal Service*, 332 NLRB at 636.

Although a union in entitled to information, it is not entitled to have the information presented to it in the exact form desired by the union.

II. Confidentiality Defense

Substantial claims of confidentiality may justify an employer's refusal to furnish information. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072-1074 (1995). A union will be entitled to information that an employer alleges is confidential only if the need of the union for the information outweighs the legitimate confidentiality interests of the employer. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). The NLRB does not accept blanket claims of confidentiality; an employer must justify such claims. *Detroit Newspaper*, 317 NLRB at 1072; *U.S. Postal Service*, 289 NLRB at 942; s*ee also McDonnell Douglas Corp.*, 224 NLRB 881, 890 (1976). To trigger the balancing test under *Detroit Edison*, an employer must first timely raise its confidentiality claim. *Detroit Newspaper*, 317 NLRB at 1072-1074. Further, even if information is confidential, the employer cannot simply deny the request; rather, it must bargain for an accommodation of its concerns, for example, by offering to enter into a non-disclosure agreement. *See Tritac Corp.*, 286 NLRB 522, 522 (1987) (an employer "cannot simply raise its confidentiality concerns, but must also come forward with some offer to accommodate both its concerns and its bargaining obligation); s*ee e.g. U.S. Postal Service*, 332 NLRB 635, 648 (2000); *Silver Brothers Co., Inc.*, 312 NLRB 1060 (1993); *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982).

When unions have requested OWCP records the Postal Service has refused to respond citing confidentiality concerns. OWCP records are covered by the Postal Service's Privacy Act. The Board has rejected the Postal Service's Privacy Act defense. *See e.g. U.S. Postal Service*, 289 NLRB at 944-945. In fact, the Postal Service's Privacy Act regulations found in the Administrative Support Manual provide that medical records can be disclosed to a union.

III. Filing Information Request ULPs

The General Counsel issued a memorandum concerning information request ULP charges against the Postal Service. OM-03-18. In the memorandum, the General Counsel requests that ULP charges contain: 1) the identity of the requester; 2) the person to whom the request was directed; 3) whether the request was oral or in writing; 4) a description of the requested information sought that was not provided; and 5) the general proffered reason for the request (e.g. contract administration, grievance processing or collective bargaining).

APPENDIX OF ATTACHED CASES AND MATERIALS

I. Weingarten Rights

A. *United States Postal Service v. NLRB*, 969 F.2d 1064 (D. C. Cir. 1992).

B. *United States Postal Service*, 252 NLRB 61 (1980).

C. *United States Postal Service*, 241 NLRB 141 (1979).

D. Letter from K.H. Fletcher, Chief Postal Inspector, to William Burrus, dated May 24, 1982 concerning role of union representatives in investigatory interviews.

E. *Texaco, Inc.*, 168 NLRB 361 (1967), *enf. denied*, 408 F. 2d 142 (5th Cir. 1969).

II. Shop Stewards' Rights

A. *Cook Paint and Varnish Company*, 258 NLRB 1230 (1981).

B. Report of the NLRB General Counsel (March-Sept. 1994).

C. *United States Postal Service*, 250 NLRB 4 (1980).

D. *United States Postal Service*, 251 NLRB 252 (1980).

E. *United States Postal Service*, 252 NLRB 624 (1980).

F. *United States Postal Service*, 268 NLRB 274 (1983).

III. Information Request ULPs

A. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

B. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

C. *Disney Park and Disney's California Adventure*, 350 NRLB No. 88 (2007).

D. *Woodland Clinic*, 331 NLRB 735 (2000).

E. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995).

F. National Labor Relations Board, Office of the General Counsel, Division of Operations Management, Memorandum OM-03-18 (2003).

Westlaw.
969 F.2d 1064
969 F.2d 1064, 140 L.R.R.M. (BNA) 2639, 297 U.S.App.D.C. 64, 61 USLW 2024, 122 Lab.Cas. P 10,253
(Cite as: 969 F.2d 1064, 297 U.S.App.D.C. 64)

H

U.S. Postal Service v. N.L.R.B.
C.A.D.C.,1992.

United States Court of Appeals, District of Columbia Circuit.
UNITED STATES POSTAL SERVICE, Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, Respondent,
American Postal Workers Union, AFL-CIO, and East Bay Area Local, American Postal Workers Union, AFL-CIO, Intervenors.
No. 91-1373.

Argued May 18, 1992.
Decided June 30, 1992.

The United States Postal Service (USPS) petitioned for review of determination by National Labor Relations Board (NLRB) that USPS committed unfair labor practice when postal inspector denied employee the opportunity to consult with his union steward prior to interrogation concerning employee's alleged misconduct. NLRB filed cross-application for enforcement of its remedial order requiring USPS to post corrective notices at all USPS union-represented facilities. The Court of Appeals, Ruth Bader Ginsburg, Circuit Judge, held that: (1) even if Court lacked jurisdiction over USPS petition seeking review of NLRB order, Court could consider USPS's objections to NLRB's decision in ruling on NLRB's cross-application; (2) union was not entitled to raise issue of whether USPS was barred by preclusion principles from challenging nationwide scope of NLRB's remedy; (3) NLRB reasonably determined that USPS committed unfair labor practice; and (4) NLRB's remedial order was not excessive.

Cross-application granted.

West Headnotes

[1] Labor and Employment 231H ⚿1931

231H Labor and Employment
231HXII Labor Relations
231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
231HXII(J)2 Enforcement by Courts
231Hk1931 k. Scope of Inquiry in General. Most Cited Cases
(Formerly 232Ak717 Labor Relations)
In ruling on cross-application by National Labor Relations Board (NLRB) for enforcement of its remedial order, Court of Appeals had authority to consider objections by United States Postal Service (USPS) to NLRB's decision, even if federal courts lacked jurisdiction over USPS petition seeking review of NLRB order. 39 U.S.C.A. §§ 1208(a), 1209(a).

[2] Labor and Employment 231H ⚿1921

231H Labor and Employment
231HXII Labor Relations
231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
231HXII(J)2 Enforcement by Courts
231Hk1921 k. Parties. Most Cited Cases
(Formerly 232Ak710 Labor Relations)
Union could not raise issue as to whether United States Postal Service (USPS) was barred by preclusion principles from challenging nationwide scope of remedy imposed by National Labor Relations Board (NLRB), but rather that position could be raised only by NLRB.

[3] Statutes 361 ⚿219(8)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(6) Particular Federal Statutes
361k219(8) k. Labor Relations

and Standards. Most Cited Cases
Court of Appeals would give deference to "special competence" of National Labor Relations Board (NLRB) in construing phrase "concerted activities for * * * mutual aid or protection" in NLRA, on review of NLRB's determination that United States Postal Service (USPS) committed unfair labor practice when postal inspector denied employee the opportunity to consult with his union steward prior to interrogation concerning employee's alleged misconduct. National Labor Relations Act, § 7, 29 U.S.C.A. § 157.

[4] Labor and Employment 231H ⚿1469(1)

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1467 Interrogation of Employees
231Hk1469 Particular Conduct
231Hk1469(1) k. In General. Most Cited Cases
(Formerly 232Ak367 Labor Relations)
National Labor Relations Board (NLRB) acted reasonably in construing NLRA provision establishing right of employees to engage in concerted activities for mutual aid or protection to mean that United States Postal Service (USPS) committed unfair labor practice when postal inspector denied employee the opportunity to consult with his union steward prior to interrogation concerning employee's alleged misconduct. National Labor Relations Act, § 7, 29 U.S.C.A. § 157.

[5] Labor and Employment 231H ⚿1468

231H Labor and Employment
231HXII Labor Relations
231HXII(G) Unfair Labor Practices
231Hk1467 Interrogation of Employees
231Hk1468 k. In General. Most Cited Cases
(Formerly 232Ak361 Labor Relations)
In evaluating credibility of employee charged with misconduct, fact that employee has exercised right under NLRA to consult with union representatives prior to interrogation by employer's representatives can be weighed. National Labor Relations Act, § 7, 29 U.S.C.A. § 157.

[6] Labor and Employment 231H ⚿1755

231H Labor and Employment
231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings
231HXII(I)6 Weight and Sufficiency of Evidence
231Hk1755 k. Interrogation of Employees. Most Cited Cases
(Formerly 232Ak555 Labor Relations)

Labor and Employment 231H ⚿1931

231H Labor and Employment
231HXII Labor Relations
231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards
231HXII(J)2 Enforcement by Courts
231Hk1931 k. Scope of Inquiry in General. Most Cited Cases
(Formerly 232Ak718 Labor Relations)
Substantial evidence supported administrative law judge's finding that, had union steward been allowed to consult with employee, there was only a possibility that she would have advised employee to remain silent or otherwise refuse to cooperate, even though union publication stated that best possible advice to employee during such situation was to remain silent; therefore, Court of Appeals would not reach question of whether it would have been incumbent upon National Labor Relations Board (NLRB), upon proof of union-enforced policy of noncooperation, to excuse denial by United States Postal Service (USPS) of consultation prior to postal inspector's interrogation concerning employee's alleged misconduct. National Labor Relations Act, § 7, 29 U.S.C.A. § 157.

[7] Labor and Employment 231H ⚿1831

231H Labor and Employment

231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings
231HXII(I)10 Orders
231Hk1830 Posting of Notice of Order
231Hk1831 k. In General. Most Cited Cases
(Formerly 232Ak624.1, 232Ak624 Labor Relations)
Upon determining that United States Postal Service (USPS) committed unfair labor practice when postal inspector denied employee the opportunity to consult with his union steward prior to interrogation concerning employee's alleged misconduct, National Labor Relations Board (NLRB) acted within its remedial discretion in requiring the posting of corrective notices at all USPS union-represented facilities, where collective bargaining agreement provision recognizing right to union participation in such interrogations applied to union members nationwide, and inspection service manual which expressly ruled out leave to confer governed all inspectors wherever they undertook an investigation. National Labor Relations Act, § 7, 29 U.S.C.A. § 157.

***1065 **65** On Petition For Review and Cross-Application For Enforcement of an Order of The National Labor Relations Board (No. 32-CA-10209).
Douglas N. Letter, Atty., Dept. of Justice, with whom Stuart M. Gerson, Asst. Atty. Gen., Jeffrica Jenkins Lee and Jacob N. Lewis, Attys., Dept. of Justice, and Karen A. Intrater, Associate Gen. Counsel, Jesse L. Butler, Asst. Gen. Counsel, James A. Friedman and Robert P. Sindermann, Jr., Attys., U.S. Postal Service, Washington, D.C., were on the brief, for petitioner William Kanter, Atty., Dept. of Justice, and Stephen E. Alpren, Washington, D.C., also entered appearances for petitioner.
William M. Bernstein, Atty., N.L.R.B., with whom Jerry M. Hunter, Gen. Counsel, and Aileen A. Armstrong, Deputy Associate Gen. Counsel, Washington, D.C., were on the brief, for respondent.
Anton G. Hajjar, Washington, D.C., was on the brief for intervenors.

Before: RUTH BADER GINSBURG, HENDERSON and RANDOLPH, Circuit Judges.

Opinion of the Court filed by Circuit Judge RUTH BADER GINSBURG.

****66*1066** RUTH BADER GINSBURG, Circuit Judge:
In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975), the Supreme Court upheld a National Labor Relations Board (Board or NLRB) decision interpreting section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157,[FN1] to secure to employees the right to union representation at an investigatory interview that the employee reasonably believes may result in disciplinary action. The dispute before us concerns the propriety of the Board's reading of the section 7 right affirmed in *Weingarten* to cover pre-interview consultation between employee and union representative.

> FN1. Section 7 establishes the right of employees, *inter alia*,"to engage in ... concerted activities for ... mutual aid or protection."

In the ruling under review, the Board determined that the United States Postal Service (USPS) committed an unfair labor practice [FN2] in March 1989 when Postal Inspectors, following a USPS nationwide policy, denied an employee the opportunity to consult with his union steward prior to an interrogation concerning the employee's alleged misconduct. The NLRB's remedial order directed the Postal Service to cease and desist from interfering with the employee-union representative consultation right recognized in the Board's decision, and it required the Postal Service to post remedial notices at all USPS union-represented facilities.

> FN2. Section 8(a)(1) of the NLRA, 29U.S.C. § 158(a)(1), makes it an unfair

> labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7."

We conclude that the NLRB has advanced a permissible construction of the NLRA, one that is consistent with the language of the statute and with the Supreme Court's *Weingarten* decision. The Board's interpretation therefore warrants our respect. We furthermore conclude that, in view of the nationwide policy followed by the Postal Inspectors, the Board acted within its large remedial discretion in requiring the posting of corrective notices at all USPS union-represented facilities. Accordingly, we enforce the NLRB's order in full.

I. FACTS AND NLRB PROCEEDINGS

Benjamin Salvador, a member of the American Postal Workers Union (Union or APWU), began working for the Postal Service in 1977. At the time of the episode in suit, he was employed as a "business reply" clerk at the Fremont, California Post Office. Confronted by his supervisor in March 1989 with apparent inaccuracies in a postal customer's account balance, Salvador attributed the discrepancies to a temporary bookkeeping manoeuver he was trained to use to cope with a time bind. The supervisor, evidently not satisfied that the errors were innocent, contacted the Postal Inspection Service.

Postal Inspectors are USPS employees. They serve, however, as federal law enforcement officers, with authority to carry weapons, make arrests, and enforce postal and other laws of the United States. *See*18 U.S.C. § 3061. The Inspection Service undertakes investigations only when criminal conduct is suspected. If an investigation reveals no crime, the Inspectors turn over the evidence they have gathered to USPS management, without recommendation or evaluation. Management then decides whether the evidence warrants disciplinary action.

On March 9, 1989, Salvador was summoned, just after his lunch break and without advance warning, to a training/supply room, where two waiting Inspectors informed him that their inquiry concerned his "job." The collective bargaining agreement between USPS and APWU provided: "If an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted." Salvador accordingly asked for the attendance of his union steward, Anne Rodrigues. The interview was deferred for forty-five minutes to an hour, pending Rodrigues' attendance, during which time Salvador was kept in isolation in the training***1067 **67** /supply room. When Rodrigues arrived, she immediately and repeatedly requested permission to confer privately with Salvador before the interview resumed. The Inspectors refused her request. Their refusal followed official instructions contained in USPS's Inspection Service Manual; the Manual declared it USPS nationwide policy to deny all requests for pre-interrogation consultation between employees and their collective bargaining representatives.

The interview proceeded, and Salvador answered all questions asked of him. Rodrigues also participated in the interview, although when Salvador first requested her presence, he was told she could attend only "as a witness" to the interrogation. The record does not disclose what action was taken regarding Salvador after the investigation concluded.

Shortly after Salvador's interview, the Union lodged an unfair labor practice charge and, in April 1989, the NLRB Regional Director issued a complaint concerning the denial of Rodrigues' request for pre-interview consultation with Salvador. The Postal Service denied that an unfair labor practice had occurred and contended that, in any event, the matter had been remedied by a notice the Service had voluntarily posted in five different locations at Fremont Post Office installations. This notice, unsigned, acknowledged the Union's charge alleging the failure of the Postal Service "to grant employees the right to confer with their union representat-

ive before an investigatory interview" and stated, specifically:

We will not prohibit employees from conferring with their union representative, upon request, where the employee has invoked his or her right to have union representation present at an investigatory interview conducted by agents of the Inspection Service which the employee reasonably believes could lead to discipline. We also will not prohibit such union representative from participating in any such interview to the extent permitted by the Supreme Court's *Weingarten* decision.

In proceedings before an administrative law judge (ALJ), the Regional Director stressed that, in Salvador's case, the Postal Service had repeated a previously adjudicated unfair labor practice. Less than a year earlier, the Board had determined that, in April 1982, at the very same Fremont Post Office, the Service had violated an employee's section 7 right when a Postal Inspector refused to let a union representative confer with the employee prior to an investigatory interview. *See United States Postal Serv.,*288 NLRB 864 (Apr. 29, 1988). Despite that unappealed ruling, the Postal Service had retained in its Inspection Service Manual, the companywide instruction requiring denial of "all requests for consultations between employees and their [union] representatives prior to any interview by a Postal Inspector." Stipulation at 1-2, *NLRB v. United States Postal Serv.,* No. C 89 2734 FMS (N.D.Cal., Aug. 1989) (Application for Enforcement of NLRB Subpoena).

The Postal Service, in response to the Regional Director's complaint, urged containment of the *Weingarten* precedent to union presence at an interrogation; the Service pressed, particularly, the inappropriateness of spreading a right of prior consultation to criminal investigations. The Service further argued that even if the right to a representative recognized in *Weingarten* could be construed to include a right to prior consultation, the latter right should not be allowed in Salvador's case because APWU had a policy of noncooperation.

The ALJ, applying Board precedents, upheld the asserted section 7 employee right to consult privately with a union representative prior to a management interview implicating discipline. *See Climax Molybdenum Co.,* 227 NLRB 1189 (1977), *enforcement denied,*584 F.2d 360 (10th Cir.1978); *Pacific Tel. & Tel. Co.,* 262 NLRB 1034, 1048 (1982), *enf'd,* 711 F.2d 134 (9th Cir.1983). Furthermore, the ALJ noted, the Board had very recently, in an unappealed decision, rejected the Postal Service plea that a consultation right should not be available in a criminal investigation conducted***1068 **68** by the Inspection Service. *See United States Postal Serv.,*288 NLRB at 866. The proof did not bear out, the ALJ found, that Rodrigues, pursuant to Union instructions, would have counseled Salvador against cooperation with the Postal Inspectors. Finally, in view of the USPS policy announced in the Inspection Service Manual, the ALJ recommended that the Postal Service be ordered (1) to cease and desist on a nationwide basis from engaging in the consultation denials declared unlawful, and (2) to make a nationwide posting of USPS's Notice to Employees that

WE WILL NOT refuse to permit union representatives to consult with employees prior to investigatory interviews conducted by Postal Inspectors which the employees reasonably believe will result in disciplinary action and WE WILL NOT refuse to permit employees to speak with union representatives prior to such interviews.

The Board, in a June 21, 1991 decision, affirmed the ALJ's rulings, findings, and conclusions and adopted his recommended order. *United States Postal Serv.,* 303 NLRB No. 75 (1991). In footnotes, the three-member panel added these qualifications. First, Chairman Stephens "expresse[d] no opinion on the Board's interpretation of [*Weingarten*]," but joined his colleagues "for institutional reasons." Second, in Member Raudabaugh's view, if a union, contrary to what the evidence showed in this case, in fact had a policy "of routinely telling employees to refuse to cooperate with an investigation," then

"an employer might well be privileged to forbid prior consultation." Finally, Member Cracraft noted that, "[a]lthough this is the second occasion in which the [Postal Service] has committed this violation, ... these violations both occurred at [USPS's] Fremont, California facility 7 years apart." Because no evidence showed "that the unlawful conduct has been carried out or disseminated to employees at any other facilities," she "would not order employerwide posting of the notice," but would have limited the remedy "to the Fremont, California facility." *Id.* at 1-2, nn. 4 & 5.

II. DISPOSITIONS

A. Jurisdiction

[1] The Union, as intervenor, maintains that federal courts lack jurisdiction over this-or any-Postal Service petition seeking review of an NLRB order. The Postal Reorganization Act (PRA) places Postal Service labor relations under the governance of National Labor Relations Act provisions. *See*39 U.S.C. § 1209(a).[FN3] APWU maintains, however, that NLRA section 10(f), 29 U.S.C. § 160(f), which provides for court review of Board orders on petition of an aggrieved party, is not among the incorporated provisions. An unconstrained reading of section 1209(a)'s incorporation language, the Union explains, would draw in NLRA section 10(e), 29 U.S.C. § 160(e), which governs *NLRB* enforcement petitions. But NLRB enforcement petitions are authorized by a discrete PRA provision, 39 U.S.C. § 1208(a), which states: "The courts of the United States shall have jurisdiction with respect to actions brought by the [NLRB] under this chapter to the same extent that they have jurisdiction with respect to actions under title 29." There would have been no need for section 1208(a), APWU concludes, if section 1209(a) encompassed judicial review petitions. *See* 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 46.06, at 119 (Singer, 5th ed., 1991) (statutes should be "construed ... so that no part will be ... superfluous").

> FN3. 39 U.S.C. § 1209(a) prescribes that postal employee-management relations "shall, to the extent not inconsistent with" other PRA provisions, follow the NLRA model. The "principal exception" is that postal employees are barred from striking. *See*H.R.Rep. 91-1104, 91st Cong., 2d Sess. 10, *reprinted in* 1970 U.S.C.C.A.N. 3649, 3658.

APWU's jurisdictional argument is difficult to reconcile with the declared purpose of Congress to place Postal Service industrial relations under the regime governing "nationwide enterprises in the private sector." *See*H.R.Rep. No. 91-1104, 91st Cong., 2d Sess. 13 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3662. Nor can we seriously entertain the contention that separation-of-powers-of-powersoncernsicial***1069 **69** review. *Cf.*5 U.S.C. § 7123 (providing for judicial review of Federal Labor Relations Authority decisions). Nevertheless, we pretermit the Union's charge that Congress precluded USPS's petition for review. The Board has cross-applied for enforcement of its order, and that application falls squarely within 39 U.S.C. § 1208(a). In ruling on the cross-application, we have authority to consider the responding party's objections to the Board's decision.FN4 *See Ford Motor Co. v. NLRB,* 305 U.S. 364, 370, 59 S.Ct. 301, 305, 83 L.Ed. 221 (1939); *FLRA v. U.S. Dep't of Commerce,* 962 F.2d 1055, 1058 (D.C.Cir.1992).

> FN4. 39 U.S.C. § 1208(a) gives federal courts jurisdiction in actions brought by the NLRB "to the same extent that they have jurisdiction ... under title 29," and 29 U.S.C. § 160(e) defines that extent as "jurisdiction of the proceeding *and of the question determined therein.*" (Emphasis added.)

B. Issue Preclusion

[2] Intervenor APWU makes a further threshold argument. The Union acknowledges that the Postal

Service is not barred by preclusion principles from challenging the nationwide scope of the Board's remedy, but asserts that a prior adjudication, *United States Postal Serv.*,288 NLRB 864 (1988), is conclusive on the merits of the unfair labor practice charge. That prior adjudication also involved the Fremont, California Post Office; it both upheld the section 7 consultation right reasserted here, and disposed of defenses raised again by the Postal Service. The Postal Service, APWU underscores, failed to seek judicial review of the 1988 NLRB decision. Essentially, the Union argues, the Service, having deliberately passed up its first opportunity, should not be accorded a second chance for court review.

The Union's preclusion plea would have been worthy of consideration had the NLRB made it. *See, e.g., Lockheed Shipbuilding & Construction Co.,* 278 NLRB 18 (1986). But courts do not force preclusion pleas on parties who choose not to make them, and APWU is not positioned to determine the Board's litigation strategy. *See Society Hill Civic Ass'n v. Harris,* 632 F.2d 1045, 1060 (3d Cir.1980). Perhaps because it prefers to have a judicial response to the questions this case presents, the NLRB raised no prior adjudication bar to the Postal Service's objections. *Cf. Poulin v. Bowen,* 817 F.2d 865, 868-69 (D.C.Cir.1987) (agency that waived application of "administrative res judicata" may not assert that doctrine as alternate basis for its decision). In short, we reject APWU's endeavor to achieve disposition of this case on a "rationale [not] set forth by the agency itself." *See Fort Stewart Schools v. FLRA,* 495 U.S. 641, 652, 110 S.Ct. 2043, 2049, 109 L.Ed.2d 659 (1990); *SEC v. Chenery Corp.,* 318 U.S. 80, 93-95, 63 S.Ct. 454, 461-62, 87 L.Ed. 626 (1943).

C. Merits

[3] The Postal Service initially recognizes that "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law." *See National R.R. Passenger Corp. v. Boston & Maine Corp.,* 503 U.S. 407, 112 S.Ct. 1394, 1401, 118 L.Ed.2d 52 (1992). As stated in the leading case, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). "If the agency interpretation is not in conflict with the plain language of the statute, deference is due." *National R.R. Passenger Corp.,* 112 S.Ct. at 1401 (citing *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 292, 108 S.Ct. 1811, 1818, 100 L.Ed.2d 313 (1988)).

This case does not fall within the standard *Chevron* analysis, the Postal Service maintains, because the Board's decision reflects its interpretation of a Supreme Court precedent construing the NLRA, *i.e., NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). "[B]efore reaching the issue of deference to the ***1070 **70** Board," the Service urges, "a reviewing court must first determine whether the NLRB's construction is consistent with [the guiding Supreme Court] precedent." Brief for the Petitioner/Cross-Respondent at 25. The Board's decision here, USPS centrally argues, is irreconcilable with *Weingarten.* In making this argument, the Postal Service emphasizes *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992), in which the Court held a Board decision incompatible with the statutory construction precedent the Court had set in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956). *See also Maislin Indus., U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 110 S.Ct. 2759, 2768, 111 L.Ed.2d 94 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis,* and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").

Weingarten upheld the Board's judgment that an

employee had a section 7 right to the presence of a union representative during an investigatory interview. The Postal Service points out, however, that the *Weingarten* decision acknowledged "contours and limits" to the statutory right. 420 U.S. at 256, 95 S.Ct. at 963. The Court in *Weingarten* spoke of protection against interference due "legitimate employer prerogatives," *id.* at 258, 95 S.Ct. at 964, and observed that "[a] knowledgeable union representative could assist the employer ... [in] getting to the bottom of the incident occasioning the interview," without "transform[ing] the interview into an adversary contest." *Id.* at 263, 95 S.Ct. at 966.

The careful *Weingarten* balance between employer prerogative and employee right, the Postal Service charges, has been upset by the NLRB in this case and in prior Board decisions recognizing a preinterview consultation right. By failing to accord proper weight to the employer's interest in gathering information needed to detect and check wrongdoing, the Service asserts, the Board has demonstrated its misunderstanding of *Weingarten's* interpretation of section 7.

We find unpersuasive the Postal Service's attempt to fit *Weingarten* and this case into the *Babcock/ Lechmere* mold. *Babcock,* the guidepost decision on allowing nonemployee organizers onto an employer's property, held a Board construction of section 7 *impermissible.* The *Lechmere* Court read *Babcock* as saying, in *Chevron* terms, that Congress had directly spoken to the question at issue. *Lechmere,* 112 S.Ct. at 848. *Babcock* had tightly circumscribed the Board's authority under the NLRA to order nonemployee access to an employer's premises. The Board, according to the *Lechmere* majority, had departed from *Babcock's* "straightforward teaching." *Id.*

Weingarten, in contrast, far from upsetting an NLRB order and correcting a Board error, spoke with approval of *NLRB-shaped* "contours and limits" to the statutory right. 420 U.S. at 256, 95 S.Ct. at 963. Key to the *Weingarten* decision is this observation:

> It is the province of the Board, not the courts, to determine whether or not the "need" [for union assistance at an investigatory interview] exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations.... [T]he Board's construction here, while it may not be required by the Act, is at least permissible under it....

Id. at 266-67, 95 S.Ct. at 968. *Weingarten* thus did not rein in the Board, as *Babcock* did. The precedent set in *Weingarten,* instead, is fully consistent with the Board's recognition in this case that Congress, in enacting section 7, did not "directly [speak] to the precise question at issue,"*Chevron,* 467 U.S. at 842, 104 S.Ct. at 2781,*i.e.,* the scope of union assistance appropriate at an investigatory interview. We thus face a case in which deference is due to the Board's "special competence" in construing the section 7 phrase, "concerted activities for ... mutual aid or protection." *See Weingarten,* 420 U.S. at 266, 267, 95 S.Ct. at 968, 968.

****71** [4] ***1071** We turn, accordingly, to the question whether the Board's unfair labor practice determination qualifies as "reasonable," *see Chevron,* 467 U.S. at 844, 104 S.Ct. at 2782; and we hold that the Board's judgment measures up to the applicable standard.

The NLRB determined that the employee's *Weingarten* recognized right to the assistance of "[a] knowledgeable union representative," *see*420 U.S. at 263, 95 S.Ct. at 966, sensibly means a representative familiar with the matter under investigation. Absent such familiarity, the representative will not be well-positioned to aid in a full and cogent presentation of the employee's view of the matter, bringing to light justifications, explanations, extenuating circumstances, and other mitigating factors. *See Weingarten,* 420 U.S. at 262-63, 95 S.Ct. at 966 ("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."); *Climax Mo-*

lybdenum, 227 NLRB at 1190 (prior consultation allows union representative "to learn [employee's] version of the events and gain familiarity with facts").

This case is illustrative. Union steward Rodrigues testified that, on other occasions when she was called to attend investigative interviews, she knew, "prior to going into the meeting," just "what was going on, what the situation was about." Prior to the start of Salvador's March 9, 1989 interview, however, Rodrigues knew only that Salvador, with whom she had been acquainted since her early days as a postal worker, was "an honest employee and [she] couldn't bring the two together: him embezzling funds-and that's why [she] would have gone in and got his story."

Significantly, in the only court case declining to extend the section 7 right confirmed in *Weingarten* to a plea for pre-interview consultation, ample time had been provided after notice, and before the interview, to allow the employees subject to investigation to arrange a conference. *See Climax Molybdenum Co. v. NLRB,* 584 F.2d 360, 363 (10th Cir.1978) (17 1/2 hours distanced time employees were advised of pending investigation and time it took place). The court therefore held:

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

Id. at 365 (emphasis added). In the case before us, as in *Pacific Tel. & Tel. Co. v. NLRB,* 711 F.2d 134, 137 n. 4 (9th Cir.1983), no time at all had been allowed for a conference. *See also United States Postal Serv.,*288 NLRB at 866.

[5] Management is not stripped, we note, of effective control of employee misconduct by allowing employee-union representative consultation in advance of interrogation. The employer remains in command of the time, place, and manner of the interview, and can concentrate on hearing the employee's account, with "no duty to bargain with the union representative" at the interview. *See Weingarten,* 420 U.S. at 260, 95 S.Ct. at 965. The fact of prior consultation, moreover, can be weighed in evaluating the employee's credibility. Nor can we agree that obstruction necessarily is promoted by consultation. One might equally forecast, as the Board observed, that an uninformed representative would attempt to obstruct the interrogation "as a precautionary means of protecting employees from unknown possibilities." *Climax Molybdenum Co.,* 227 NLRB at 1190.

Nor was the Board obliged to except Postal Inspector interrogations from the consultation right at issue based on the potentially criminal character of the conduct that Inspectors investigate. *Weingarten* protections have been consistently accorded***1072 **72** to private sector employees suspected of criminal conduct. *See, e.g., Exxon Co.,* 223 NLRB 103 (1976). Furthermore, the results of inspections, when no criminal proceedings ensue, are routinely turned over to management for possible use in disciplinary actions. *See* ALJ Decision at 2, *United States Postal Serv.,* 303 NLRB No. 75 (June 21, 1991). Mindful of the deference due to the Board, we uphold as reasonable the NLRB's judgment that neither "public safety" nor "legitimate employer prerogatives" necessitate the suggested exemption of Inspector interviews, and the attendant "sacrifice" of the statutory right of postal employees. *See United States Postal Serv.,* 241 NLRB at 142 & n. 12. [FN5]

FN5. A question was raised at oral argument, and in subsequent submissions to the court, concerning the potential consequences of an employee's telling her uni-

> on steward the whole story. A steward, unlike a lawyer, can be compelled to testify in court as to his knowledge of criminal conduct, and postal employees are obliged, by regulation, to report to USPS misconduct of which they are aware. These considerations were not aired before the Board. Whatever impact they might have on the union representative-employee conversation, we cannot find, on the current record, that they supply a reason for *the employer* to deny the opportunity for prior consultation. *Cf.*Climax Molybdenum, 227 NLRB at 1190 (denied opportunity to consult beforehand, steward might advise employee silence at interview, despite employee's innocence).

[6] The Postal Service next urges that it was APWU's policy to have Union stewards tell interviewees at Inspection Service interrogations "to remain silent"; such advice, USPS urges, could only frustrate, not advance the objective of uncovering truth. The Postal Service supports this point by citing pages from an APWU 1986 publication: A Guide for the Craft Employee in Dealing with the U.S. Postal Inspection Service. The Guide contains these lines:

Q. What are your rights during an interrogation by the inspection service in which you could possibly be the subject of a criminal investigation?

A. The best possible advice to an employee during this type of situation is to remain silent. Advise the inspector that you intend to seek legal counsel. Then when you have engaged the services of an attorney you will cooperate with the investigation....

Guide at 20-21. Asked whether she would have followed the Guide and counseled Salvador's silence, Rodrigues ultimately clarified that if Salvador admitted "he had done wrong ..., I would have told him to remain silent and to let us handle it from there." But if he had told her he was innocent, she would have told him he had "nothing to hide." [FN6]

> FN6. The ALJ found Rodrigues a credible witness. *See* ALJ Decision at 7, United States Postal Serv., 303 NLRB No. 75 (June 21, 1991).

No evidence was introduced to show that the Guide was distributed generally to Union members or that the Union otherwise maintained a noncooperation policy. Nor was there any showing that Rodrigues or any Union steward had ever advised noncooperation with the Inspection Service. At the interview itself, Rodrigues made no effort to urge silence upon Salvador. To the contrary, she assisted the Inspectors in eliciting the facts from him. Viewing the record as a whole, the ALJ found that, had Rodrigues been allowed to consult with Salvador, "there was only a possibility that she would have advised him to remain silent" or otherwise refuse to cooperate. The evidence supporting that finding qualifies as "substantial." *See*29 U.S.C. § 160(e). We therefore do not reach the question whether it would have been incumbent upon the Board, upon proof of a union-enforced policy of noncooperation, to excuse an employer's consultation denial. *Cf. Climax Molybdenum,* 584 F.2d at 363-64 (denying enforcement of Board's order where union had a policy of noncooperation pursuant to which union officials, including the official who requested the pre-interview consultation, "had urged [employees] not to cooperate with management in any investigatory interviews").

[7] The Postal Service ultimately argues that the remedy is overbroad. Taking into account that it has been charged only twice with the unfair labor practice in question,,***1073 **73** that the two episodes occurred, several years apart, at the same facility, and that it had voluntarily posted notices at that facility, the Service resists nationwide relief. The ALJ, however, whose decision the Board adopted, properly relied upon these features of the case: (1) the collective bargaining agreement provision recognizing the right to Union participation in Inspection Service interrogations applies to APWU members nationwide; and (2) the Inspection Service

Manual, which expressly rules out leave to confer, governs all Inspectors, wherever they undertake an investigation. Nor do we agree that cause for restraint is supplied by the Service's commission of a second violation at the Fremont Post Office, despite the cease and desist order the Board had issued regarding that facility less than a year earlier.

In sum, Congress allowed the Board large discretion to impose remedies that "will effectuate the policies of [the NLRA]." *See*29 U.S.C. § 160(c). We have no warrant on the facts before us to declare the Board's relief order excessive. *See Virginia Elec. & Power Co. v. NLRB,* 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943); *Consolidated Freightways v. NLRB,* 892 F.2d 1052, 1055 (D.C.Cir.1989).

III. SUMMARY AND CONCLUSION

In *Weingarten,* the Supreme Court approved as consistent with NLRA section 7 the Board's recognition of a right to a union representative's attendance at investigatory interviews. The NLRB has since determined that the right recognized in *Weingarten* and the statutory purposes underlying that decision are best effectuated by allowing employees to consult with their union representatives prior to the occurrence of an interview; and the Board has extended that protection to Postal Service employees whose conduct is subject to investigation by the Postal Inspection Service.

Noting the court's clear statutory authority to entertain NLRB enforcement petitions and our obligation to review the reasoning actually relied upon by the agency, we find the Board's decision a "permissible" and "reasonable" construction of section 7, one in no way foreclosed by the *Weingarten* decision. The Board was unpersuaded either that the Union in this case maintained a policy of counseling noncooperation or that the Union representative, Anne Rodrigues, had pre-interview consultation been allowed, would have counseled the interviewee, postal employee Benjamin Salvador, to remain silent. The record supports these Board assessments. We therefore leave for another day and case the question whether an established union policy of counseling noncooperation should excuse an employer's refusal to allow pre-interrogation consultation. The Postal Service's currently-maintained policy, as stipulated by the parties, directs Inspectors, nationwide, to deny all pre-interview consultations. That policy, combined with USPS's evident disregard of a prior Board order, warranted the nationwide cease and desist directive and notice posting remedy approved by the Board. Accordingly, the cross-application for enforcement of the NLRB's order is

Granted.

C.A.D.C.,1992.
U.S. Postal Service v. N.L.R.B.
969 F.2d 1064, 140 L.R.R.M. (BNA) 2639, 297 U.S.App.D.C. 64, 61 USLW 2024, 122 Lab.Cas. P 10,253

END OF DOCUMENT

United States Postal Service *and* American Postal Workers Union, AFL-CIO. Cases 1-CA-15630(P), 1-CA-15894(P), and 1-CA-16286(P)

September 9, 1980

DECISION AND ORDER

On May 28, 1980, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.

We agree with the Administrative Law Judge that, on the record in this case, the "fitness for duty" examinations in question were not part of a disciplinary procedure and do not fall within the purview of *Weingarten*.[1] Thus, while the examinations were prompted by personnel problems such as excessive absenteeism because of alleged illness or injury, and the examinations might lead to recommendations respecting the employees' future work assignments, there is insufficient evidence establishing that these examinations were calculated to form the basis for taking disciplinary or other job-affecting actions against such employees because of past misconduct. Noteworthy also is the absence of evidence that questions of an investigatory nature were in fact asked at these examinations. In addition these particular medical examinations do not meet with the tests set forth in the *Weingarten* line of cases, or the rationale underlying these tests which envision a "confrontation" between the employee and his employer.[2] Accordingly, we need not decide in the instant case what weight, if any, should be given to the Administrative Law Judge's findings that the physicians performing the examinations had no authority to impose or recommend discipline, and that the requested union representatives had insufficient medical qualifications to enable them to be of assistance to the physicians. We also need not determine, in this case, as urged by the General Counsel, whether, in an appropriate case, it might be appropriate and feasible to provide union representation during the interview portion of an examination while excluding the representative from the "hands on" physical examination.

We also agree with the Administrative Law Judge that the remarks concerning the Union made by Dr. Doyle during his examination of employee Norman Fugere, Jr., and his questioning of Fugere as to why he wanted the union representative with him at a physical examination, did not violate Section 8(a)(1) of the Act. Although a supervisor by reason of his supervision of nurses and administrative personnel employed in Respondent's medical unit, Dr. Doyle was not acting in a supervisory capacity with respect to Fugere. In addition, his question and his remarks were manifestly the outcome of a personal irritation at what he regarded as the union representative's intrusion into the examination, an incident which had resulted in a heated altercation between the doctor and the representative immediately prior to the doctor's remarks to Fugere. Although Fugere was ordered to report for the examination, nothing Dr. Doyle said, in these circumstances, carried the imprimatur of Respondent's management or could reasonably be construed as a threat of retaliation by Respondent for the exercise of a Section 7 right. Therefore, we find it unnecessary to pass on the Administrative Law Judge's conclusion with respect to the necessity for a remedial order if an 8(a)(1) violation were found, and we adopt his recommendation that this allegation, and the complaint in its entirety, be dismissed.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: This consolidated proceeding was heard before me at Boston, Massachusetts, on November 15, and December 12-14, 1979,[1] pursuant to due notice. The principal issue to be resolved is whether the United States Postal Service (herein the Respondent) violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein the Act), when it refused to allow a representative of the Charging Party (American Postal Workers Union AFL-

[1] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[2] *Id.* at 260. We note also that since the examinations here were limited to the establishment of personal medical information concerning the employee, the Respondent did not have the option of proceeding on its own, without the examination, to obtain this information. Cf. *id.* at 258-259.

[1] All dates hereinafter refer to the calendar year 1979, unless otherwise indicated.

CIO—herein the Union) to accompany employees during their fitness for duty examination interviews.[2]

Subsequent to the hearing, counsel for the General Counsel and counsel for the Respondent filed helpful, post-hearing briefs, which have been duly considered.[3]

Upon the entire record in the case, and from my observation of the demeanor of the witnesses,[4] I make the following:

FINDINGS AND CONCLUSIONS[5]

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Setting of the Issues*

As previously stated, the principal issue in this case is whether the Respondent violated Section 8(a)(1) of the Act by refusing to allow, upon an employee's request, his union representative to accompany him (or her) during a "fitness for duty examination."[6]

The facility of the Respondent involved in the instant proceeding is located in Boston, Massachusetts, where it is known as the South Postal Annex. This facility serves the Respondent's employees in Massachusetts, Maine, New Hampshire, Vermont, and Rhode Island. In the South Postal Annex, the Respondent maintains a medical unit, staffed by two full-time physicians, Dr. Edward Handy, the area medical officer, and Dr. Joseph Doyle. The examinations at issue herein are conducted by either of the above-named physicians, both of whom are acknowledged to be supervisors within the meaning of the Act, inasmuch as they, in fact, supervise the registered nurses and administrative personnel who are employed in the medical unit. The record reflects that, in addition to conducting the examinations at issue herein, the medical unit also provides first aid treatment and medical care for injured or ill employees at the facility, conducts physical examinations for prospective employees, and clearance examinations following an illness or injury.[7]

The fitness for duty examination on which the instant proceeding is focused is normally initiated by an administrative officer of the Respondent (such as a postmaster) when a personnel problem arises in his jurisdiction which involves or requires a medical opinion. For example, some of the alleged discriminatees in the instant matter were scheduled for such examinations because of asserted excessive absenteeism due to alleged illness or injury; i.e., to determine the nature and scope of any such illness or injury. It should be noted that prior to the scheduling of such an examination the file of the affected employee is forwarded to the administrative assistant in the medical unit who makes the determination that a medical problem is involved and can only be resolved through a fitness for duty examination. Once this determination is established, a date and time for the examination is mutually agreed upon, and the employee is then scheduled for such examination at the medical unit in Boston.

The affected employee may have a friend, relative, or representative accompany him to the examination, and there may be, if desired, a discussion prior to the examination among the doctor, patient, and his representative. However, it is the policy of the Respondent not to allow a third party (except an attending nurse, when needed) to be present during the actual examination itself. This policy is based primarily on the need for complete candor, confidentiality, and lack of intrusion between the doctor and the patient. However, after the examination is completed it is the Respondent's policy to allow a discussion among the doctor, patient, and his representative at that time.

Following the examination, the physician will, in due course, write a report making his findings and recommendations to the requesting official. Such report may, for example, find no injury or illness and recommend full duty; find that any such illness or injury would necessitate only light duty; or perhaps recommend further specialized physical examination.[8]

The record is clear that the examining physician at the medical unit has no authority to mete out any form of discipline or punishment to the employee-patient, nor does the record reflect that he ever recommends such a course of action to the administrative officer. The most that the record shows of a circumstance which comes closest to such a recommendation is, for example, should an employee have a record of excessive absenteeism based on asserted illness, the examining physician may

[2] The original charge in Case 1-CA-15630 was filed February 14; the original charge in Case 1-CA-15894 was filed April 5; the charge in Case 1-CA-16286 was filed June 29. On August 8, the Regional Director for Region 1 of the National Labor Relations Board issued his order consolidating the cases, issuing a second amended complaint and notice of hearing. At the hearing and in its brief, the Respondent protested that the complaint was not valid to the extent that it alleged violations of the Act respecting one of the alleged discriminatees since "the amended charge or the original complaint issued on employee Walter J. Urban made no mention of any violation of Section 8(a)(1) and (3) of the National Labor Relations Act by disciplining Mr. Urban." The Respondent also moved that those portions of the second amended complaint be dismissed respecting Urban since he appealed his suspension through the grievance procedure and, therefore, this proceeding should be deferred to the procedure under the contract.

I do not deem it necessary to discuss and resolve these procedural matters since I have found no violation of the Act on the merits of Urban's case.

[3] Also, on March 11, 1980, counsel for the Respondent filed a motion to correct the hearing transcript in certain respects. No objections having been filed, the motion is hereby granted.

[4] Cf. *Bishop and Malco, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

[5] There is no issue as to the jurisdiction of the National Labor Relations Board in this matter, the Board having such jurisdiction by virtue of the Postal Reorganization Act.

The complaint alleges, the answer admits, and I find that at all times material, the Union is a labor organization within the meaning of Sec. 2(5) of the Act, and within the meaning of the Postal Reorganization Act.

[6] A "Fitness for duty examination," may be described, essentially, as a physical examination conducted by one of the Respondent's staff physicians, and comprising, in addition to a "hands on" physical examination of the employee's anatomy, questions and discussion by the physician of the employee's medical and work history. It is normally requested by the Respondent in order to ascertain whether an employee is fully fit for duty, fit for only light duty, or not fit for any duty.

[7] The record shows that during an annual period, the medical unit handles approximately 23,000 individual medical complaints.

[8] The collective-bargaining agreement between the Respondent and the Charging Party provides a procedure for the appointment of a third physician where there is a disagreement between the employee's physician and the physician designated by the Respondent concerning the medical condition of an employee who is on a light duty assignment. See Jt. Exh. 1, pp. 32-33.

find insubstantial medical evidence to sustain such a position; however, there is no evidence that the examining physician has ever recommended any form of discipline to be imposed as a consequence of such a circumstance.

B. *Facts and Concluding Findings as to Weingarten Allegations*

The amended complaint herein alleges that on various dates between January 8 and June 25, the Respondent denied requests of six named employees, "to be represented by the Union during interviews which said employees had reasonable cause to believe would result in disciplinary action or otherwise have an adverse impact on their employment." It is further alleged that notwithstanding the fact that the Respondent had denied the said employees' request for representation, the above-named doctors proceeded to conduct such interviews on or about the said dates. It is further alleged in paragraph 7 of the complaint that some of the named employees suffered adverse consequences such as discharge or discipline as a consequence of the interviews conducted by the physician.[9]

The Respondent acknowledged its policy, set forth above, which denies permission for union representation during the fitness for duty examinations, for the reasons stated. The General Counsel relies on the doctrine enunciated by the Board and the United States Supreme Court in *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251, (1975), in support of his position on this aspect of the case. The Respondent argues that *Weingarten*, which arose in a commercial or industrial[10] context, is not applicable, and should not be invoked in a physician-patient interview such as is involved in the instant case. I agree with the Respondent for the reasons discussed *infra*.

Briefly summarized, the facts in *Weingarten* are that an employee at one of its stores was accused of a small theft of money from a cash register, and company officials investigated. When they called the employee in for an interview concerning alleged violations of company policy, the employee asked that a shop steward accompany her, but the store manager denied her request. This refusal, where the employee has a reasonable fear that discipline will result, was what the Board and the Court found to constitute an invasion of employees' Section 7 rights, in violation of Section 8(a)(1) of the Act.[11] The Supreme Court, in *Weingarten*, approved the Board's shaping of the "contours and limits of the statutory right" as follows:

> First, the right inheres in 7's guarantee of the right of employees to act in concert for mutual aid and protection. . . .
>
> * * * * *
>
> Second, the right arises only in situations where the employee requests representation. In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.
>
> Third, the employee's right to request representation as a condition of participation in an interview *is limited to situations where the employee reasonably believes the investigation will result in disciplinary action* . . . .[Emphasis supplied.]
>
> * * * * *
>
> Fourth, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one. . . .
>
> * * * * *
>
> Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the 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. 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.*"[Emphasis supplied.]

Considering the facts of the instant case in the light of the contours set forth above, it would appear that such contours or limits simply did not contemplate covering the kind of medical interview involved herein. Thus, the third test requires that the employee reasonably believes that the investigation will result in disciplinary action. We may assume, for purposes of discussion, that the employees involved herein reasonably believed that there was a possibility that the fitness for duty examination might have an adverse impact on their employment.[12] However, it would seem to unduly expand the ordinary meaning of the word "discipline"—at least as it is understood in labor relations parlance—to make it fit into the instant situation. That is to say, the use of the term "discipline" in the industrial context normally means a punishment or penalty which is imposed on an employee for

[9] At the hearing, counsel for the General Counsel acknowledged that if it were found that the interviews were not conducted unlawfully, the various consequences alleged in par. 7 of the complaint would not constitute violations of the Act.

[10] See companion case of *International Ladies' Garmet Workers' Union* v. *Quality Manufacturing Company*, 420 U.S. 276 (1975).

[11] In *Quality*, where the employer was a manufacturer of women's clothing, the controversy involved a wage dispute between the employee and management. The employee's request to have her union steward present at a meeting with the president, where she feared that discipline would ensue, was denied.

[12] Several of the employees testified that they had heard from other employees that the latter had been suspended or not allowed to perform certain tasks, or consequences of that nature, as a consequence of the fitness for duty examination.

violation of an employer's policy, practice, or plant rules.[13] There is no evidence in the instant record that any one of the six employees involved herein, or any other employee, was required to undergo the fitness for duty examination as a part of any "disciplinary program" as that term is usually defined. They were simply called for the examination in order to determine whether or not they were physically and/or mentally capable of carrying on the duties to which they were assigned. The doctors, unlike the supervisory or managerial personnel involved in *Weingarten* and its progeny (see fn. 19, *infra*) had no authority to either impose discipline or even to recommend it and did not do so. To be sure, in the case of any individual employee, the results of the examination could have an adverse impact on their employment; i.e., their hours could be shortened, they might not be able to perform the work which they believed themselves capable, or, in the extreme case, it could be recommended that he (or she) be suspended for lack of ability or capacity to perform the job. However, this is not "discipline" in the sense of punishment for the breach of a rule or practice but, rather, a resolution of a medical problem for the health and safety of the employee, his fellow workers, and possibly the public with which the employee may come in contact.

It is recognized, of course, as the General Counsel points out, that the procedure might be utilized by an unscrupulous employer to rid itself of an unwanted employee by having the employer's physician make medical findings which would necessarily result in the dismissal of the employee. However, there is no evidence of such a Machiavellian intent here. The fact that an employee might be discharged or suspended as a result of not complying with the physician's recommendation, with which the administrative officer agrees, does not make the fitness for duty examination into an interview which the employee fears might result in disciplinary action within the meaning of the *Weingarten* doctrine.

Nor does the fitness for duty examination fit comfortably within the above-quoted fourth contour enumerated by the Supreme Court in *Weingarten*. This test emphasizes the freedom of the employee to refrain from participating in an interview while at the same time relinquishing any benefit which might be derived therefrom; by the same token, the employer would then be free to act on the basis of information obtained from other sources.[14] Like the situation emanating from an alleged breach of a rule or practice of the employer, the employer may decide to proceed with discipline based on the information he has absent the investigatory interview which the employee has declined. However, unlike that situation, the Respondent here has evidenced no desire to discipline or penalize the employee called for a medical examination, but rather to simply ascertain the physical and/or mental ability or capacity of the employee to perform tasks to which he may be assigned. Certainly, it may not be reasonably assumed that an employer, without ulterior motives,[15] normally wishes to rid itself of otherwise competent employees who have not conducted themselves in such a manner as to warrant dismissal or other consequences of a disciplinary nature.

Finally, it seems clear that the instant situation does not fit the fifth test of the Supreme Court, above-quoted. Thus, it is apparent that the Court thought that the sanctioning of a union representative at the type of interview there under consideration would be of assistance not only to the employee (since the union representative may attempt to clarify the facts or suggest other employees who may have knowledge of them), but also "to make certain that the employer does not initiate or continue a practice of *imposing punishment* unjustly."[16] The Court goes on to point out that "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." (Emphasis supplied.)[17] Again, it is apparent that the Court was pointing out the desirability of collective action in a situation premised upon the employee's fear of discipline due to an alleged breach of a rule or practice in the plant. Here, it would seem highly questionable, to say the least, that a lay union representative would be of much assistance to a physician conducting a physical examination.[18]

But the General Counsel and the Charging Party argue that the union representative in the instant case may be of assistance to the employee with respect to the questions posed by the physician relating to work history, family history or, for example, questions relating to how an injury occurred, etc. However, the record herein is clear that the fitness for duty examination does not lend itself to such a truncated procedure. Thus, while it is apparently the customary procedure for the examining physician to initiate the fitness for duty examination by asking certain questions relating to the above-mentioned subjects, and then proceeding to the "hands on" physical examination, it is usual and customary for the physician to pursue such questions and discussion during the "hands on" physical after the doctor has learned more respecting the employee-patient's anatomy and his physical abilities. It would, therefore, not be feasible to attempt to divide the fitness for duty examination into two parts in order that a union representative might be present for the part relating to work history and the like.

Based on all of the foregoing, I am convinced and, therefore, find that the fitness for duty examination at issue here was not within the contemplation of the deci-

[13] See the definition in Webster's Third New International Dictionary: "4: punishment: as a: chastisement self-inflicted as mortification or *imposed as a penance or as a penalty*"; Black's Law Dictionary, 5th Edition, defines the term as: "Instruction, comprehending the communication of knowledge and training to observe and act in accordance with rules and orders, *Correction, chastisement, punishment, penalty*." (Emphasis supplied.)

[14] *Mobil Oil Corporation*, 196 NLRB 1052 (1972) (quoted with approval by the Supreme Court in *Weingarten*).

[15] There is no evidence or contention here that the Respondent, which is in a collective-bargaining relationship with the Charging Union, harbors a general antiunion bias.

[16] 420 U.S. 251.

[17] *Id.*

[18] There is no contention in the instant case that the union representatives requested by the alleged discriminatees had any medical qualifications.

sion in *Weingarten* and its progeny.[19] I shall therefore recommend that the complaint, insofar as it is based upon the asserted right of the alleged discriminatees to have a union representative present during their fitness for duty examinations, be dismissed.

C. *Alleged Independent 8(a)(1) and (3) Violations*

The amended complaint (paragraph 8) alleges that during the fitness for duty examination conducted by Dr. Joseph B. Doyle of employee patient Norman R. Fugere, Jr., on or about June 25, the doctor made certain coercive remarks and engaged in interrogation concerning union activities in violation of Section 8(a)(1) of the Act. It is also alleged in paragraph 9 that through the conduct of the fitness for duty examination on said date, the Respondent "subjected its employee Norman R. Fugere, Jr., to an accusatory, coercive and intimidating interview." It is further alleged in paragraph 10 that the Respondent engaged in such conduct described in paragraph 9 because Fugere "joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection." By its duly filed answer, the Respondent denies having engaged in any unlawful conduct.

For several years prior to the events giving rise to the instant controversy, Fugere had been employed by the Respondent at its Woonsocket, Rhode Island, postal facility as a distribution clerk (mail sorter). In October 1978, he received an injury to his knee. Later, in January, there was an operation performed on the knee, and Fugere did not work from that time until approximately 7 months later. On or about June 6, he wrote a letter to his postmaster in Woonsocket informing him that he would be available to return to work on June 20, but his work schedule would be limited to 2 hours per day due to the order of his doctor. The postmaster, upon checking with Fugere's physician, assertedly received conflicting reports respecting the limitation on Fugere's ability to work full time. On that basis, as well as the postmaster's expressed doubt as to whether a knee injury should cause an absence for as long a term as existed, requested a fitness for duty examination for Fugere.[20]

The fitness for duty examination was scheduled for—and took place—on June 25. A few days prior thereto, Fugere contacted Union Representative Smyrnios and requested that the latter accompany him to the examination. Smyrnios agreed and, in fact, accompanied Fugere to the medical unit on that day.[21]

When Fugere was called for examination by Dr. Doyle, Smyrnios accompanied Fugere into the doctor's office, and Fugere requested that Smyrnios be allowed to represent him during the examination. Doyle refused, citing the Respondent's policy. After some rather acrimonious discussion, Smyrnios did leave, but under protest. Fugere also indicated that he was submitting to the examination under protest since he felt that failure to submit to the examination might result in some form of discipline to him.

Following Smyrnios' departure, according to Fugere's testimony, Doyle turned to him and stated as follows: "I don't know why you brought him with you. You came here to jump down our throats and I'm not going to allow it." Fugere further testified that Doyle asked him why he thought the Union was needed, and that Doyle opined that "the Union should not bother with people like me. The Union should stick with the drunks and dope addicts where they belong." Later in the interview, according to Fugere, Doyle stated that while Doyle did not give out disciplinary action, Fugere deserved it, and then "We'll see what the Union will do for you."[22]

Doyle denied making the above-quoted statements except that, on cross-examination, he did indicate that it was probable that he asked Fugere why he had Smyrnios at the examination.

The credibility issue here has been a difficult one. Fugere impressed me as being one who approached the fitness for duty examination with great apprehension and concern based upon his apparent belief that the Respondent had ordered the same in an attempt to justify subsequent disciplinary action, if not worse—as a basis for establishing an intent on the part of Fugere to defraud the Respondent—that is, by making claims based on asserted injury which were not true. Dr. Doyle impressed me as being an outspoken individual who, while not harboring an antiunion intent in general, was positive in his opinion that union representation had no place in a medical interview. In addition, it is clear that Doyle did not appreciate Smyrnios' militant and intrusive attitude on this point. Accordingly, I believe, and therefore find, that following Smyrnios' departure from the room, Doyle asked Fugere why he wanted Smyrnios with him, and probably opined in strong language that Doyle was of the view that it was not in the best interest of either the Respondent or Fugere that a union representative be present during the interview. Doyle might very well have, in his agitated state, gone on to suggest other areas where unions should interest themselves such as with

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[19] See, e.g., *Amoco Chemical Corporation*, 237 NLRB 394 (1978); *Southwestern Bell Telephone Company*, 227 NLRB 1223 (1977); *Climax Molybdenum Company*, 227 NLRB 1189 (1977); *Alfred M. Lewis, Inc.*, 229 NLRB 757 (1977); *General Electric Company*, 240 NLRB 497 (1979); *Good Hope Refineries, Inc.*, 245 NLRB No. 39 (1979); *Roadway Express, Inc.*, 246 NLRB No. 180 (1979); *Baton Rouge Water Works Company*, 246 NLRB No. 161 (1979).

[20] The notice to Fugere stated the reason: "to determine your fitness for duty in view of continuous absence since December 1978, attributed to an alleged injury on duty."

[21] The record reflects that, at prior union meetings, Smyrnios had expressed the viewpoint that the *Weingarten* doctrine encompassed the fitness for duty examination and encouraged employees who were called for such examinations to request union representation. As a consequence, he had been to the medical unit in a representative capacity on prior occasions, and knew some of the personnel, including the doctors, employed there. However, he had never been allowed to accompany an employee-patient during a fitness for duty examination.

[22] It should be noted that the doctor did not in his report to the postmaster recommend any discipline for Fugere, but did recommend full duty.

drunks and dope addicts. However, I do not believe that Doyle directed Fugere not to talk to the Union or said that employees do not need a union. However, given the antagonistic circumstances extant in the interview, I believe it likely that Doyle made the statement attributed to him by Fugere that while Doyle did not give out disciplinary action that Fugere deserved it, and then "We'll see what the Union will do for you."

While I have found that Doyle made some of the statements attributed to him by Fugere which were derogatory toward union representation and Fugere, I am not convinced that such constituted a violation of the Act in the circumstances of this case. That is to say, as previously noted, each participant came into the interview with an emotional chip on his shoulder, filled with suspicion and antagonism toward each other. The statements of the doctor made under such circumstances were either emotional exclamations as a consequence of intrusive conduct of the union representative [23] or were basically his own opinion and were therefore protected by Section 8(c) of the statute.[24] Moreover, even if it be found that some of the statements made by the doctor to Fugere in the particular circumstances of this case constituted interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act, I do not believe it would serve a useful purpose to issue a remedial order. This for the reason that, since I have found that the *Weingarten* doctrine does not apply to the fitness for duty examinations, there will be no repetition of events which would lead to the kind of utterances made by the doctor on this occasion; i.e., there would be no attempt by an employee-patient to have a union representative present at the examination. Accordingly, there is no need for an order to cease and desist from such conduct in the future.

Finally, I find a lack of substantial evidence to support the allegation in paragraph 9 that the Respondent subjected Fugere to "an accusatory, coercive and intimidating interview" because he engaged in union or other concerted activities, and in order to discourage other employees from engaging in such activities. Although there were certain coercive and intimidatory statements made by the doctor in the interview, as above-described, I find that they were as a result of: (1) Fugere's desire to have a union representative present during the examination, which is not a right protected by Section 7; (2) that the doctor believed that Fugere was in fact malingering with respect to the seriousness of the injury he sustained and his ability to perform essentially sedentary duties; and (3) because of the intrusion and militancy of the union representative on the occasion, which clearly upset the doctor. None of the above fall within the tests of violation of Section 8(a)(1) and/or (3) of the Act.

In the light of all of the foregoing factors, I am unable to conclude that there is substantial evidence to sustain the allegations of paragraphs 9 and 10 of the complaint, and will therefore recommend that they be dismissed.

CONCLUSIONS OF LAW

1. The National Labor Relations Board has jurisdiction over the Respondent by virtue of the Postal Reorganization Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and within the meaning of the Postal Reorganization Act.

3. The Respondent did not, as alleged in the amended complaint, engage in conduct violative of Section 8(a)(1) and (3) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[25]

The complaint is hereby dismissed in its entirety.

[23] See, e.g., *Wilmington Heating Service, Inc.*, 173 NLRB 68 (1968).

[24] See, e.g., *Hospital Service Corporation d/b/a Blue Cross*, 219 NLRB 1 (1975).

[25] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

United States Postal Service *and* Eddie L. Jenkins. Case 13-CA-16195-P

March 19, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On September 19, 1978, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter Respondent filed exceptions and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge, as further explained herein, and to adopt her recommended Order.

The Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by requiring employee Eddie L. Jenkins to submit to an interview with Postal Service inspectors, which the employee reasonably feared might result in disciplinary action, while denying his request for union representation at the interview. Respondent has excepted to the Administrative Law Judge's finding that the rendition to an employee in a criminal investigation of his rights under *Miranda* v. *State of Arizona*[3] does not supersede or satisfy the rights under *N.L.R.B.* v. *J. Weingarten, Inc.*,[4] which might also attach to such an investigation. We find no merit in this exception, for the reasons discussed below.

There is no dispute in the instant case that Jenkins reasonably feared that the February 2, 1977, interview with Postal Inspectors Hagedorn and Strachan might result in his discipline. In addition, the credited testimony reveals that Jenkins requested a union representative during the February 2 interview and that he was told by Inspector Hagedorn that Union representatives were not permitted to attend such criminal investigations.

Under *Weingarten*, once an employee makes such a valid request for union representation,[5] the employer is permitted one of three options: (1) grant the request, (2) discontinue the interview,[6] or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all.[7] Under no circumstances may the employer continue the interview without granting the employee union representation, *unless* the employee voluntarily agrees to remain unrepresented *after* having been presented by the employer with the choices mentioned in option (3) above or if the employee is otherwise aware of those choices.[8]

In the instant case, after Jenkins requested union representation Respondent not only denied his request but also failed to offer Jenkins the option of continuing the interview unaccompanied by a union representative or having no interview at all.[9] Rather, Respondent merely continued with the interview. Under these circumstances, it is clear that Jenkins did not waive his *Weingarten* rights, and, thus, Respondent violated Jenkins' Section 7 right to union representation at the February 2 interview.

Respondent nevertheless contends that it satisfied its obligations under *Weingarten* by informing Jenkins of his *Miranda* rights and, in addition, that Jenkins in effect waived his *Weingarten* rights by signing the *Miranda* waiver. We find no merit in these con-

[1] Respondent has requested oral argument. This request is hereby denied, as the record, the exceptions, and the brief adequately presents the issues and the positions of the parties.

[2] Respondent asserts that the Administrative Law Judge's resolution of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

In the course of her decision, the Administrative Law Judge cited *Climax Molybdenum Company, a Division of Amax, Inc.*, 227 NLRB 1189 (1977), in support of her statement that "both *Miranda* and *Weingarten* rights include the right to preinterview consultation with the representative." Member Penello, for the reasons discussed in his dissenting opinion in *Climax Molybdenum*, would not rely on that case to support the decision herein. While expressing no view on *Climax Molybdenum*, Member Truesdale finds the facts in that case inapposite to those here and, accordingly, places on reliance on that decision in affirming the Administrative Law Judge.

In addition, in recommending that Respondent be ordered to rescind the warning notice issued to Jenkins and to reimburse Jenkins for the $216.95 deducted from his salary, the Administrative Law Judge relied on *Southwestern Bell Telephone Company*, 227 NLRB 1223 (1977). Member Penello agrees with the Administrative Law Judge's recommended remedy, but in doing so, he would not rely on *Southwestern Bell Telephone Company*, in which he dissented.

[3] 384 U.S. 436 (1966).

[4] 420 U.S. 251 (1975).

[5] Compare *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977), where a majority of the Board concluded that an employee's request for union representation was not valid, since he knew that a particular union steward was unavailable for several days and failed to request an alternative representative.

[6] See *Amoco Oil Company*, 238 NLRB No. 84 (1978).

[7] See *Meharry Medical College*, 236 NLRB 1396 (1978).

[8] See *Super Valu Xenia, a Division of Super Value Stores, Inc.*, 236 NLRB 1581, 1590-91 (1978).

[9] There is no evidence to indicate that Jenkins was otherwise aware that he could choose to discontinue the interview or to proceed with the interview without a union representative.

tentions. We are in complete agreement with the Administrative Law Judge's analysis of the significant differences in foundation and scope of *Miranda* and *Weingarten* rights, and we adopt her conclusion that "Jenkins' *Weingarten* rights were unaffected by any rights he may also have possessed or been accorded under *Miranda*." The fact that Jenkins signed the *Miranda* waiver at the outset of the interview is completely irrelevant to his subsequent assertion of his *Weingarten* rights, since we have found that at the time Jenkins requested his union representative, Respondent failed to offer Jenkins the option of continuing the interview unaccompanied by a union representative or having no interview at all. Thus, Jenkins never expressed a willingness to waive his *Weingarten* rights *after* his assertion of such rights, nor was he even given the opportunity to do so.[10]

Respondent further contends that if an employee is afforded the right to have a union representative present during a criminal investigation conducted by postal inspectors, there might exist a significant interference with "legitimate employer prerogatives,"[11] as well as societal prerogatives, in having the Federal laws dealing with postal offenses properly investigated. Although we are not unmindful of the serious nature of the offenses which the Postal Inspection Service is charged with investigating, the fact remains that in the instant case, Respondent administratively disciplined 43 security police officers for unauthorized purchases under the uniform-allowance program, and in each case the discipline was based on evidence obtained as a result of the criminal investigation conducted by the Postal Inspection Service. The only employee who was accorded a separate administrative investigation was Jenkins, but, as the Administrative Law Judge correctly found, the "letter of warning" issued to Jenkins was based on evidence derived from the criminal investigation. Thus, were we to accept Respondent's argument that "legitimate employer prerogatives" and the public safety require the exclusion of all union representatives from criminal investigations conducted by the Postal Inspection Service, while at the same time permitting Respondent to administratively discipline employees based on the fruits of such criminal investigations, we would in effect be nullifying the *Weingarten* rights of any Postal Service employee who might be administratively disciplined as the result of a criminal investigation. Such an outcome is clearly repugnant to the historical development by the Board of the principle, approved by the Supreme Court in *Weingarten*, that Section 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline.[12] Accordingly, we reject the Respondent's contention as being wholly without merit.

[10] We also note that the question as to whether Jenkins did in fact waive his *Miranda* rights is not free from doubt, in light of the evidence that at the time Jenkins signed the *Miranda* waiver, he was told it was merely a formality and that when Jenkins later requested legal counseling, such request was denied.

[11] *N.L.R.B.* v. *J. Weingarten, Inc.*, *supra* at 258, fn. 4.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, United States Postal Service, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[12] See *Exxon Company, U.S.A.*, *223 NLRB 203 (1976) (violation found where the investigation involved alleged criminal conduct by the employee); Illinois Bell Telephone Company*, 221 NLRB 989 (1975) (violation found where the investigation involved alleged theft of company property by the employee, and it was conducted by employer's security representative); *Detroit Edison Company*, 217 NLRB 622 (1975) (violation found where the investigation involved alleged irregularities in travel reimbursement claims by the employer, and it was conducted by the employer's security department.)

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge: This case was heard in Chicago, Illinois, on May 15 and 16, 1978, pursuant to a charge filed on February 7, 1977, and a complaint issued on June 16, 1977. The issue presented is whether Respondent United States Postal Service violated the Postal Reorganization Act (the PRA) and Section 8(a)(1) of the National Labor Relations Act, as amended (the NLRA), by requiring the Charging Party, employee Eddie L. Jenkins, to submit to an interview, which he reasonably feared would lead to disciplinary action against him, while denying his alleged request for union representation during the interview. The General Counsel contends that Jenkins was entitled to such representation under *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975). The Postal Service contends, *inter alia*, that any such right was sufficiently satisfied by the Postal Service's action in allegedly affording Jenkins rights under *Miranda* v. *State of Arizona*, 384 U.S. 436 (1966).

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel) and the Postal Service, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Board has had jurisdiction over this matter by virtue of Section 1209 of the PRA. The Fed-

eration of Postal Security Police (the Union) is a labor organization within the meaning of the NLRA.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Postal Service maintains a Postal Inspection Service which is responsible for, *inter alia*, enforcement of postal laws, plant and personnel security, and internal audits. Its responsibilities include carrying out investigations and presenting evidence to the Department of Justice and United States attorneys in investigations of a criminal nature and the performance of operating inspections and audits for the Postal Service. 39 CFR 224.7. The Postal Inspection Service is headed by the postal inspector in Washington, D.C. Among the officials reporting directly to him is Regional Chief Inspector Carl E. Lawrence, whose office is in Chicago, Illinois, but whose duties encompass 13 Midwestern States. Among the officials reporting directly to Lawrence is the postal inspector in charge of the Chicago division, Robert N. Moore, whose office is also in Chicago but whose duties encompass northern Illinois and portions of Iowa and Indiana. Among the personnel under Moore's jurisdiction are about 106 postal inspectors and about 290 security police officers. Directly under Moore are, *inter alia*, an assistant inspector in charge for fraud and prohibited mailings (Henrickson) and an assistant inspector in charge for security and internal crimes, who during the period here involved was Dobbins. Directly under Dobbins were persons classified as security officers in charge. Directly under each such security officer in charge are lieutenants; at the Chicago main post office, there are three lieutenants, each of whom is responsible for a particular 8-hour shift out of the 24-hour day. Under the lieutenants are persons classified as sergeants, and under them are employees classified as security police officers. At all times relevant here, the Union has represented the security police officers in the Chicago division. Some of the security officers' duties are summarized *infra* at footnote 30.

The Postal Service requires all security officers to wear "approved uniform items," at least some of which are acceptable as ordinary civilian dress. Among such items are "[b]lack, lace type shoes as prescribed in Postal Service Manual."[1] The security force manual given to each security police officer when he enters on duty states that upon graduation from the security force training course, each employee will receive a first-year uniform allowance of $250, and that thereafter he will receive a uniform allowance of $154 a year (see fn. 2 *infra*). Administratively, this uniform allowance is handled by giving each employee a card or cards which resemble checks. After selecting "approved uniform" items from a vendor approved by the Postal Service, the employee signs a statement that the merchandise conforms to Postal Service regulations and gives a stub from the card to the vendor, who sends the stub to the Postal Service to get paid. Many, if not all, of these vendors also sell items which are not on the Postal Service's "approved uniform items" list to persons who are not necessarily uniformed postal service personnel. An employee who fails to use up his entire uniform allowance in 1 year loses the unused amount. At all times here relevant, the security police have been covered by a bargaining agreement which contains provisions for uniform allowances.[2] The Postal Services's security force manual provides, *inter alia*, "Payments shall not be claimed and may not be made for any items of clothing that do not conform with the detailed male or female specifications and styles for the employees' category of employment."

In early January 1977 Moore received a report from Postal Inspector McCloud that examination of uniform-allowance records showed that several security police officers were purchasing unusual numbers of shoes from one vendor. McCloud further advised Moore of a report from one such officer that these purchases had been encouraged by the vendor. In late January or early February Moore directed Postal Inspector Wilbur E. Holmes, Jr., to conduct an investigation into possible conspiracy by the vendor and possible intent to defraud by the security police officers.[3] In order to conduct this investigation, Holmes had about seven two-man teams of postal inspectors conduct interviews of the 75 security police officers who were the subjects of the investigation. Among these 75 security police officers was the Charging Party, Eddie L. Jenkins, who has been employed by the Postal Service as a security police officer since about 1972.

B. *Jenkins' Interview With Postal Inspectors Strachan and Hagedorn*

Among the postal inspectors assigned to the investigation were John S. Strachan and Timothy W. Hagedorn. They arranged through Jenkins' supervisor to have Jenkins report to the security office on February 2, 1977. That day Jenkins' superior, Lieutenant Lomax, gave Jenkins a slip with his name on it and, in the presence of Sergeant Magee, instructed Jenkins to leave his gun, belt, baton, and handcuffs in his locker and to go to the security office. This was the first occasion on which Jenkins had been directed to leave his gun belt in his locker before going to the security office.

When Jenkins came into the security office, Strachan and Hagedorn showed him their credentials and asked him to

[1] Such items also include black leather belts, black gloves, neckties, fur caps, boots, rubbers, and galoshes.

[2] Division Postal Inspector Moore so testified. He further testified that prior to the hearing he filed an affidavit with the Board and attached thereto certain provisions of the collective-bargaining agreement. This affidavit and these attachments were attached to Respondent's prehearing September 1977 and May 1978 motions for summary judgment, both of which were denied by the Board and which were offered by the General Counsel, and received in evidence without objection, as part of the formal pleadings. See G.C. Exhs. 1(f) and 1(p). Sec. XXVIII of the agreement in question deals with uniform allowances. I need not and do not determine the extent, if any, to which these attachments may be regarded as probative evidence.

[3] Such conduct might have violated 18 U.S.C. §§371 ("Conspiracy to commit offense or to defraud United States"), 1001 (in matter within jurisdiction of a United States department or agency, making or using document a with false, fictitious, or fraudulent statement), 1003 (use of a false document to support a money demand against United States), 1711 ("Misappropriation of postal funds"), or 1712 ("Falsification of postal return to increase compensation"). Such offenses are punishable by fine (in some instances up to $10,000) and/or imprisonment (in some instances up to 5 years).

sit down. In order to make sure that Jenkins was the person the inspectors were supposed to interview, and in order "to get [Jenkins] to start talking in an atmosphere of conversation," Strachan or Hagedorn asked Jenkins whether he was married, whether he had any children, and how long he had been working on the job. Jenkins answered all these questions. Hagedorn then told Jenkins that Hagedorn and Strachan were investigating various security police officers that might be involved in misuse of the uniform allowance and that Jenkins might be one of them. Hagedorn asked Jenkins not to reply at this point. Hagedorn went on to inquire if Jenkins was familiar with the *Miranda* decision (384 U.S. 436). As a security police officer, Jenkins had status as a law enforcement officer and had the power to make arrests (see fn. 30 *infra*). In being trained 5 years earlier for his job as a security police officer, Jenkins had been told to give *Miranda* warnings when someone was placed under arrest, but he had never in practice had occasion to give any such warning and had forgotten much of what he had been taught in this connection. Hagedorn read Jenkins, and asked him to sign, the following document:

> Before you are asked any questions you must understand your rights. You have a right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.
>
> I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Jenkins said that "the only time you read the *Miranda* decision to anyone is when they are under arrest. Am I under arrest?" Hagedorn said he was not and that it was "just a formality." Jenkins then signed the document.

Strachan then produced nine vouchers, which bore dates between April 30, 1973, and April 23, 1976, a period of almost 3 years. Each of these vouchers was signed by Jenkins and stated that he had purchased shoes conforming to Postal Service requirements. The vouchers covered the purchase of 13 pairs of shoes.[4] Hagedorn said that "we know" all those shoes were not for the job and asked Jenkins how many pairs he had bought for his own personal use. Hagedorn said that Jenkins might as well tell them because they were going to subpena the records of the store where Jenkins bought most of the shoes, and if Hagedorn and Strachan found out he was lying, it could be hard on him. Jenkins said that he thought he should have some kind of legal counseling before answering any more questions and asked whether he could get a lawyer. Hagedorn said that he could obtain one at his own expense, but it would be foolish to get a lawyer because a lawyer could not sit in on an investigation. Jenkins said, ". . . so this is an investigation?" Hagedorn said, "Yes." Jenkins said, ". . . if I can't get a lawyer in on the investigation, can I get a union steward in?" Hagedorn said that a union steward cannot sit on an investigation. In a series of questions, he asked Jenkins to name the union steward, the chief steward, the president, and the assistant steward. In response, Jenkins named each of them, including two referred to herein as John Doe and Richard Roe (see fn. 16 *infra*). All of them worked on Jenkins' "tour" (shift). Jenkins said, ". . . just a minute ago you read me my rights and said I could have legal counselling. Now you are saying I can't have legal counselling." Hagedorn said, ". . . [D]o you think you should have legal counselling for defrauding the government?" Jenkins denied defrauding the Government and asked how long the investigation had been going on. Hagedorn said that it had been going on for 3 months.[5] Jenkins asked who was being investigated. Hagedorn said that anybody that had a uniform allowance was being investigated.[6] Strachan asked how many pairs of shoes Jenkins had bought for the job. Jenkins, Strachan, and Hagedorn went through nine vouchers, two of them issued by Kale Uniforms and seven of them issued by a firm referred to herein as the X Company (see fn. 17 *infra*). Jenkins, Hagedorn, and Strachan all initialed each voucher where Jenkins could authenticate his signature and was sure that he had not paid the voucher from his own funds. All of the vouchers so initialed were issued by the X Company, and they covered a total of 11 pairs of shoes, 2 of them having been bought on March 13, 1975, and 3 having been bought on June 30, 1975. Jenkins declined to identify his signature on or initial one of the Kale Uniform vouchers, dated almost 4 years earlier, on the ground that it had been issued some time ago. Hagedorn said, ". . . you are so God damn stupid you can't identify your own signature on the voucher." Jenkins said that he did not appreciate Hagedorn's "cussing at" him. Strachan told Hagedorn to "cool down because everybody's nerves were on edge." Jenkins said that 10 of the 11 pairs of shoes covered by X Company vouchers had been purchased from the X Company for his personal use. Hagedorn and Strachan thereupon added up the total amount of the X Company vouchers, divided this total by 11 to determine the average price per pair of shoes, and multiplied this average by 10. They reached the arithmetic result of $240.90. Strachan then took a premimeographed form, typed in Jenkins' name and the amount, typed in an additional sentence, signed the form, and gave it to Jenkins. The form as given to Jenkins stated, in material part (emphasis to indicate portions typed in by Strachan):

> Subject: Demand for Payment
>
> This letter is demand for payment of *$240.90* for items purchased and paid for through the uniform allowance program. These items do not comply with Postal Service uniform specifications for your employment category. They were purchased by you for per-

[4] Vouchers which included the shoe size variously specified 9M, 9D, 9-1/2, 9-1/2D, and 10E. The price per pair varied from about $17 (June 1976) to $30.95 (March 1976).

[5] The investigation was already in progress when Moore became division postal inspector in January 1977.

[6] In fact, the investigation was limited to security police officers.

sonal use. *Payment by certified check or money order should be made within 15 days from this date.*[1]

Jenkins said that if it was illegal for the employees to purchase shoes from the X Company on their uniform allowance, why had the vouchers been approved, and why had this not been stopped 4 years ago, when it started? Strachan or Hagedorn asked whether anyone had told Jenkins to go to the X Company. Jenkins said, "No." Strachan or Hagedorn asked whether Jenkins had heard any locker room talk and, when Jenkins said "No," asked him what had happened. He said that he had shopped at the X Company before he had started working at the post office and that when an X Company salesman learned during a conversation with Jenkins where he was working, the salesman told him that he could buy shoes on his uniform allowance. Strachan said that this corresponded with what everybody else had said. Hagedorn asked Jenkins to write a statement about whether he had seen any postal employees at the X Company the first time he went there and how he had found out about X Company's arrangements about selling shoes to Postal Service employees. Jenkins refused to write any statement. Strachan and Hagedorn asked whether Jenkins knew of any supervisors that were buying shoes at the X Company and whether any supervisor had told him about going down there. Jenkins said "No". Hagedorn and Strachan said that the investigation was secret and told Jenkins not to talk with anyone about it, including "security" or the X Company. Jenkins told Hagedorn that Jenkins had paid out of his own pocket for some of the shoes listed on the vouchers, because when the vouchers came through he had no more money left on his uniform allowance, and the store had sent him a letter that he owed this money because the Postal Service had not paid it. Hagedorn said that he and Strachan had no way of verifying this. Upon termination of the interview, Jenkins was "excused." About February 4, 1977, Hagedorn and Strachan, in accordance with the general practice followed during the uniform-allowance investigation, gave their handwritten field notes of this interview to Postal Inspector Holmes.

My findings as to this February 2 conversation are based on a composite of and inferences from the vouchers, the "Demand for Payment," and credible portions of the testimony of Jenkins, Hagedorn, and Strachan. I do not credit Hagedorn's and Strachan's denials that Jenkins asked for a union steward, for demeanor reasons, because both postal inspectors admitted that Hagedorn asked Jenkins to name his union representatives, and because I regard as somewhat improbable Hagedorn's explanation (uncorroborated by Strachan, who could not recall the context of Hagedorn's inquiries) that he asked these questions in order to "maintain rapport" with Jenkins and because he knew that he and Strachan were going to interview union representatives accused of the same violation. To the extent that it is inconsistent with my findings in the preceding paragraphs, I do not credit Strachan's testimony that Jenkins did not ask for a lawyer, Hagedorn's testimony that Jenkins never asked for legal counseling and was not denied the right to obtain a lawyer, or Strachan's denial that Jenkins was told that a lawyer would not be able to sit in on the investigation, for demeanor reasons and in view of Hagedorn's testimony that toward the middle of the interview, Jenkins said that he might need a lawyer and that Hagedorn said he could have one at his own expense if he wished. In view of the probabilities of the situation, I do not accept Jenkins' testimony that before signing the *Miranda* form he said, "Seems like I should have some sort of legal counselling," and I accept Hagedorn's denial. However, for demeanor reasons, I do not accept Strachan's testimony that Jenkins signed the *Miranda* form without hesitation. I do not accept Hagedorn's testimony that Jenkins initialed the vouchers for shoes he admittedly purchased for personal use, in view of Hagedorn's further testimony that Jenkins said 10 pairs of the shoes he bought from the X Company were for his personal use and the fact that Jenkins intialed X Company vouchers for 11 pairs of shoes. I do not credit Hagedorn's or Strachan's denial of Jenkin's testimony that Hagedorn called him stupid and "cussed" him for being unable to authenticate his signature on a 4-year-old voucher, for demeanor reasons and because Strachan did not corroborate Hagedorn's testimony that Jenkins did not question the authenticity of his signature on any of these documents. My findings that Jenkins failed to initial vouchers which he thought he might have paid for himself is based on an inference drawn from the fact that the two he failed to initial each involved one pair of shoes from Kale Uniforms; he in fact had paid at least one of these vouchers himself (see sec. II, C *infra*), and both Jenkins and Strachan testified that Jenkins said he had paid some of the vouchers out of his own pocket—according to Strachan, vouchers for two or three pairs. In crediting Jenkins' testimony to the extent indicated, I have taken into account his obviously untruthful disclaimer of knowledge that he had arrest powers. My credibility findings would not be altered were I to give to Jenkins' admissions to Hagedorn and Strachan about buying shoes for personal use the same weight that I would give them by assuming with Respondent that Jenkins did not ask for his *Weingarten* rights. In any event, see fn. 41 *infra*.

C. *Jenkins' Second Interview With Postal Inspectors Hagedorn and Strachan*

After this interview, Jenkins located at his home certain documents which showed that he had paid out of his own pocket one of the nine vouchers produced by Hagedorn and Strachan during the February 2 interview—namely, a $23.95 voucher issued by Kale Uniforms in April 1976. At Jenkins request, on February 3 he again went down to see Hagedorn and Strachan. Hagedorn again read and asked Jenkins to sign a *Miranda* form, identical to the form signed

[1] The Postal Service's memorandum in support of its prehearing motions for summary judgment asserts that the "Demand for Payment" was authorized by 39 U.S.C. §2601(a), 39 CFR 946.1(g) (see fn. 31 *infra*), and Art. XXVI of the bargaining agreement. According to the attachments to this memorandum (see fn. 2 *supra*), Art. XXVI reads as follows:

> Section 1. The parties agree that continued public confidence in the Service requires the proper care and protection of the U. S. P. S. property, postal funds, and the mails. In advance of any money demand upon an employee, he must be informed in writing and the demand must include the reasons therefor.
>
> Section 2. An employee shall be financially liable for any loss or damage to property of the Employer including leased property and vehicles only when the loss or damage was the result of the willful or deliberate misconduct of such employee.

by Jenkins on February 2. Jenkins refused but said that he understood his *Miranda* rights.

Jenkins then showed the proof of payment to Hagedorn. Hagedorn said that he would not reduce the size of the "Demand for Payment" unless Jenkins left the documents with Hagedorn and Strachan or permitted them to make copies, but Jenkins refused on the ground that "there might be something incriminating against me." Jenkins did not request union representation during this interview.

D. *Events Preceding Jenkins' Interview With Security Officers in Charge Cruse and Scott*

On February 7, 1977, Jenkins filed his charge herein, alleging that the Postal Service, in violation of the PRA and Section 8(a)(1) of the NLRA, had "[s]ince on or about February 2, 1977 . . . denied Eddie L. Jenkins union representation." On February 9, 1977, this charge was received by an agent of Richard Froelke, counsel for the Postal Service.

On February 15, 1977, Jenkins received a "Demand for Payment," signed by Postal Inspector Holmes, which stated:

> This memorandum is demand for payment of $216.95 for items purchased and paid for through the uniform allowance program, which items do not comply with Postal Service uniform specifications for your employment category. This memorandum rescinds the earlier letter of demand dated February 2, 1977.
>
> The amount is reduced based on a review of the invoices you submitted for payment under the uniform allowance program during uniform allowance year beginning March 10, 1976 [sic; cf. fn. 12 *infra*]. The total invoices submitted for payment exceeded your maximum allowance by $23.95 and the last invoice generating the excess was for unauthorized items.
>
> Payment by certified check or money order should be made within 15 days from this date.

The $23.95 reduction had been authorized by Holmes personally.

A day or two later Jenkins told Strachan and Hagedorn that Jenkins would pay this amount in a lump sum. Jenkins then decided that rather than pay in a lump sum, he would have the money taken out of his paycheck in installments. On February 18, at Jenkins' request, he went down to see Strachan and advised him of this decision. Jenkins did not request union representation during this interview. That same day Jenkins signed an "Authorization for Payroll Deduction to Liquidate Indebtedness" form which read, in part (emphasis to indicate nonprinted portions of document):

> I acknowledge that I am indebted to the U.S. Postal Service in the amount of *$216.95*. Since it will be to my financial advantage, I respectfully request that I be permitted to liquidate this indebtedness in the following manner:
>
> * * * * *
>
> 2. A balance of *$216.95* to be deducted in *5* equal installments of *$43.39* from my salary checks . . . beginning with the check due . . . *3-18-77*, and continuing until the debt is liquidated. *Reimbursement for unauthorized purchases under the uniform allowance program.*
>
> I hereby certify that the foregoing statements are true and correct to the best of my knowledge and belief, and they are made of my own free will and at my own direction.

Jenkins credibly testified that he signed this document "because they told me I had to pay the money back so I didn't want to pay it out of my pocket so I told them to take it out of my check." When Postal Service counsel then asked, "So you agreed to this arrangement? There is no question in your mind about that, is there?," Jenkins credibly replied, "Well, I had to."

The deductions so authorized were duly made, with the final deduction made on April 15, 1977. Jenkins testified at the hearing that the word "reimbursement" means "pay back."

Meanwhile, Postal Service attorney Froelke got in touch with an assistant to Division Postal Inspector Moore about February 10 and with Moore himself about March 25. During this latter meeting, Froelke advised Moore of the contention that the merits of the instant charge were governed by *Weingarten* (420 U.S. 251). Postal Inspector Holmes, who was in charge of the investigation regarding uniform allowances, testified that about this same time Assistant Inspector in Charge Henrickson instructed him to return the uniform-invoice file regarding Jenkins back to the personnel section because a separate administrative investigation would be conducted by someone else. Holmes further testified that he thereupon returned these documents to Ms. A. Spencer, a security force program analyst whose immediate superior was Dobbins, the assistant inspector in charge for security and internal crimes. Henrickson, Spencer, and Dobbins did not testify. By letter to Moore dated May 12, 1977, Regional Chief Inspector Lawrence stated:

> This has reference to your request for procedural instructions regarding the possible misuse of uniform allowance funds by Security Force personnel.
>
> Because of the unusual circumstances of this case and specifically the position taken by the Postal Service in its preliminary statement to [the Board's Regional Office in the instant case], Mr. Froelke's advice as expressed in his April 15, 1977, memorandum should be followed. In this regard, it is suggested that the Inspection Service manager selected to supervise the administrative investigation should be one who neither was involved in the criminal investigation nor has any responsibilities in connection with the processing of grievances under the contract.
>
> Further, should the employee request union representation during any investigative interview, such request should be granted, notwithstanding the fact that Security Force labor contracts do not contain a Memorandum of Understanding regarding union representation like that relating to the 1975 National Agreement with other postal crafts.
>
> In view of the unavailability of grand jury testimony and subpoenaed documents, evidence upon which disciplinary action may be taken will, of necessity, have to be developed independent of the criminal investigation through interviews of involved personnel, exami-

nation of internal Postal Service documents relating to the uniform program, etc. If, of course, indictments are handed down, the indicted employees may be placed on indefinite suspension under the discipline procedure in Section 3 of Article XVI of the Federation of Postal Security Police contract, which permits the Postal Service to immediately remove an employee from a pay status where there is reasonable cause to believe that the employee is guilty of a crime for which a sentence of imprisonment can be imposed. It is further suggested that all notices of charges prepared in their case be coordinated with Mr. Froelke's office.

National Headquarters is continuing to assess the impact of recent NLRB decisions interpreting *Weingarten* on the Postal Service's long-standing policy regarding union representation during investigatory interviews and as soon as a decision is reached as to what legal obligations these Board decisions impose upon the Postal Service, a policy statement will be disseminated to all affected Postal Service elements.

Moore testified that during Holmes' investigation of the uniform-allowance program, on two or three occasions Holmes described to Moore the overall progress of the investigation, but never related to him specific data as to specific conduct of specific security police officers. Moore further testified that as of his conversation with attorney Froelke on March 25, Moore did not have in his possession any of the criminal data developed by Holmes' group with respect to Jenkins personally, and, so far as Moore knew, as of that date neither the assistant inspector in charge for security and internal crimes (Dobbins) nor any direct supervisor of security police officers had any such data. In addition, Moore testified that, so far as he knew, and laying Jenkins to one side, none of the security police personnel interviewed in connection with the uniform-allowance investigation requested union representation.[8]

Moore testified that after receiving Lawrence's May 12 letter, he instructed Henrickson, the assistant inspector in charge for fraud and prohibited mailings, to cause the conduct of an administrative investigation of Jenkins' use of his uniform allowance. Still according to Moore, he instructed Henrickson to have the investigation conducted by two supervisors who had no knowledge whatever of the investigation being conducted and not to afford such supervisors any of the material collected in connection with the criminal investigation.[9] The two supervisors selected were Security Officers in Charge P. E. Cruse and R. H. Scott. Moore had no personal knowledge of what they were told to do. Henrickson, Cruse, and Scott did not testify.

E. *Jenkins' Interview With Security Officers in Charge Cruse and Scott*

On May 27, Lieutenant Lomax instructed Jenkins to wait in Lomax's office for Security Officer in Charge Cruse, who wanted to talk with Jenkins. A few minutes later Cruse came into Lomax's office and escorted Jenkins to Cruse's office, where Cruse said they had to wait for Security Officer in Charge Scott. Jenkins and Cruse discussed sports until, about 1/2 hour later, Scott came in with a briefcase. Scott sat at one end of Cruse's desk and pulled out some papers. Cruse sat at the other end, pulled out Jenkins' file, and said that Cruse and Scott had to question Jenkins about vouchers for shoes he bought at the X Company. Jenkins said that he had already been through this investigation once with the postal inspectors and saw no reason why he had to go through the matter again. Cruse said that he had orders to question Jenkins. Jenkins asked who had issued these orders. Cruse said that he did not know and that he "just had a piece of paper on his desk to question" Jenkins. Jenkins said that he wanted a union steward to be present. Cruse asked the identity of the union steward on duty. John Doe was "off," and Jenkins said it was Gentry Daniels. Cruse then called for Daniels.

After Daniels had arrived, Cruse again said that he had to ask Jenkins about shoes he bought from the X Company. Jenkins said that he wanted to talk to Daniels privately. Cruse told them to go into the hall to discuss what they had to say. When they went out into the hall Daniels said that Jenkins did not have to say anything and that Daniels did not see why Jenkins had to go back through the investigation again. After the two returned to Cruse's office, Jenkins again asked Cruse why he was questioning Jenkins. Cruse said that he had orders to question Jenkins. Jenkins asked whether Cruse would be questioning anyone else. Cruse said that "we" had already questioned one security police officer and would be questioning others.[10] Daniels said that he did not see why Jenkins had to go through this. Jenkins asked Cruse whether he had had knowledge of the investigation when it had been conducted in February. Cruse said that the investigation had been just about over when he heard about it, that the postal inspectors did not usually tell him anything, that they had not told him anything about the investigation, and that he knew nothing about their investigation of Jenkins. Cruse told Jenkins to explain what happened when he went to see the inspectors. Jenkins gave him an account which included the *Miranda* warning matter and the fact that Jenkins had asked for and been denied a union steward.

Cruse and Scott then started asking Jenkins questions from lists they had in front of them. From time to time Scott prefaced a question with: ". . . [D]id the inspectors ask you this?" Jenkins said "Yes," and Scott said, ". . . [W]ell, I will go on to the next one." The record fails to show the subject matter of these particular questions. Daniels answered some of the questions asked by Cruse, including questions regarding the relative quality and price of shoes (see fn. 4 *supra*).[11] Cruse asked Jenkins why he had not

[8] However, Holmes later reported to Moore that an undisclosed number had refused to discuss the uniform-allowance matter after receiving their *Miranda* rights. See *infra*.

[9] As discussed *infra*, such material was in Holmes' office files or in the possession of the grand jury. Moore testified that none of this material would be in Jenkins' personnel folder.

[10] No "administrative investigation" was conducted of any other employees regarding the uniform-allowance matter.

[11] The Postal Service's brief states that Jenkins was annoyed by the fact that Daniels answered some of these questions. While the Postal Service's contention may be justified by a reading of the cold record, when I watched Jenkins testify about the matter I did not conclude that Daniels' conduct annoyed Jenkins in any respect. There is no evidence that Jenkins ever asked Daniels to be quiet or to leave.

bought any shoes recently.[12] Jenkins said, "I'd be a fool to buy some shoes now. The inspector still has this investigation going on." Scott asked Jenkins whether he had bad feet, and Jenkins said "No." Cruse asked how much money he had paid back, and Jenkins told him. After Cruse and Scott had finished questioning Jenkins and he was preparing to leave, he asked Cruse what was going to happen "behind all this" and whether Jenkins would be suspended or fired or "something like that." Cruse said, ". . . [D]on't worry, nothing's going to happen." Jenkins and Daniels then left the office.

My findings as to what happened during this May 27 conversation are based on Jenkins' uncontradicted testimony. At the time of the hearing, Cruse and Scott were still working for the Postal Service, at locations a short distance from the hearing room, but they did not testify.[13] Respondent's brief nonetheless attacks as unworthy of belief Jenkins' uncontradicted testimony that he told Cruse and Scott that during the February 2 interview he had asked for and been denied the presence of a union steward, on the ground that this allegation is not set forth in Jenkins' prehearing affidavit although Jenkins said he told the Board agent about the matter. I do not regard this omission as sufficient to warrant my discrediting Jenkins in this respect, because any directly contradictory testimony which existed would be readily available to Respondent but was not produced.

On June 7, 1977, Cruse and Scott submitted to Moore an "Investigative Memorandum" regarding investigation of Jenkins' uniform invoices. This document was not offered to show the truth of the matters asserted therein. The memorandum states that Jenkins told them he had promised to pay the Postal Service $216 in connection with the postal inspectors' investigation, but had not admitted to the inspectors that he had made illegal purchases on his uniform allowance. Also, the memorandum states that Jenkins said all the shoes he purchased met Postal Service specifications, so far as he knew. There is no specific probative evidence that Jenkins made either statement to Cruse and Scott. The memorandum contains further assertions as to which there is no probative evidence. Thus, the memorandum states that Jenkins was told that the Cruse-Scott investigation was a management inquiry, that it had no relationship to the postal inspectors' investigation, and that a *Miranda* warning and waiver were not necessary because Cruse and Scott were conducting a management inquiry and not a criminal investigation. Further, the memorandum states that upon being given the purpose of the interview, steward Daniels said he had no objection and that "it was evident" to Daniels that Jenkins "was being evasive and giving vague answers." Also, the memorandum states that Jenkins said he had thrown out all of the shoes, except those he was wearing, which he had bought with his uniform allowance and that he refused to give a written statement on the ground that he had not given one to the postal inspectors.

Furthermore, the memorandum states that Cruse and Scott decided to interview Jenkins because Cruse and Scott had inspected his uniform-voucher file, and it appeared to show irregularities. However, during this interview Cruse told Jenkins that Cruse had been ordered to conduct the interview by someone whose identity he did not know. The memorandum states that when asked how long Jenkins wears a pair of shoes, he replied that he had bad feet and had to wear comfortable shoes. However, during this interview Jenkins had in fact denied having bad feet. The memorandum states that when asked why he had not bought any shoes recently or since June 1, 1976, Jenkins said that he did not know. However, Jenkins had in fact told Cruse and Scott that Jenkins had not bought any shoes recently because of the pending uniform-allowance investigation.[14]

The memorandum begins with the assertion that on May 23 Cruse and Scott were instructed to conduct a management investigative inquiry of Jenkins' uniform vouchers, and "[n]o other information was given us at that time." The memorandum is dated 11 days after Cruse's and Scott's interview with Jenkins. Division Postal Inspector Moore testified that this memorandum constituted his only personal knowledge of what Cruse and Scott had available to look at when they conducted their investigation of Jenkins.

F. *The Postal Service's Contacts With the United States Attorney*

The uniform-allowance investigation covered 75 security officers, both supervisory and nonsupervisory. On the basis of this investigation, Postal Inspector Holmes concluded that 44 security officers, including Jenkins, had improperly used their uniform allowances. On various occasions between March and June 1977, Holmes forwarded to the United States Attorney for the Northern District of Illinois all of the investigative notes of all the postal inspectors assigned to help Holmes in the investigation. These notes included the field notes of Inspectors Hagedorn and Strachan about their interview with Jenkins. Holmes also retained copies of these Jenkins notes in his office. In consequence of a subpena issued at the instance of Postal Service counsel, these notes were tendered to such counsel, but they are not in the record.

G. *The Letters of Warning Issued in Connection With the Uniform-Allowance Investigation*

In connection with the uniform-allowance investigation, Inspector Holmes wrote 43 investigative memorandums, each dealing with a particular member of the security force,

[12] As to each employee, the 1-year period within which the annual uniform allowance must be used or lost runs from the anniversary date of the employee's hiring. Jenkins' anniversary date was March 10. So far as the record shows, as of the May 27, 1977, date of his interview he had bought no shoes under his uniform allowance since June 1, 1976, when he bought two pairs. Since March 10, 1976, he had bought four pairs under his uniform allowance, including one pair in April 1976 from Kale Uniforms for which he eventually paid out of his own pocket (see sec. II, C *supra*).

[13] On the second day of the hearing, counsel for the General Counsel stated on the record without denial that both Scott and Cruse had been present during the first day of the hearing. Jenkins, Hagedorn, and Strachan testified on that day. Because neither Cruse nor Scott was identified to me, I do not know whose testimony they heard. Before the first witness testified, and over the objection of Respondent's counsel, I granted the General Counsel's motion to sequester the witnesses.

[14] The investigation had begun on an undisclosed date before January 1, 1977. However, none of the security officers was interviewed before February 1977, and Jenkins' May 27 remarks aside, there is no evidence that he knew about the investigation before his own interview on February 2, 1977.

to Division Postal Inspector Moore. Each memorandum stated that the particular individual had purchased "unauthorized pairs of shoes" on his uniform allowance. Holmes' June 29, 1977, memorandum of transmittal states, "All memorandums are based on voluntary admissions in writing and/or orally." The sums involved ranged from about $20 to about $284 per person, with a total amount of about $3,121, over a period of a little more than 4 years.[15] Among the persons who were the subjects of these memorandums were a security officer in charge (not Cruse or Scott), two sergeants (not including Magee), and three union stewards (including John Doe and Richard Roe,[16] but not Daniels). Holmes testified that no investigative memorandum was written about Jenkins, and his name is not included in the 43-person list attached to the memorandum of transmittal. Holmes' memorandum of transmittal further stated: "After the investigation met with a high degree of success for repetitive purchases, the investigation was expanded to cover singular instances of purchases at [the X Company[17]]. Additional success in this area indicated that Security Police Officers generally using other licensed vendors may have specifically visited [the X Company], intending to make unauthorized purchases." The February 2 Jenkins interview was conducted by Hagedorn and Strachan on the second day of their interviews as one of about seven two-man teams. Holmes' memorandum of transmittal concluded with the following paragraph:

> The investigation includes about twelve files of individuals who may have made unauthorized purchases and who are suspected of making false negative statements or who declined to discuss the matter after receiving their Miranda rights. These files were retained for the possibility of proving unauthorized purchases by the material obtained from the vendor through a grand jury subpoena. However, this is not possible because the United States Attorney advised that subpoenaed documents cannot be used administratively, and also because the documents do not appear to be complete and may work only in an isolated instance. Examples of these suspicious files are a Security Officer in Charge who spent $118.00 of his uniform allowance at one time at [the X Company] for five pairs of shoes which could not be produced because his dog chewed them all up; another Security Police Officer who purchased fourteen pairs of shoes on his uniform allowance on a total of seven occasions within twenty-six months is employed in a sedentary indoors position of Communications Room duties. It is suggested that these files receive administrative consideration in the same manner as the Security Police Officer Eddie Jenkins matter.

Moore testified that the June 7 Cruse-Scott memorandum regarding their interview with Jenkins was referred to the security section for "preparation of disciplinary action" by it and by Jenkins' supervisor. Jenkins' immediate superior was Lieutenant Lomax. Jenkins' squad leader was security supervisor Joseph P. Pizzurro. Under the letterhead "United States Postal Service/Office of the Inspector in Charge/Chicago," and the date July 22, 1977, the following "Letter of Warning" signed by Pizzurro was issued to Jenkins, who refused Pizzurro's request to sign it:

> The official Letter of Warning is being issued to you for the following reason.
>
> Between April 30, 1973, and June 1, 1976, you purchased a total of thirteen (13) pairs of shoes that were charged to your uniform allowance. Five (5) pairs of the referenced shoes were purchased between March 13, 1975, and June 30, 1975. During an interview with SOIC's [Security Officers in Charge] Paul Cruse and Richard Scott on May 27, 1977, you acknowledged that you are reimbursing the U.S. Postal Service in the amount of $216.00 for non-uniform shoes purchased during the referenced period.
>
> Your attention is directed to Part 1 of the Security Force Manual which states that all Security Police Officers must be thoroughly familiar with the contents of the Security Force Manual as well as Postal laws and regulations pertaining to the area of responsibility covered. It is expected that you will familiarize yourself with the authorized uniform items as listed in the Security Force Manual Part 4 and Postal Service Manual SubChapter 420, Part 422. If you have some question as to whether a particular item is authorized, please call on me or you may consult with your other supervisors and we will assist you where possible. However, I must warn you that future infractions such as outlined above will result in more severe disciplinary action being taken against you including suspensions or removal from the Postal Service.
>
> You may appeal this Letter of Warning in accordance with Article XV of the Bargaining Agreement within 10 days from the date you receive this letter.

Pizzurro did not testify. When asked to account for the 6-week interval between Moore's receipt of the June 7, 1977, Cruse-Scott report and the issuance of the July 22, 1977, letter of reprimand to Jenkins, Moore testified, "At that time we [were][18] still waiting for the release of the criminal investigative results from the grand jury on the other security police officers and supervisors who . . . had committed similar offenses as Mr. Jenkins had committed and I wanted to . . . weigh all the evidence and to invoke fair and equitable disciplinary procedures against the entire personnel that was involved." Attached to the Postal Service's motions for summary judgment is an affidavit from Postal Inspector Holmes, dated September 9, 1977, which states, *inter alia*, "The investigation has been continued by the

[15] Some of these purchases were for shoes which did not conform to Postal Service requirements but which may in fact have been bought for and used on the job because the wearers believed them to be permitted.

[16] Whether these stewards had actually misused their uniform allowances was not material to the issues here and was not litigated. To avoid possible unfairness to their reputations, they are referred to herein as John Doe and Richard Roe. Holmes' memorandum states that one of them failed to comply with or respond to the letter of demand and a followup letter of demand.

[17] Because of implied allegations in the record that this firm may have been involved in fraudulent activity and because the truth of any such allegations is immaterial to the issues herein and was not litigated, to avoid possible unfairness to the reputation of that firm, it is referred to herein as the X Company.

United States Attorney through an impaneled Grand Jury. I am still to date personally involved in this investigation and am therefore unable to supply any further information in connection therewith." As of the May 1978 date of the hearing before me, no prosecutions had been initiated against any security personnel, including Jenkins. Moore testified that he believed, but was not sure, that the grand jury had released all the material connected with the investigation. The record otherwise fails to show when this happened or when the Postal Service found out about it. On July 22, 1977, the date of Jenkins' letter of warning, the following letter was sent over Pizzurro's signature to a security police officer not involved in the instant proceeding:

> This official letter of warning is being issued to you for the following reason.
>
> You have misused your uniform allowance by the purchase of non-uniform items in violation of the Security Force Manual, Part 4, and Postal Service Manual, Sub-Chapter 420, Part 422.715. Specifically, on July 28, 1976, you purchased two (2) pairs of shoes that do not conform to the specifications for the Security Force Police Officer Uniform as detailed in Security Force Manual, Part 4, and Postal Service Manual, Part 422.41(i). You further certified that the statement of charges submitted by the vendor on 7 28-76, for those items was correct and just.
>
> Your attention is directed to Part I of the Security Force Manual which states that all Security Police Officers must be thoroughly familiar with the contents of the Security Force Manual as well as Postal laws and regulations pertaining to the area of responsibility covered. **It is expected that you will familiarize yourself with the authorized uniform items as listed in the Security Force Manual, Part 4, and Postal Service Manual Sub-Chapter 420, Part 422. If you have some question as to whether a particular item is authorized, please call on** me or you may consult with your other supervisors and we will assist you where possible. However, I must warn you that future infractions such as outlined above will result in more severe disciplinary action being taken against you including suspensions or removal from the Postal Service.
>
> You may appeal this letter of warning in accordance with Article XV of the Bargaining Agreement within 10 days from the date you receive this letter.

The parties stipulated that this is one of 42 substantially identical letters issued on July 22, 1977, to security police officers by their immediate supervisors under Division Postal Inspector Moore's authorization and that these 42 letters were issued as a result of the inspectors' investigation of these employees in February and March 1977.[19] Moore testified that he sent out these 43 letters after "reviewing a representative number" of the investigative memorandums which Holmes had forwarded to him with the June 29 memorandum of transmittal. However, because these memorandums did not include any investigatory memorandum about Jenkins, I infer that Moore must also have considered the June 7 Cruse-Scott memorandum. As previously noted, when sending Moore the files attached to the June 29 memorandum of transmittal, Holmes had retained the files of about 12 security officers, including some who had refused to discuss the matter after receiving their *Miranda* rights. None of these 12 ever received a letter of warning.

On August 10, 1977, steward John Doe filed a grievance on Jenkins' behalf. The form stated the grievance as follows: "He had made restitution for whatever wrong that was done. He was led to believe that no action would be taken against him after restitution was made." The grievance further alleged that the discipline violated article XVI of the collective-bargaining agreement[20] and was untimely and, as to the remedy expected, stated, "Rescind the letter of warning." The grievance form does not call for the grieving employee's signature, and Jenkins did not sign the grievance. In support of that grievance, Jenkins supplied steward Doe with a written statement which asserted that during the May 27 interview, Cruse and Scott had told him they had orders to question Jenkins again about the shoe purchases; that when Jenkins said he had already undergone a postal inspectors' investigation, Cruse said he knew nothing about that; that Cruse said he would interview others besides Jenkins but he was the only one called into Cruse's office; and that Jenkins told Cruse that the inspectors had "made [Jenkins] pay back the money for the shoes." Jenkins' supporting statement did not deal with whether Jenkins actually owed the $216.95 which had been deducted from his pay and paid to the Postal Service pursuant to his written authorization (see fn. 41 *infra*), nor, so far as the record shows, did the grievance itself.

On August 23, 1977, Postal Inspector Witkowski sent Moore a memorandum which stated that Witkowski had discussed Jenkins' grievance with steward John Doe on August 15, 1977. This summary, which was not received in evidence to prove the truth of the matter asserted, describes the union position as follows:

> SPO [security police officer] Jenkins was singled out and had to go through a second different type of investigation concerning misuse of his uniform allowance. Why was Jenkins singled out to be coerced? The Investigative Memorandum prepared by SOICs Paul Cruse and Richard Scott states they were instructed to conduct a management inquiry. On what basis, who instructed them? They must have gotten their information from somewhere—probably the previous investigation conducted by the Inspection Service. Why didn't Mr. Jenkins' letter of warning pertain to the first investigation?
>
> Mr. Jenkins has a hearing next month concerning

[19] One of the 43 employees (not a union representative) named in Postal Inspector Holmes' June 29, 1977, memorandum had died.

Attached to the General Counsel's September 1977 opposition to Respondent's motion for summary judgment are purported copies of two additional letters of warning not otherwise in the record, one of them to union representative Richard Roe. Although otherwise substantially the same as those reproduced in the text, both of these are signed by "Randolph L. Lomax, Security Supervisor in Charge," inferentially the same person as the Lieutenant Lomax who was Jenkins' immediate superior and directed him to attend the Hagedorn-Strachan interview.

[20] According to the attachments to the Postal Service's prehearing motions for summary judgment (fn. 2 *supra*), this article deals with just cause and procedures for discipline. The article does not in terms refer to letters of warning.

the Inspector's investigation.[21] If that hearing results in a finding in favor of Mr. Jenkins, then any action taken against him would be null and void. Therefore, he should not have been issued the letter of warning at this time.

The summary further describes management's position as follows:

> Disciplinary action taken against SPO Jenkins was based solely on the management investigation conducted by SOICs Paul Cruse and Richard Scott. Any previous investigation which may have been conducted was not furnished Messrs. Cruse and Scott.
>
> While no admission of the purchase of non-uniform shoes on the uniform allowance was made by SPO Jenkins to SOIC Cruse and Scott, he acknowledged that he was repaying the Postal Service an amount of $216.00. Also, the grievance form submitted by the union states that SPO Jenkins "made restitution for whatever wrong that was done. He was led to believe that no action would be taken against him after restitution was made."

By letter dated August 23, 1977, Moore stated, "Grievance denied. Disciplinary action taken was warranted and considered timely in this case." This grievance could have been, but was not, appealed to binding third-party arbitration (see fn. 39 *infra*).

Moore testified that in preparing and issuing his decision on the grievance, he relied on Witkowski's memorandum, whose recommendation Moore adopted *verbatim*. Witkowski did not testify. Moore further testified that so far as he knew, in the Postal Service's handling of Jenkins' grievance, no data from Inspector Holmes' criminal task force regarding Jenkins were used. Holmes testified that he never prepared an investigative memorandum regarding his criminal investigation of Jenkins, and Moore testified that he never received any such memorandum from Holmes. Holmes testified that he retained Strachan's and Hagedorn's notes of their interview with Jenkins in Holmes' office; that they had not been made available to Moore; that nobody, including Scott or Cruse, had ever asked to see them; and that Scott and Cruse had never contacted Holmes regarding Jenkins. Scott and Cruse did not testify. Hagedorn and Strachan testified on the Postal Service's behalf, but they were not asked whether they had ever discussed Jenkins' case with Scott or Cruse.

Three or four other employees filed grievances regarding their respective July 22 letters of warning. All were denied at the first step, and none of them was appealed.

H. *Analysis and Conclusions*

Weingarten held that an employee has a statutory right to refuse to submit without union representation to an interview with an employer representative which he reasonably fears may result in his discipline. 420 U.S. at 256-267. Laying to one side the facts that Jenkins' employer is the Postal Service and that the employer agents who interviewed him on February 2, 1977, were postal inspectors, the Postal Service does not appear to question the General Counsel's contention that *Weingarten* rights would attach to this interview, which Jenkins' superior directed him to attend and which he did not leave until the inspectors excused him, because Jenkins reasonably feared this interview would result in his discipline. I agree. Before asking Jenkins about the uniform-allowance matter, Postal Inspector Hagedorn told him that Hagedorn and Postal Inspector Strachan were investigating various security police officers that might be involved in misuse of the uniform allowance and that Jenkins might be one of them. Moreover, Hagedorn then reminded Jenkins of the *Miranda* decision (384 U.S. 436), which deals with the rights of an individual who is subjected to custodial police interrogation regarding his suspected commission of a crime. Furthermore, Jenkins' superior had required him to leave his gun, gun belt, and handcuffs in his locker before proceeding to the interview, and letters of warning resulted from more than half of the postal inspectors' interviews with other security officers during the uniform-allowance investigation.

The Postal Service principally contends that as to the February 2, 1977, interview, no statutory rights under *Weingarten* existed as to Jenkins because, as to that interview, he allegedly was entitled to and allegedly was afforded constitutional rights under *Miranda*, *supra*, 384 U.S. 436. I agree with the General Counsel that Jenkins' alleged entitlement to and alleged receipt of *Miranda* rights are immaterial to the existence of *Weingarten* rights. It is true that *Miranda* and *Weingarten* share one very similar ethical foundation—namely, the belief that a lone individual is subjected to unfair pressures when he is compelled, without being given the right to informed assistance, to submit to an interview about his alleged shortcomings with trained interrogators empowered to cause him to suffer adverse consequences therefor. Perhaps because of this common ethical foundation, both *Miranda* and *Weingarten* rights include the right to preinterview consultation with the representa-

However, the foundations, and therefore in significant respects the scope, of *Miranda* rights and *Weingarten* rights are otherwise different. Thus, *Weingarten* rights are statutory rights created by the NLRA with respect to possible adverse action relating to employment, not with respect to possible criminal liability, and do not have as their sole purpose the protection of the individual employee who seeks representation. Rather, *Weingarten* contemplates that the union representative will safeguard "not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview." 420 U.S. at 260-261. Further, although during a *Weingarten* interview the union representative is present to assist the employee and is expected to provide the employee with a witness to what

[21] Inferentially, the hearing in the instant case. That hearing was initially scheduled for September 19, 1977. It was postponed on September 16, 1977, and on various subsequent dates

[22] *Climax Molybdenum Company, a Division* *Inc.*, 227 NLRB 1189 (1977); *Miranda*, 384 U.S. at 444-445.

actually happened during the interview, the union representative can properly elicit facts favorable to the employer as well as to the employee and is not expected to render the interview an adversary proceeding.[23] Moreover, *Weingarten* is designed partly to empower the union representative to discourage unmeritorious grievances. 420 U.S. at 262-264. In consequence of this *Weingarten* mix of individual employee rights under Section 7 of the Act and any statutory rights and interests possessed by the union institutionally,[24] the *Weingarten* class of cases implicitly hold that the employer is under no obligation affirmatively to advise the employee of his *Weingarten* rights. For similar reasons, although an employee has the statutory right to refuse to begin a *Weingarten* interview without a union representative and to refuse to continue it upon the employer's rejection of an initial request during the interview for such a representative,[25] the *Weingarten* class of cases implicitly hold that if such requests are granted, the employee must proceed with the interview. On the other hand, *Miranda* rights are aspects of the rights to counsel and against self-incrimination which the Constitution affords to individuals as such in connection with criminal investigations. The interrogators are required affirmatively to advise the interrogated person of his *Miranda* rights. 384 U.S. at 478-479. Moreover, the attorney at a *Miranda* interview is expected to act as a wholehearted advocate for his client (subject, of course, to his obligations as officer of the court) and may not ethically subordinate his client's interest to the interests of the bargaining unit or its representative. Also, the interrogated person may terminate his own participation in the interview at any time, even when the interview is attended by the counsel whom he requested. *Miranda*, 384 U.S. at 444-445.[26]

Nor can it be said that the *Miranda* protections are in all respects "greater" than the *Weingarten* protections. While an attorney would likely be more familiar than a union representative with the employee's rights under the criminal law, a union representative would likely be more familiar with the employee's bargaining agreement rights regarding the uniform allowance, retention of his job, and the disciplinary and grievance-arbitration procedure. Furthermore, the union representative costs the employee no money, the representative is ordinarily (as here) immediately available, and the employee is likely to have had some firsthand opportunity to assess the representative's competence. On the other hand, the employee would have to affirmatively seek out an attorney, might well have difficulty finding one whose abilities he knew something about, and would probably have to pay him. Respondent suggests that representation by a lay union steward during a criminal investigation might disadvantage the employee. This contention is somewhat difficult to reconcile with the Postal Service's further contention, discussed *infra*, that affording the employee the right to such participation might interfere with the effectiveness of the postal inspectors' investigation. In any event, the choice of whether to be represented by a union steward, an attorney, both, or neither during an investigation is normally confided to the employee and/or his bargaining representative rather than to the employer who is conducting the investigation of the employee. See *National Can Corporation*, 200 NLRB 1116, 1123 (1972).

In my discussion up to this point, I have assumed with Respondent that Jenkins was entitled to *Miranda* rights during the February 2 interview and that he was afforded such rights. However, I am by no means easy with respect to either assumption. It is true that, at least in some circumstances, interrogation by a postal inspector does not constitute a purely private interrogation, where *Miranda* is inapplicable, but instead may render relevant a determination as to whether *Miranda* attached and was satisfied.[27] However, *Miranda* rights exist only after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, or where special circumstances exist which render the law enforcement officials' behavior such as to overbear the person's will to resist and bring about a confession not freely self-determined.[28] During the February 2 interview in the instant case, Jenkins was told that he was not under arrest, and it is at least arguable that *Miranda* rights were not generated by the fact that Jenkins (himself a law enforcement officer) had come pursuant to the instructions of his superior on the job and by that superior's instructions to leave Jenkins' gun and handcuffs in his locker prior to the interview.[29] Furthermore, when Jenkins asked during the interview whether he could get a lawyer, Hagedorn said that the interview was an investigation and that a lawyer could not sit in on an investigation and further asked whether Jenkins thought he should have legal counseling for defrauding the Government. It is at least arguable that at that point Jenkins was improperly denied any *Miranda* rights which the circumstances of the interview may have generated. *Miranda*, 384 U.S. at 444-445. Indeed, if *Miranda* rights were generated by the circumstances of the February 2 interview, Jenkins

[23] *Weingarten*, 420 U.S. at 260, 262-263; *Climax Molybdenum*, 227 NLRB at 1190; *Keystone Steel & Wire, Division of Keystone Consolidated Industries, Inc.*, 217 NLRB 995 (1975).

[24] However, the Board has recently held that *Weingarten* rights are possessed by employees who are not in a union-represented bargaining unit. *Glomac Plastics, Inc.*, 234 NLRB 1309 (1978).

[25] *Weingarten*, 420 U.S. at 256-259; *Mobil Oil Corporation*, 196 NLRB 1052 (1972), enforcement denied 482 F.2d 842 (7th Cir. 1973) (per then Circuit Judge John Paul Stevens). Portions of the Board's *Mobil* decision were quoted with approval in *Weingarten*, *supra*.

[26] Compare the "*Miranda*" form used by the Postal Service, which states, *inter alia*, "You also have the right to stop answering at any time until you talk to a lawyer."

[27] *United States* v. *Brunson*, 549 F.2d 348 (5th Cir. 1977), cert. denied 434 U.S. 842; cf. *United States* v. *Gardner*, 516 F.2d 334, 339-340 (7th Cir. 1975); *United States* v. *Parr-Pla*, 549 F.2d 660, 663 (9th Cir. 1977), cert. denied 431 U.S. 972.

[28] *Beckwith* v. *United States*, 425 U.S. 341 (1976); *United States* v. *Fitzgerald*, 545 F.2d 578, 580-581 (7th Cir. 1976).

Strachan's and Hagedorn's action in reading a purported *Miranda* warning to Jenkins at the February 2 interview is entitled to virtually no weight in determining whether a *Miranda* warning was constitutionally required. They also read a purported *Miranda* warning to him at the February 3 interview, which was held at Jenkins' own request. Moreover, Strachan testified, "Our instructions with regard to *Miranda* is that *Miranda* comes into application during a criminal investigation at [the] point [when] the interview revolves to an accusatorial position with respect to questions asked the individual in the interview. In other words, before you ask specific questions about an individual's involvement in an alleged violation, *Miranda* [rights are] to be advised to the individual." Strachan did not refer at all to the custodial or related circumstances of the interview.

[29] See *Oregon* v. *Mathiason*, 97 S.Ct. 711, 713-714 (1977); *Fitzgerald*, 545 F.2d 578; *Barfield* v. *State of Alabama*, 552 F.2d 1114 (5th Cir. 1977).

may at least arguably have been entitled to *Miranda* rights (which admittedly he was not afforded) during his May 27 interview with Cruse and Scott about alleged violation of Postal Service rules regarding the uniform allowance. Jenkins attended this interview, as well as the February 2 interview, because his superior instructed him to do so; and as members of the Postal Service security police force, Cruse and Scott had the power to enforce Postal Service rules and regulations and to make arrests (including arrests of postal employees) which could involve the use of handcuffs.[30]

In view of my ultimate conclusion herein that Jenkins' *Weingarten* rights were unaffected by any rights he may also have possessed or been accorded under *Miranda*, I need not and do not determine whether, as to the February 2 interview, he possessed *Miranda* rights and they were honored. However, I do regard as militating against the Postal Service's *Miranda* defense herein its implicit requirement that in each instance involving an interview by postal inspectors (if indeed not by security officers as well), the employee, the interrogators, and the Board must determine whether *Miranda* attached (and, perhaps, whether it was satisfied) before they can determine whether *Weingarten* rights existed. Cf. fn. 28 *supra*. No like problem was presented in *Mt. Vernon Tanker Company* v. *N.L.R.B.*, 549 F.2d 571 (9th Cir. 1977), on which the Postal Service heavily relies. The Court there held, as an alternative basis for rejecting the Board's finding of a *Weingarten* violation, that while "at sea" a seaman does not have the statutory right to refuse to submit to a master's orders to attend a *Weingarten*-type investigatory interview without union representation. Whether a seaman is or is not "at sea" is a good deal easier to determine, for the seaman and the master as well as the Board, than whether *Miranda* attaches and is satisfied. A more significant difference between *Mt. Vernon Tanker* and the instant case is the nature of the interests which, in the Court's view, exclude *Weingarten* rights while a vessel is at sea. The Court relied on Federal law, which charges the ship's master with responsibility for the safety of ship, cargo, and crew and, in order to enable him to discharge this responsibility, gives him authority to maintain strict discipline, including the authority summarily to punish willful disobedience at sea by placing the disobedient seaman in irons and on bread and water. In the instant case the interest which allegedly excludes *Weingarten* is the public interest in the postal inspectors' discharge of their power by statute and regulation to enforce, against the general public as well as against postal employees, laws regarding property of the United States in the custody of the Postal Service, the use of the mails, and other postal offenses.[31] The laws enforced by postal inspectors, unlike orders issued by the master of a ship, are enforced through conventional civil and criminal procedures and do not involve the safety at sea of human beings, ships, and cargo. Of course, *Weingarten* rights extend to interviews regarding alleged criminal acts. Indeed, *Weingarten* itself involved a grocery store employee who was accused of fraudulently underpaying for groceries and of eating lunches at a store facility without paying for them. See also *Mobil Oil*, 196 NLRB 1052.

Furthermore, the Postal Service's conduct evinces a conclusion by it that adherence to *Weingarten* does not in fact impair effective performance of the postal inspectors' duties. Thus, Holmes' memorandum about the uniform-allowance investigation to Moore on June 29, 1977, some 3 weeks after Holmes received the report from Security Officers Cruse and Scott about their interview with Jenkins in Union Steward Daniels' presence, suggests that the files of 12 security officers who during interviews with the postal inspectors had been given their *Miranda* rights and who had then declined to discuss the uniform-allowance matter or were suspected of making false negative statements could not be handled by use of documents obtained through grand jury subpena and should "receive administrative consideration in the same manner as the . . . Jenkins matter."[32] Further, the Postal Service issued to Jenkins, after the Cruse-Scott interview where he was afforded *Weingarten* rights and allegedly without regard to anything developed during his interview with Postal Inspectors Hagedorn and Strachan, substantially the same letter of warning which it issued to 42 other employees on the basis of interviews with the postal inspectors where no union representative was present. Moreover, Regional Chief Inspector Lawrence's May 1977 letter to Division Postal Inspector Moore indicates that the Postal Service's 1975 national agreement with other postal crafts contains an express provision affording the right to union representation during at least certain kinds of investigative interviews. Indeed, page 11 of the Postal Service's "Verified Memorandum in Supprt of Motion for Summary Judgment," filed in September 1977 and in May 1978, avers, "Respondent Postal Service [has] recognized [the] general principle [of *Weingarten*] in our national craft bargaining units since 1973—way before the Supreme Court endorsed the Board's construction of Section 7 of the Act."

For the foregoing reasons I reject the Postal Service's defenses to the complaint to the extent that such defenses rely on the Supreme Court's *Miranda* decision.

In its brief the Postal Service also suggests in passing that it was under no duty to comply with any request for union representation made by Jenkins, because union representa-

[30] The Code of Federal Regulations provides, "Members of the U.S. Postal Service security force shall exercise the powers of special policemen provided by 40 U.S.C. 318 and shall be responsible for enforcing the regulations in this section in a manner that will protect Postal Service property." 39 CFR 232.6(p). Section 232.6 forbids conduct on postal property which includes disorderly conduct, carrying weapons or explosives, gambling, use of alcohol or drugs, creating hazard to persons or things, dangerous driving, and destruction of property. 40 U.S.C. §318 gives special policemen, on Federal property, the powers of sheriffs and constables (except service of civil process) to enforce laws for the protection of persons and property, to prevent breaches of the peace, to suppress affrays or unlawful assemblies, and to enforce certain administrative rules and regulations. Rather similar provisions are included in the Postal Service's security force manual, which erroneously refers to 40 U.S.C. §18 rather than §318. The security force manual specifically empowers security personnel "to enforce Postal Service rules and regulations" and contains instructions regarding use of force in arrests, specifically including arrests of postal service employees, and regarding use of handcuffs.

[31] 18 U.S.C. §3061; 39 U.S.C. §2601(a)(1); 39 CFR 232.5, 946.1(g). These powers include the power to make and disburse collections regarding improperly paid money orders, customs duty, damage by the public to postal equipment, c.o.d. charges embezzled by an employee, certain kinds of revenues, discrepancies in postmasters' accounts, salary overpayments, or improper payments of uniform allowances.

[32] However, this was not in fact done (fn. 10 *supra*).

tives may have been subjects of the very investigation directed partly against Jenkins. Moreover, among the security officers who eventually received letters of warning in consequence of this investigation were two of the union representatives whom Jenkins identified to the postal inspectors during the February 2 interview. However, there is no claim or evidence that any investigation was ever directed at the other two whom he named or at the steward who attended Jenkins' May interview; nor did Jenkins express preference for any particular union representative. I note, moreover, that two security officers in charge conducted Jenkins' second interview, although another security officer in charge later received a letter of warning in connection with the uniform-allowance investigation and still another was found by Postal Inspector Holmes to have spent $118 of his uniform allowance at one time at the X Company for five pairs of shoes which could not be produced because his dog allegedly chewed them up. Under these circumstances I reject any reliance by the Postal Service on the fact that the uniform-allowance investigation included union stewards. Cf. *Service Technology Corporation, a subsidiary of LTV Aerospace Corporation*, 196 NLRB 845 (1972); *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977).

For the foregoing reasons I conclude that the Postal Service violated the PRA and Section 8(a)(1) of the NLRA by requiring Jenkins to submit to his February 2, 1977, interview with the postal inspectors while denying his request for union representation at the interview.

Conclusions of Law

1. The Board has jurisdiction over this matter by virtue of Section 1209 of the PRA.

2. The Union is a labor organization within the meaning of the NLRA.

3. The Postal Service violated Section 8(a)(1) of the NLRA on February 2, 1977, by requiring employee Eddie L. Jenkins to submit to an interview with Postal Service inspectors, which he reasonably feared might result in his discipline, while denying his request for union representation at the interview.

The Remedy

Having found that the Postal Service has violated the NLRA in certain respects, I shall recommend that it be required to cease and desist therefrom and from like or related conduct and to post appropriate notices. The question remains of what affirmative relief, if any, should be provided to Jenkins individually.

Initially, I consider what relief would be appropriate if the May 27 interview with Cruse and Scott had never been held and if no grievance had ever been filed in connection with Jenkins. In early *Weingarten* cases the Board without discussion afforded no remedy for employees who suffered adverse personnel action as the end result of events which included interviews regarding alleged employee deficiencies during which *Weingarten*-required union representation was refused. See, e.g., *Mobil Oil*, 196 NLRB 1052; *Detroit Edison Company*, 217 NLRB 622 (1975); *Keystone Steel & Wire*, 217 NLRB 995.[9] However, in more recent decisions, the Board has required the restoration of the *status quo ante* by requiring affirmative correction of such personnel action. *Southwestern Bell Telephone Company*, 227 NLRB 1223 (1977) (reinstatement with backpay for employees discharged or suspended for making false claims that a fellow employee's injury was work related); *Certified Grocers of California*, 227 NLRB 1211 (1977) (backpay and excision of layoff notice to an employee laid off for 2 weeks because of low production).

Still laying to one side the May 1977 interview and the August 1977 grievance proceeding, these decisions plainly require an order that the July 22 warning notice be removed from Jenkins' file. Contrary to the Postal Service, I conclude that they also call for an order requiring the repayment to Jenkins of the $216.95 deducted from his salary pursuant to Jenkins' written authorization. The employers' conduct in the instant case, in *Southwestern Bell*, and in *Certified Grocers* was found unlawful for the very reason (among others) that if the employer had permitted a union representative to participate in the *Weingarten*-type interview, the adverse personnel action which the employer actually took after the interview might not have been taken or might have been less severe. See *Weingarten*, 420 U.S. at 262 264. At least unless the employer can affirmatively show that he would have taken the same action even if the union representative had been permitted to attend, the doubts created by his own unlawful conduct about what he would have done should in fairness be resolved against him.[9] I regard as unmeritorious the Postal Service's contention that it should not be required to return the $216.95 to Jenkins because this payment by him did not constitute discipline and was paid pursuant to his written authorization. Division Postal Inspector Moore testified that if Jenkins had not complied with the Postal Service's demand for payment, he "could" have been subject to disciplinary action; and, indeed, Moore did not know whether Jenkins would have been fired if he had not paid.[9] Moreover, if Jenkins did not in fact owe some or all of the $216.95, or even if he believed he did not, the effect on him of having to pay it was indistinguishable from the effect of a fine. The Postal Service's contention that this payment did not constitute discipline because Jenkins in fact owed the money implicitly resolves in the Postal Service's favor the doubts created by the Postal Service's unfair labor practices.

[9] The Board has not only required the correction of adverse personnel action imposed on employees to punish them for refusing to submit to a *Weingarten*-type interview without union representation—in other words, for refusing to abandon a Section 7 right. The reasoning which supports affirmative relief for this kind of personnel action does not necessarily call for like relief where, as here, the employer asserts that the adverse personnel action was based on the alleged employee deficiencies which was the subject of the interview.

[9] *N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir. 1938), cert. denied 304 U.S. 576; *Television Wisconsin, Inc.*, 224 NLRB 722, 780 781 (1976). Indeed, if Jenkins' request for union representation had led Hagedorn and Strachan to exercise the *Weingarten* permitted option of terminating the interview at that point, the Postal Service might have treated Jenkins like the employees who claimed their *Miranda* right of silence and against whom, so far as the record shows, no action was ever taken. Jenkins' case aside, the letters of warning were issued only to employees who admitted misusing their uniform allowances.

[9] The form signed by Jenkins states that the authorized arrangements for payment are to Jenkins' "financial advantage."

The Postal Service contends that in any event no affirmative relief should be afforded to Jenkins on the basis of the February 2 interview with the postal inspectors because of the May 27 interview with the security officers during which Jenkins was afforded *Weingarten* rights and because the July 22 letter of warning issued to Jenkins was allegedly issued without regard to the February 2 interview. Of course, all of the evidence regarding the Postal Service's real basis for issuing the July 22 letter lies solely within the knowledge of Postal Service management personnel and the Postal Service's own records. The only substantial evidence produced by the Postal Service in support of its contention that Jenkins' interview with Postal Inspectors Hagedorn and Strachan did not affect the decision to issue the letter of warning consists of certain portions of Moore's and Holmes' testimony. As previously noted, Postal Inspector Holmes, with some corroboration by Moore, testified that Holmes had never prepared an investigative memorandum regarding his criminal investigation of Jenkins and that nobody had ever asked to see Hagedorn's and Strachan's field notes, which Holmes had retained in his office. Further, Holmes testified that Cruse and Scott never contacted him regarding Jenkins. Also, Moore testified that so far as he knew, in the Postal Service's handling of Jenkins' grievance, no data about Jenkins from Holmes' criminal task force were used. For demeanor reasons I believe that Holmes and Moore were truthful in so testifying.[36] However, during the May 27 interview Cruse asked Jenkins what had happened during the February 2 interview, and Jenkins replied; Scott skipped questions on his prepared list after ascertaining from Jenkins that the same questions had been asked during the February 2 interview; and Cruse said, in effect, that Jenkins was not going to be disciplined in consequence of the May 27 interview. Moreover, the letter of warning eventually issued to Jenkins had the same date and essentially the same contents as the letters of warning to others admittedly issued on the basis of the postal inspectors' interviews. Further, Cruse and Scott had 11 days between their May 27 interview with Jenkins and the June 7 date of their memorandum to discuss the February 2 interview with Hagedorn and Strachan, and there is no testimonial denial that such conversations occurred.[37] Also, in purportedly describing the May 27 conversation, the memorandum contained some assertions which were inaccurate and some whose source the record fails to show. In addition, Supervisor Pizzurro was not called as a witness to specify the evidence on which he based his July 22 letter of reprimand to Jenkins, and Postal Inspector Witkowski was not called as a witness to specify the evidence on which he based his August 15 recommendation that Jenkins' letter of warning be sustained, which recommendation was adopted by Moore on the basis of Witkowski's memorandum. Finally, Jenkins' February 18 authorization for the installment deduction of $216.95 from his paychecks was referred to in the June 7 Cruse-Scott memorandum, was relied on in Pizzurro's July 22 letter of warning, and was included in the summary of management's position contained in Witkowski's August 15 memorandum to Moore regarding Jenkins' grievance. The payments so authorized had all been made before the May 27 Cruse-Scott interview.

On this state of the record, I decline to find that the July 22 letter of warning was issued and upheld without regard to the Hagedorn-Strachan interview. In the first place, all the relevant documents refer to Jenkins' $216.95 deduction authorization, which stemmed almost entirely from the Hagedorn-Strachan interview and was not affected at all by the Cruse-Scott interview. Furthermore, the Postal Service's failure to ask its witnesses Hagedorn and Strachan whether they relayed an oral report of their interview to Cruse, Scott, Pizzurro, or Witkowski and the Postal Service's failure to call these last four individuals as witnesses lead me to infer that such oral reports were made. *Zapex Corporation*, 235 NLRB 1236 (1978).[38] This inference is strengthened by Scott's abandonment of questions answered in the Hagedorn-Strachan interview and by the wholly unexplained discrepancies between the contents of the Cruse-Scott interview and the report thereof which they submitted to management. Finally, the Postal Service has failed to discharge its burden (fn. 34 *supra*) of establishing that the letter of warning and its affirmance were not based at all on the Hagedorn-Strachan interview, particularly in view of the Postal Service's continued reliance on Jenkins' deduction authorization, Cruse's assurance to Jenkins that he would not be disciplined in consequence of the Cruse-Scott interview, and the fact that Jenkins' letter of warning contains nothing on its face to distinguish it from the 42 letters admittedly based on the postal inspectors' interviews.

Further, Respondent contends that no affirmative relief should be afforded to Jenkins, because the grievance filed on his behalf did not challenge the propriety of the $216.95 "letter of demand" which Jenkins had complied with and because the grievance regarding his letter of warning was not taken to arbitration.[39] This contention misconceives the reasons why Respondent's conduct was unlawful, the reasons for requiring Respondent to remedy it, and Respon-

[36] There is no evidence about whether other Postal Service personnel could have seen these notes without Holmes' knowledge. Postal Service counsel obtained these notes by subpena but elected not to offer them into evidence.

[37] As previously noted, Hagedorn and Strachan testified on the Postal Service's behalf, but they were not asked whether such conversations occurred. Cruse and Scott were still in the Postal Service's employ and were available as witnesses, but they were not called.

[38] I regard as immaterial Moore's ignorance that the actions by his subordinates which were approved by him were in fact based partly on the Hagedorn-Strachan interview. *Jackson Sportswear Corporation*, 211 NLRB 891, 902 (1974).

[39] The material attached to Respondent's prehearing motions for summary judgment (fn. 2 *supra*) indicates that the "letter of demand" and related action were grievable and mandatorily arbitrable, and the General Counsel does not appear to contend otherwise. This material also indicates that although an employee may file a grievance without the Union's participation, only the Union has the power to appeal or procure arbitration of an adverse determination. The record fails to show whether Jenkins asked the Union to appeal his grievance regarding the letter of warning. Jenkins never filed a lawsuit or an 8(b)(1)(A) charge against the Union attacking as a breach of the duty of fair representation the Union's failure to appeal his grievance. However, such proceedings against the Union would put at issue not the merits of the grievance against the Postal Service but whether the Union's conduct in connection with the grievance was arbitrary, discriminatory, or in bad faith. *Carpenters Local Union # 1104 (The Law Company, Inc.)*, 215 NLRB 537 (1974); *United Steelworkers of America, Local Union 2610 (Bethlehem Steel Corporation)*, 225 NLRB 310 (1976); *Clerks and Checkers Local No. 1593, International Longshoremen's Association, AFL-CIO (Strachan Shipping Company, et al.)*, 234 NLRB 511, 519 (1978). As to such an issue, handicaps which Respondent's *Weingarten* violation imposed on the posture of Jenkins' case might well have entered into a decision to carry his grievance no further.

dent's rights after affording that remedy. Denial of *Weingarten* rights during an investigatory interview is unlawful partly because such denial may render the evidence adduced during the interview inaccurate or incomplete. Also, once the employer makes a decision on the basis of such defective evidence, "it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them." *Weingarten*, 420 U.S. at 263-264. In short, Respondent's unlawful denial of *Weingarten* rights at the initial investigatory interview could have contaminated, as to any Jenkins grievance about the deduction or the warning letter, the entire functioning of the grievance-arbitration procedure, by affecting to Jenkins' detriment the evidence presented to Respondent which led it to issue the two demands for payment and the letter of warning, which documents may have rendered Respondent disposed to discount corrections or amplifications of the tainted evidence on which Respondent based its initial public commitment about what action should be taken.[40] In this connection, I note that both demands for payment alleged that Jenkins had purchased from his uniform allowance some items which did not comply with Postal Service uniform requirements and that Jenkins' letter of warning alleged that he was reimbursing the Postal Service for "non-uniform shoes." These documents aside, there is no evidence whatever that Jenkins bought any shoes which did not conform to Postal Service uniform specifications. Moreover, as a practical matter, which party actually has in hand the disputed $216.95 at the outset of the investigation (as Jenkins did before the February 1977 interview) may in itself have some effect on who has it at the end. After restoring the *status quo ante*, Respondent will be free, so far as the NLRA is concerned, to conduct a lawful investigation of Jenkins' use of his uniform allowance and, by using lawful procedures, to take such consequent and lawfully motivated personnel action as it wishes. While the evidence in the record before me may well point to a misuse of Jenkins' uniform allowance, this question was not fully litigated, and available evidence favoring Jenkins may not have been offered.[41]

Finally, Respondent contends that affirmative relief to Jenkins is precluded by Section 10(c) of the Act, which provides, "No order of the Board shall require the reinstatement of any individual who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." Of course, Jenkins has not been suspended or discharged, and my recommended Order does not call for his reinstatement or for any backpay. In any event, the Supreme Court has held that Section 10(c) does not deprive the Board of power to order reinstatement and backpay for employees discharged because their employer thought their work could be done more cheaply by an independent contractor and therefore contracted out the work without complying with his legal duty to consult their bargaining representative, even though it was not possible to say that if he had so bargained, an agreement would have been reached under which the employees would have been retained. *Fibreboard Paper Products Corporation* v. *N.L.R.B.*, 379 U.S. 203 (1964); see also *Southwestern Bell*, 227 NLRB 1223; *Certified Grocers*, 227 NLRB 1211; *Strachan Shipping*, 234 NLRB at 513-514; *Port Drum Co.*, 180 NLRB 590 (1970); *United Steelworkers of America (Inter-Royal Corp.)*, 223 NLRB 1184 (1976).

For the foregoing reasons I conclude that the remedial order should include excision of the letter of warning from Respondent's records and files and repayment to Jenkins of the $216.95 deducted from his salary, with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[42]

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the NLRA, I hereby issue the following recommended:

ORDER[43]

Respondent, United States Postal Service, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Requiring any employee to take part in an interview without union representation if such representation has been requested by the employee and he reasonably fears that the interview will lead to disciplinary action against him.

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 National Labor Relations Act.

[40] Cf. *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967); *Morrison-Knudsen Company*, 213 NLRB 280, fn. 2, 287 (1974), enfd. 521 F.2d 1404 (8th Cir. 1975).

[41] The Postal Service contends that Jenkins should be discredited because he "falsely signed certifications on uniform allowance vouchers," "concededly misused his uniform allowance, [and] made voluntary restitution of the money to escape criminal charges." I perceive no evidence that Jenkins paid the $216.95 to escape criminal charges rather than to escape discharge or other discipline. Also, for the reasons stated in the text, it cannot be found or assumed in the instant case that Jenkins improperly signed these vouchers. Jenkins' statement to Hagedorn and Strachan about buying shoes for personal use was not made until after they told him, in effect, that concealment would be harder on him than admitting wrongdoing (which assertion was likely untrue; see fn. 34 supra) and had denied his request for union representation (and, at least arguably, for a lawyer).

The Postal Service heavily relies on his deduction authorization. However, whether or not Jenkins had misused his uniform allowance, the fact remains that the Postal Service had paid the amounts called for in the vouchers which Jenkins signed and had charged such payments to his uniform allowance. Accordingly, Jenkins' testimony, in effect, that in signing this authorization he had agreed to "pay back" the Postal Service is equally consistent with a view by him that he had misused his allowance and a view by him that he had not. The words "I acknowledge that I am indebted to the Postal Service" were printed on the form he signed. The record fails to show whether, without this language, the Postal Service would have accepted his arrangement to pay off by installments an amount which he allegedly already owed and which could likely have been covered by a single 2-week paycheck. See fn. 35 supra. This authorization aside, at no time after the interview where he was denied *Weingarten* rights did Jenkins concede misusing his uniform allowance.

[42] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[43] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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

(a) Strike and physically remove from its records and files any reference to the letter of warning issued to Eddie L. Jenkins on July 22, 1977.

(b) Pay Eddie L. Jenkins $216.95, with interest, as set forth in that portion of this Decision entitled "The Remedy."

(c) Post at its facilities in Chicago, Illinois, copies of the attached notice marked "Appendix."[44] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[44] In the event that this Order is enforced by a judgment of a 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."

APPENDIX

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

After a hearing at which all parties had the opportunity to present evidence, it has been decided that we violated the law. We have been ordered to post this notice. We intend to carry out the order of the Board and abide by the following:

WE WILL NOT require any employee to submit to an interview with our representatives which he reasonably fears might result in his discipline while denying his request for union representation during the interview.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

It has been found that we issued a July 22, 1977, letter of warning to Eddie L. Jenkins, and demanded and received $216.95 from him, in consequence of our conclusions based partly on an interview with Jenkins during which he was unlawfully denied union representation. WE WILL strike and physically remove from our records and files any reference to this letter of warning and return the $216.95 to Jenkins, with interest. The National Labor Relations Act and the Board's Order permit us to issue a second letter of warning to Jenkins and to require another money payment from him, both motivated by the same alleged conduct by him which led to the July 22, 1977, letter of warning and the $216.95 payment by him, by using means and procedures which do not violate the National Labor Relations Act, as amended.

UNITED STATES POSTAL SERVICE

CHIEF POSTAL INSPECTOR
Washington, DC 20250

May 24, 1982

Mr. William Burrus
General Executive Vice President
American Postal Workers Union, AFL-CIO
817 14th Street, N.W.
Washington, DC 20005

Dear Mr. Burrus:

This replies to your May 10, 1982, letter to Senior Assistant Postmaster General Joseph Morris concerning the role of stewards or union representatives in investigatory interviews. Specifically, you expressed concern that the Inspection Service has adopted a policy that union representatives be limited to the role of a passive observer in such interviews.

Please be assured that it is not Inspection Service policy that union representatives may only participate as passive observers. We fully recognize that the representative's role or purpose in investigatory interviews is to safeguard the interests of the individual employee as well as the entire bargaining unit and that the role of passive observer may serve neither purpose. Indeed, we believe that a union representative may properly attempt to clarify the facts, suggest other sources or information, and generally assist the employee in articulating an explanation. At the same time, as was recognized in the Texaco opinion you quoted, an Inspector has no duty to bargain with a union representative and may properly insist on hearing only the employee's own account of the incident under investigation.

We are not unmindful of your rights and obligations as a collective bargaining representative and trust that you, in turn, appreciate the obligations and responsibilities of the Inspection Service as the law enforcement arm of the U. S. Postal Service. In our view, the interests of all can be protected and furthered if both union representative and Inspector approach investigatory interviews in a good faith effort to deal fairly and reasonably with each other.

Sincerely,

W. H. Fletcher

Texaco, Inc., Houston Producing Division *and* Oil, Chemical and Atomic Workers International Union, Local No. 4-367, AFL-CIO. Case 23-CA-2271

November 20, 1967

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND ZAGORIA

On June 8, 1967, Trial Examiner Ivar H. Peterson issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in and was not engaging in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Union filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, briefs, and the entire record, and finds merit in certain of the exceptions of the General Counsel and the Union. Accordingly, the Board adopts the findings of the Trial Examiner only to the extent consistent herewith.

On the morning of November 5, 1965,[1] Alaniz, a company porter for some 20 years, was using kerosene to spray weeds on company property. He placed in his car a 2-gallon can of kerosene, concededly belonging to the Company. At lunchtime when Alaniz started to go home in the car, the production foreman saw the can in the car, confronted him concerning the kerosene, and suspended him without pay. After lunch Alaniz attempted to return to work, but was again told he was suspended. At the time Alaniz was part of a unit of employees represented by the Union.[2] He was not, though, a union member. Later in the day, Whitten, the Union's field steward, learned of the incident and called the foreman about the matter. He requested that it be handled on the local level, complained that the Union should have been notified of the incident, and added that Alaniz needed representation. The foreman replied that he had already reported the matter to the Company's district superintendent and, thus, that the matter was out of his hands. He also stated Alaniz did not need union representation as he was not a union member. Alaniz had, as noted, worked as a porter for some 20 years, had something less than a fourth grade education, could read English very little, spoke Spanish at home, and testified in this proceeding through an interpreter.

The company controller's office undertook to investigate the matter and scheduled a meeting for November 17. Alaniz was extended the opportunity to attend the meeting to defend himself. The Union, on the ground that Alaniz was within its recognized unit, requested the right to represent him at the meeting. The request was denied. The meeting was held as scheduled; Alaniz attended and at the outset requested that the Union be permitted to represent him. His request was also rejected by the Company. One of its representatives stated there would be no interview if Alaniz insisted on union representation, adding that Alaniz was free to go if he wished. However, Alaniz remained, was questioned, and then was given a statement prepared by the Company to sign. In the statement, which he signed, Alaniz conceded he had taken 2 gallons of Company kerosene to spray weeds but not "with the thought of stealing but only because of the convenience," promised to do his job in a manner which would do credit to him, and asked that consideration be given "on past service to Texaco." Alaniz was given a suspension of 24-1/2 days (16-1/2 working days) without pay and restored to duty on November 30. By letter dated December 3, the Company notified Alaniz that it felt the suspension lenient and wholly justified and warned him that any future similar or other disciplinary offense would subject him to discharge.

During the period here involved there was in existence a company-union contract containing a grievance procedure. Neither the Union nor Alaniz filed a grievance at any time.

The complaint alleges in substance that the Company violated Section 8(a)(1) and (5) of the Act by refusing to allow a union representative to be present at the November 17 meeting. The Trial Examiner concluded that the alleged 8(a)(5) violation could be found only if the meeting and its outcome involved the adjustment of a grievance within the meaning of Section 9(a) of the Act. But he found tha no grievance had been raised concerning Alaniz' situation and that even assuming it had, the meeting was not concerned with its adjustment. There was, thus, in his view of the case no 8(a)(5)

[1] All dates refer to 1965

[2] The Union is the recognized bargaining agent of the following appropriate unit

All hourly rated production and maintenance employees in the Company's South Texas Division (except clerical, administrative, technical, and professional employees, all employees at the Houston garage and warehouse, all Divisional employees, temporary chainmen and rodmen, foremen, rotary drillers, head roustabouts, and all other supervisory employees)

violation.[3] With respect to the alleged 8(a)(1) violation, he found no interference with Alaniz' rights in denying him union representation at the meeting because he could have filed a formal grievance and thereby assured himself such representation. In view of his findings, the Trial Examiner recommended the complaint be dismissed. We are of the opinion, however, that the Trial Examiner took too narrow a view of the issues before him.

As the record shows, the November 17 meeting was not simply part of an investigation into some alleged theft and Alaniz was not invited to attend solely to provide the Company's representatives with information. Rather the meeting was concerned essentially with Alaniz and his alleged theft, the facts of which were known to management representatives some 2 weeks earlier, and more specifically with the Company's concluding its "case" against Alaniz in order to provide a "record" to support disciplinary action, if deemed appropriate. Thus it is clear that on November 17 the Company sought to deal directly with Alaniz concerning matters affecting his terms and conditions of employment. Yet, as noted, the employees in the unit had selected the Union to deal with the Respondent on such matters and there is no evidence that either Alaniz – assuming he could have done so – or the Union had waived to any extent the right of representation or had agreed to channelize disputes concerning such right into the procedures of the contract grievance provisions. Consequently, we find in the circumstances here that the Respondent's refusal to respect Alaniz' request that the bargaining representative be permitted to represent him at the meeting interfered with and restrained him in the exercise of his rights guaranteed by Section 7 of the Act. Also in view of Alaniz' request for union representation at the meeting and the Union's evident willingness to represent him—both conveyed to management—we find that the Respondent's refusal to deal with the Union on that occasion transgressed its statutory obligation to bargain with the Union concerning the terms and conditions of employment of the employees it represents. Accordingly, we find that the Respondent by the above conduct violated Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It has been found that the Respondent unlawfully denied the request of Alaniz for representation by the Union and refused to deal with the Union at the November 17 meeting. Consequently, the meeting and its results are tainted by Respondent's unlawful activities, and it is, therefore, necessary in order to provide a full and effective remedy to recreate insofar as possible the status quo prior to the meeting. Accordingly, we shall order the Respondent to strike from its records any references to the meeting and what occurred there, including all copies of the statement signed by Alaniz at the close of the meeting and the December 3 letter of reprimand sent Alaniz. We shall also order it to revoke its decision that Alaniz be suspended for 24-1/2 days because of his alleged misconduct on November 5, and so notify him. We shall further order the Respondent to give Alaniz the original (i.e., signed copy) of the statement he signed on November 17, and notify him that it is withdrawing and considering of no effect its letter of reprimand dated December 3.

The General Counsel and Union request that we also order the Respondent to make Alaniz whole for such loss of pay and other benefits he suffered as a result of his suspension. However, Respondent's illegal conduct occurred after Alaniz was suspended without pay and it is not alleged that the suspension itself was unlawfully caused. Furthermore, that Respondent would have reinstated Alaniz with backpay had it dealt with the Union on November 17 is at best a speculative consideration concerning the merits of Respondent's disciplinary action, and is not for us to resolve. However, the possibility that Respondent's unlawful conduct did adversely affect Alaniz can be fully remedied by ordering in addition to those matters covered above that Respondent meet with Alaniz and the Union upon Alaniz' request within 5 days of the date of this Decision and Order for a consideration *de novo* of those matters dealt with at the November 17 meeting. We shall also order that the Respondent take no further action with respect to Alaniz' alleged misconduct until after the expiration of the above specified 5-day period or, if Alaniz requests a meeting, until after such meeting has been concluded.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material, the Union has been the exclusive representative of the employees in a unit,

[3] Sec. 9(a) provides in part that an employee has the right to present a grievance directly to his employer and have it adjusted without intervention of the bargaining representative, providing "that the bargaining representative has been given the opportunity to be present at such adjustment." That provision on its face is concerned with a situation where an employee is not, contrary to the matter before us, seeking union representation. Consequently, finding the above part of Sec 9(a) inapplicable does not dispose of the 8(a)(5) issue before us

of which Alaniz has been at such times a member, appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. By denying Alaniz his request that the Union represent him at the November 17, 1965, meeting, the Respondent violated Section 8(a)(1) of the Act.

5. By denying the Union the right to represent Alaniz in accordance with his request at the November 17, 1965, meeting, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. All exceptions other than those relating to the aforesaid unfair labor practices are without merit and are hereby overruled.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Texas, Inc., Houston Producing Division, Freer, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing any employee in the unit of which Oil, Chemical and Atomic Workers International Union, Local No. 4-367, AFL-CIO, or any other labor organization, is the legal bargaining representative permission to be represented by such labor organization at any meeting convened by the Employer in which the employee is questioned about, or required to defend himself against, his own alleged misconduct in the course of his duties or occurring on, or in relation to, the Respondent's property where the employee requests representation at the meeting by said labor organization.

(b) Refusing permission to Oil, Chemical and Atomic Workers International Union, Local No. 4-367, AFL-CIO, or any other labor organization, to attend any meeting and to represent any employee at such meeting who is a member of a unit of which it is the legal bargaining representative where the purpose of such meeting is to question the employee about or to require him to defend himself against his own alleged misconduct in the course of his duties or occurring on, or in relation to, the Respondent's property where the employee requests representation at the meeting by said labor organization.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization to form labor organizations, to join or assist the above-mentioned Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

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

(a) Strike and physically remove from its records and files any reference to the meeting of November 17, 1965, and to decisions or actions based upon that meeting, including all copies of the statement signed by Alaniz on that date and all copies of the letter of reprimand dated December 3, 1965; but nothing in this Order shall be construed as adversely affecting Alaniz' reinstatement on November 30, 1965.

(b) Revoke its decision, and notify Alaniz that it has revoked said decision, that he be suspended without pay for 24-1/2 days because of his alleged misconduct on November 5, 1965.

(c) Return to Alaniz the signed original statement he signed on November 17, 1965, if it still has possession of such statement, and notify him that it is withdrawing and considering of no effect its letter of reprimand dated December 3, 1965.

(d) Meet with Alaniz and the Union as his representative for purposes of considering *de novo* those matters dealt with at the November 17, 1965, meeting if within 5 days of the date of issuance of this Order Alaniz requests such a meeting, taking no further action with respect to Alaniz' alleged misconduct on November 5, 1965, until after the above-specified 5-day period or, if a meeting is requested, until after said meeting has been concluded.

(e) Post at its place of business, Freer, Texas, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 23, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

[4] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order"

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board and in order to effectuate

the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse any employees in the unit of which Oil, Chemical and Atomic Workers International Union, Local No. 4–367, AFL–CIO, or any other labor organization, is the legal bargaining representative permission to be represented by such labor organization at any meeting we hold with the employee for the purpose of questioning him about, or having him defend himself against, his alleged misconduct.

WE WILL NOT refuse permission to Oil, Chemical and Atomic Workers International Union, Local No. 4–367, AFL–CIO, or any other labor organization, to attend any meeting and represent any employee who is a member of a unit of which it is the legal bargaining representative where an employee attends a meeting set up by the Company for purposes stated above and the employee requests the Union be present to represent him.

WE WILL remove from our files all papers and other references to the November 17, 1965, meeting with employee Alaniz and rescind all actions based in whole or in part upon such meeting, except our actions shall not affect his reinstatement on November 30, 1965.

WE WILL upon the request of Alaniz meet with him and the Union as his representative to consider anew the matters taken up at the November 17, 1965, meeting, and shall take no further action with respect to his alleged misconduct until after such meeting, if he requests it, has been held.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

TEXACO, INC., HOUSTON PRODUCING DIVISION
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston, Texas 77002, Telephone 228-0611.

United States Postal Service *and* American Postal Workers Union, Columbus, Ohio Area Local. Case 9-CA-13926(P)

June 19, 1980

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND TRUESDALE

On March 14, 1980, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, United States Postal Service, Columbus, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge: Upon a charge filed on May 31, 1979, by the American Postal Workers Union, Columbus, Ohio Area Local, referred to below as the Union, the Regional Director for Region 9 of the National Labor Relations Board (herein called the Board), on behalf of the General Counsel, issued the complaint herein on July 19, 1979, alleging that the Respondent, United States Postal Service, violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended,[1] by suspending employee Betram J. Wilson for 5 days without pay because he pressed a grievance. Respondent, by its timely answer, denied commission of the alleged unfair labor practices.

Upon the entire record, including the testimony and demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND THE LABOR ORGANIZATION INVOLVED

The Board has jurisdiction over the subject matter of the complaint by virtue of Section 1209 of the Postal Reorganization Act.[2] The facility involved in this case is Respondent's Air Mail Facility at Columbus, Ohio. It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Union is the recognized collective-bargaining representative of a unit of Respondent's employees at its Columbus, Ohio, mail facilities, including the Air Mail Facility and the Main Post Office at 850 Twin Rivers Drive. Article IV of the applicable current collective-bargaining agreement between Respondent and the Union is entitled "Grievance-Arbitration Procedure" and provides in pertinent parts:

> Section 1. Definition. A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.
>
> Section 2. Grievance Procedure—Steps

[1] We hereby affirm the Administrative Law Judge's conclusion that the factual situation at issue in this proceeding is comparable to prior cases wherein the Board has held that obscenities uttered by an employee as part of the *res gestae* of concerted protected activity were not so flagrant or egregious as to remove the protection of the Act and warrant the employee's discipline. E.g., *Firch Baking Company*, 232 NLRB 772 (1977); *American Telephone & Telegraph Co.*, 211 NLRB 782 (1974); *Thor Power Tool Company*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965). We also specifically reject the argument made in Respondent's exceptions that *Atlantic Steel Company*, 245 NLRB No. 107 (1979), mandates a different conclusion.

In *Atlantic Steel*, a Board panel agreed to defer to an arbitrator's decision that the respondent had lawfully discharged an employee for insubordination. The employee had asked his foreman a question about overtime assignments, had received an answer, and had then uttered an obscene characterization of the foreman or his answer as the foreman walked away. In finding that the arbitral decision upholding the employee's discharge was not repugnant to the Act, the majority emphasized that his obscenity was unprovoked and was made on the production floor during his working time. Apart from the procedural distinctions between Board review of an arbitral award under *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), and Board review of an administrative law judge's decision, *Atlantic Steel* is factually quite distinguishable from the present case. Wilson, the discriminatee herein, had received supervisory permission to discuss an employee's potential grievance, was engaged in the formal investigation of that grievance in his capacity as a steward, and uttered a single, spontaneous obscene remark, provoked at least in part by the failure of the supervisor with whom Wilson was speaking to provide an immediate and direct answer to Wilson's inquiries. We agree with the Administrative Law Judge that under these circumstances Wilson's use of obscene language was not so egregious as to remove the Act's protection from his grievance activities.

Member Jenkins did not participate in the *Atlantic Steel* Decision, and finds it unnecessary to distinguish that case.

[1] 29 U.S.C. §151, *et seq.*

[2] 39 U.S.C. §101, *et seq.*

> Step 1: (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance.

On April 17, 1979,[3] part-time flexible employee James Morgan, a bargaining unit employee who worked a 6-hour shift (4:30 a.m.–10:30 a.m.) at Respondent's Columbus, Ohio, Air Mail Facility brought a complaint to the Union's steward, Betram Wilson. Wilson, a 13-year employee of Respondent, was working as a claims and inquiry clerk at Respondent's Main Post Office at 850 Twin Rivers Drive, Columbus, Ohio. The two met in a hall at the Main Post Office after Wilson had obtained permission from his supervisor to leave his work station.

Wilson's duties as the union steward included investigation of employee complaints regarding supervisors, warnings and other disciplinary action, discrimination, and other matters affecting unit employees.

Part-time employee Morgan told Wilson that, after completing 6 hours of work at the Air Mail Facility, Respondent told him that he could have an additional 2 hours' work at the Main Post Office under conditions which annoyed Morgan. Morgan complained, that after a 15-minute drive from the Air Mail Facility, Respondent required that he wait an additional 1 hour and 45 minutes before clocking in. Morgan sought relief from what he considered to be an onerous condition. After making the complaint, Morgan left Wilson.

Immediately upon Morgan's departure, Wilson telephoned the Air Mail Facility and asked to talk to its acting manager, Otto Gage. When Gage got on the telephone, Wilson explained that he represented employee James Morgan and went on to ask about the 2-hour wait required before Morgan could clock in on his 2-hour shift at the Main Post Office.

Wilson and Gage discussed the matter at length. Gage did not provide a direct answer. Instead, he reminded Wilson that Morgan was a part-time employee and that he, Gage, could "work him six hours and send him home." The discussion moved to Morgan's entitlement to the same treatment as other part-timers who worked 8-hour shifts and some overtime.

Wilson pressed for an explanation of Morgan's 2-hour wait. Gage explained that this break in Morgan's work excused Respondent from paying him for his travel time. Wilson testified that at hearing this explanation he "told Mr. Gage that was a stupid, and asinine policy and . . . hung the phone up."

Gage's testimony does not contradict Wilson's account until the final comment by Wilson. According to Gage, he heard Wilson end their exchange with: "You know what, Mr. Gage? You are a stupid ass."[4]

Following this conversation, Gage complained by phone to his immediate supervisor about Wilson. That evening, about 5-1/2 hours after the incident, Gage drafted a memorandum to "Director, Processing Main Post Office, 850 Twin Rivers Dr . . . ." giving his version of his conversation with Wilson.

On or about May 4, Respondent issued a written notice of suspension, which Wilson received on May 7. The notice of suspension announced that Wilson was to be suspended for "five (5) working days beginning: 8:30 AM, May 21 . . . ." The notice went on to recite Gage's account of the incident of April 17, under the heading "CONDUCT UNBECOMING A POSTAL EMPLOYEE—ABUSIVE LANGUAGE." Wilson suffered the 5-day suspension without pay.

B. *Analysis and Conclusions*

The General Counsel contends that the Postal Service violated Section 8(a)(3) of the Act by suspending employee Betram H. Wilson for 5 days because he pursued a grievance on behalf of the Union. The General Counsel also argues that Respondent by this conduct also impaired its employees' Section 7 rights[5] and thereby violated Section 8(a)(1) of the Act. The Postal Service urges that "unprovoked name-calling of another human being for the pure purpose of 'effect'" was the reason for Wilson's punishment, and that he was not entitled to the Act's protection at the time of his misconduct. I find that Respondent's treatment of Wilson ran afoul of his rights under Section 7 of the Act for the following reasons.

In *Prescott Industrial Products Company*, 205 NLRB 51, 52 (1973), the Board provided the following guidance for the instant case:

> The Board has long held that there is a line beyond which employees may not go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service.

Application of the Board's policy, as stated above, is found in *Thor Power Tool Company*, 148 NLRB 1379, 1380 (1964), enfd. 351 F.2d 584, 587 (7th Cir. 1965).

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[3] Unless otherwise stated, all dates herein occurred in 1979.

[4] In view of my analysis and conclusions below, I find it unnecessary to resolve this issue of credibility.

[5] Sec. 7:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Sec. 8(a)(3).

There, an employee who was a member of a union grievance committee, lost his temper during an informal discussion of an employee's grievance, and referred to his plant superintendent as "the horse's ass." The employer thereafter discharged the employee because of this objectionable remark. The Board concluded that the discharge was unlawful. In reaching this result, the Board observed that the remark was "part of the *res gestae* of the grievance discussion . . . ." 148 NLRB at 1380. The Board also adopted the Trial Examiner's balancing of the employee's right to the protection of the Act while discussing a grievance with the impropriety of accompanying objectionable language, and the result favoring the employee. 148 NLRB at 1380, 1388–89.

Applying the Board's policy as exemplified in *Thor Power Tool, supra*, I reach the same result here. Employee Wilson, acting in his capacity as the Union's steward, was discussing a possible grievance on behalf of a unit employee and, thus, was engaged in activity protected by Section 7 of the Act. Cf. *Huttig Sash & Door Company, Inc.*, 154 NLRB 1567, 1571–72 (1965); *Thor Power Tool Company, supra*, 148 NLRB 1380, 1388–89. Assuming that Wilson used the words "stupid ass" toward Supervisor Gage, this utterance came in the course of that discussion and, thus, was part of the *res gestae*.

Finally, assuming that Wilson used that improper language, I find it to be no worse than that found in *Thor Power Tool, supra*. Accordingly, I find that, by suspending Wilson for calling Gage a "stupid ass" in the course of discussing a possible grievance, Respondent violated Section 8(a)(1) of the Act. In view of the remedy provided below, I find it unnecessary to determine whether Respondent also violated Section 8(a)(3) of the Act by suspending Wilson. *Ad Art Incorporation*, 238 NLRB 1124 (1978); *Merlyn Bunney and Clarence Bunney, partners, d/b/a Bunney Bros. Construction Company*, 139 NLRB 1516 (1962).

III. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take other appropriate actions to remedy its unfair labor practices. I therefore recommend that Respondent be required to make Bertram J. Wilson whole for wages lost by reason of the 5-day suspension levied upon him, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

I further recommend that Respondent be required to expunge and remove all records of and references to the suspension from all of Respondent's records, wherein that suspension is now noted, and that Respondent be ordered to post an appropriate notice to employees.

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The General Counsel's request for 9-percent interest is rejected in accordance with the Board's policy as set forth in *Florida Steel Corporation, supra*.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recommended:

ORDER[7]

The Respondent, United States Postal Service, Columbus, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the National Labor Relations Act, as amended, by suspending or otherwise punishing employees because of the exercise of such rights.

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

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

(a) Make Bertram J. Wilson whole for any loss of pay he suffered by reason of his unlawful 5-day suspension. Said backpay shall be computed in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge and physically remove from its records any suspension notices and any references thereto relating to the suspension of Bertram J. Wilson for 5 calendar days beginning May 21, 1979.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Columbus, Ohio, facilities copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a 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."

Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives all employees these rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

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

WE WILL NOT suspend or otherwise punish any employees for exercising such rights.

WE WILL make Bertram J. Wilson whole for any loss of pay he may have suffered by reason of his suspension for 5 calendar days beginning May 21, 1979.

WE WILL expunge and physically remove from our records and files any suspension notices and any references thereto relating to the suspension of Bertram J. Wilson beginning May 21, 1979.

UNITED STATES POSTAL SERVICE

COOK PAINT AND VARNISH COMPANY AND PAINTMAKERS AND ALLIED TRADES LOCAL 754 AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO

Case 17-CA-8258

NATIONAL LABOR RELATIONS BOARD

258 N.L.R.B. 1230; 1981 NLRB LEXIS 1429; 108 L.R.R.M. 1150; 1981-82 NLRB Dec. (CCH) P18,433; 258 NLRB No. 166

September 30, 1981

CORE TERMS: steward, interview, discipline, grievance, questioning, representational, notice, National Labor Relations Act, Administrative Law, posted, spill, investigatory, interrogation, regular, disciplinary action, union activities, conversations, threatening, involvement, reiterated, plant, paint, duties, arbitration proceeding, protected activities, arbitration hearing, rights guaranteed, written material, union activity, blanket rule

[1]** SUPPLEMENTAL DECISION AND ORDER

By Fanning, Member; Jenkins, Member; Zimmerman, Member.

OPINION:

[*1230] On November 30, 1979, the National Labor Relations Board issued a *Decision and Order in the above-entitled proceeding, n1 adopting an Administrative* Law Judge's finding that Respondent Cook Paint and Varnish Company violated Section 8(a)(1) of the National Labor Relations Act, as amended, by threatening employees Jesse Whitwell and Douglas Rittermeyer with disciplinary action for their refusal to submit to interrogation by Respondent's attorney and other representatives concerning an incident involving another employee as to which arbitration had been invoked. The Administrative Law Judge also found that Respondent further violated Section 8(a)(1) of the Act by threatening Union Steward Whitwell with discipline for refusing to submit to questioning by Respondent's attorney and other representatives and refusing to submit written material to Respondent concerning the same incident. In its Decision, the Board found that, inasmuch as Whitwell was entitled to the protection of the Act as a regular employee, it was unnecessary to pass on whether his role as union steward entitled him to additional **[**2]** protection. The Board ordered Respondent to cease and desist from the conduct found unlawful and to take certain affirmative actions designed to effectuate the policies of the Act. Thereafter, Respondent filed a petition for review of said Order and the Board filed a cross-application for enforcement with the United States Court of Appeals for the District of Columbia Circuit.

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n1 246 NLRB 646.

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On April 2, 1981, a panel of the court of appeals issued its decision, n2 declining to enforce the Board's Order and remanding the case to the Board for further proceedings. In its decision, the court determined that the interview of Rittermeyer, a regular employee, did not violate Section 8(a)(1) of the Act. With respect to Whitwell, however, the court noted that "very different considerations may be relevant in considering the legality of an interview of a union steward that are not present in the case of employees generally." n3 Accordingly, since the Board had declined to pass on the issue of whether **[**3]** Whitwell's position as union steward entitled him to protections not available to employees generally, the court remanded the case to the Board for further proceedings on that issue.

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n2 648 F.2d 712 (D.C. Cir. 1981).

n3 *Id.* at 725.

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Thereafter, the Board informed the parties that they were entitled to file statements of position on the issue remanded to the Board. Respondent filed a statement of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board, having accepted the remand, respectfully recognizes the court's decision as binding for the purposes of deciding this case.

The pertinent facts surrounding Respondent's interview of Union Steward Jesse Whitwell are as follows. On February 2, 1978, employee Paul Thompson was involved in an incident in Respondent's tank washing room which purportedly **[**4]** resulted in Thompson slipping and injuring himself. Whitwell, who was union steward for the area of Respondent's plant where Thompson worked, testified without contradiction that his initial involvement in the incident came about when Thompson and Working Foreman Mallot approached him to discuss a paint spill that had occurred in Thompson's work area. Whitwell discussed the matter with Thompson and Mallot and got the problem "straightened out." Several minutes later, Mallot and Thompson returned to Whitwell with a dispute as to whether Thompson should clean up the spill or continue with his regular duties. Whitwell told Thompson to continue with his regular duties and then sought out Floor Supervisor Ervin Woolery. Meanwhile, Thompson allegedly fell in the area of the paint spill and requested permission to go to the doctor. The record reveals no further discussions involving Whitwell on that day concerning the Thompson matter. n4

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n4 As was indicated by the Administrative Law Judge, it is unnecessary for resolution

of this case to determine the merits of Respondent's actions concerning Thompson. For our purposes, the significant facts concern Whitwell's role in the incident. For all practical purposes, the actions of Whitwell are undisputed.

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As a result of the February 3 incident, Respondent decided to discharge Thompson. Toward this end, a meeting was held on February 6. The meeting was attended by Whitwell, Union Business Representative Fixler, and several management representatives. Those present at the meeting, including Whitwell, discussed the February 3 incident and Respondent reiterated its decision to discharge Thompson. On the same day, the Union filed a grievance on behalf of Thompson.

[*1231] Thereafter, the grievance was processed in accord with the parties' collective-bargaining agreement. Whitwell, as steward for Thompson's department, was directly involved in all three steps of the grievance which failed to result in a resolution of the matter. Pursuant to the contractual grievance procedure, the Union invoked binding arbitration. The arbitration hearing was scheduled for May 3, 1978.

On April 21, 1978, Whitwell was called into the office of General Superintendent Keller. Already present were other management officials and William Nulton, Respondent's labor relations attorney. Nulton informed Whitwell that he was preparing for the upcoming arbitration hearing and wished to question Whitwell as to the **[**6]** February 3 incident. He told Whitwell that refusal to cooperate would result in disciplinary action against him. Whitwell requested and was granted time to discuss the matter with Business Representative Nash. Because Nash was not available, Whitwell contacted Union Attorney Robert Reinhold who came to the plant and accompanied Whitwell into Keller's office.

Upon resumption of the meeting, Nulton reiterated that Whitwell would be subject to discipline if he refused to cooperate. Following a discussion and legal argument between Reinhold and Nulton, Whitwell agreed to answer questions under protest. According to Whitwell's uncontradicted testimony, Nulton then asked him a series of questions pertaining to the events which occurred on February 3, Thompson's action regarding the spill, and "conversations taking place between myself [Whitwell], Mr. Thompson, Mr. Mallot, Mr. Woolery."

During the questioning, Whitwell revealed that he had kept contemporaneous notes relating to the Thompson matter. Nulton then "ordered" Whitwell to produce them. Whitwell refused, stating that the notes were part of his union notebook. Nulton then told Whitwell to produce the notes by 8 a.m. of the following **[**7]** day. Whitwell did not comply with the directive but, instead, sent the notes to the Thompson case arbitrator. On the next day, Respondent made no further request for the notes. n5

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n5 With respect to the order to turn over the notes, we specifically adopt the Administrative Law Judge's finding that Nulton ordered Whitwell to produce them and that Whitwell reasonably could not have viewed the directive as anything other than a threat of discipline for failure to comply.

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In its decision, a majority of the court held: "As part of a contractual arbitration procedure, an employer may conduct a legitimate investigatory interview in preparation for a pending arbitration." n6 It further held, however, that the "interview may not pry into protected union activities." n7 In the view of the court majority, Respondent's interview of Rittermeyer was a legitimate investigatory interview that did not pry into protected activities. With respect to Whitwell, however, a majority of the court found that there may be "fundamental differences **[**8]** between an interview of an employee and an interview of a union steward." n8 While cautioning the Board against promulgating a "blanket rule" immunizing stewards from investigatory interviews relating to pending arbitrations, the court remanded the case to the Board to determine whether Respondent's interview of Whitwell constituted a lawful investigatory interview or an unlawful prying into protected union activities.

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n6 648 F.2d at 723.

n7 *Id.*

n8 *Id.* at 724.

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Upon review of the entire record, including the court's decision, we are of the view that Respondent's interview of Whitwell, in the circumstances of this case, did constitute an unwarranted infringement on protected union activity and, consequently, violated Section 8(a)(1) of the Act.

In reaching this conclusion, our initial inquiry involves examination of the role played by Whitwell in the Thompson incident. From our review of the record, it is clear that Whitwell's involvement in the Thompson **[**9]** incident arose solely as a result of his status as union steward. In this regard, we note that Whitwell did not become involved as a result of his own misconduct. Nor was Whitwell an eye-witness to the events that resulted in Thompson's alleged fall and his subsequent discharge. Instead, Whitwell initially was approached in his capacity as steward by Thompson and Mallot who were engaged in a dispute over a paint spill. Whitwell conversed with the two, attempting to "straighten out" the dispute. Several minutes later, Mallot and Thompson returned to Whitwell to discuss further developments. At that point, Whitwell gave his advice to Thompson and then sought out Supervisor Woolery. Meanwhile, Thompson returned to his work area where he allegedly slipped and injured himself. Thus, Whitwell became involved in the incident *ab initio* as a result of his role as union steward.

Following the incident, Whitwell continued to act in a representational capacity. Pursuant to the collective-bargaining agreement, Whitwell was Thompson's designated representative at the first two grievance steps. In addition, as found by

the Administrative Law Judge, Whitwell acted in this representational capacity **[**10]** at the third step of the grievance process as well. In short, from the beginning **[*1232]** of the Thompson incident, and up through each progressive step of the grievance process, all of which occurred prior to the April 21 interview, Whitwell's participation was a direct result of the execution of his duties as union steward in representing Thompson.

Having determined that Whitwell's involvement in the incident arose and continued in the context of his acting as Thompson's representative, our inquiry shifts to an examination of the scope of Respondent's interrogation to determine whether the questions pried into protected union activities and interfered with the employees' exercise of their Section 7 rights. In our view, the questioning exceeded permissible bounds, pried into protected activities, and, accordingly, constituted an unlawful interference with employee Section 7 rights.

As to the scope of Respondent's interrogation it is virtually undisputed, and we specifically find, that Nulton sought to probe into, *inter alia*, the substance of conversations between Whitwell and Thompson. Indeed, the scope of Respondent's probing is highlighted by Nulton's order to Whitwell to **[**11]** turn over the contemporaneous notes concerning the incident which he had taken in his capacity as steward. Significantly, the order was reiterated even after Whitwell informed Respondent's representatives that the notes were part of his "union notebook" that he regularly kept in carrying out his union functions.

Clearly, the scope of Respondent's questioning exceeded the permissible bounds outlined by the court and impinged upon protected union activity. For while questions posed by Nulton may be termed "factual inquiries," the very facts sought were the substance of conversations between an employee and his steward, as well as the notes kept by the steward, in the course of fulfilling his representational functions. Such consultation between an employee potentially subject to discipline and his union steward constitutes protected activity in one of its purest forms. To allow Respondent here to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives. n9 Such actions by Respondent also inhibit stewards in obtaining needed information from **[**12]** employees since the steward knows that, upon demand of Respondent, he will be required to reveal the substance of his discussions or face disciplinary action himself. In short, Respondent's probe into the protected activities of Whitwell and Thompson has not only interfered with the protected activities of those two individuals but it has also cast a chilling effect over all of its employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline.

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n9 In its brief, Respondent advances the argument that Whitwell, pursuant to the bargaining obligations of Sec. 8(d), was obligated to turn over documents in his possession relating to the Thompson grievance. We find no merit in such a claim. Initially, we note that, while the cases cited by Respondent do refer to a union's obligation to supply relevant information for the purposes of collective bargaining,

Respondent has advanced no case support for the unique proposition that notes kept by a steward in the course of representing employees are subject to the requirements of supplying relevant bargaining information. Yet, even if we were to so hold, which we do not, we could not endorse Respondent's additional claim that the Union's obligation to supply such information can be unilaterally enforced against a steward by means of a threat of discipline for failure to comply. For if, indeed, the information was relevant to collective bargaining and Respondent was entitled to obtain it, our Act provides the appropriate mechanism for Respondent to assert its rights. Respondent, however, rejected that course and sought to short circuit the process through threats and coercion. We firmly reject the concept that an employer, in its quest to obtain information, may unilaterally determine the relevance of the information and its entitlement to obtain the information and then set about enforcing its determination through threats of discipline.

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Finally, in view of the court's admonition against our promulgation of a "blanket rule," we wish to emphasize that our ruling in this case does not mean that all discussions between employees and stewards are confidential and protected by the Act. Nor does our decision hold that stewards are, in all instances, insulated from employer interrogation. We simply find herein that, because of Whitwell's representational status, the scope of Respondent's questioning, and the impingement on protected union activities, Respondent's April 21, 1978, interview of Jesse Whitwell violated Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Cook Paint and Varnish Company, Kansas City, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening union shop stewards with discipline for refusing to submit to questioning by Respondent's counsel or other representatives, or to submit written material kept in the course of the steward's representation of employees, concerning any matter involving a unit employee when the steward is **[**14]** contractually bound or authorized to represent such employee in a grievance or arbitration proceeding and the steward has acted in such representational capacity.

(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.

[*1233] 2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its plant 3, in North Kansas City, Missouri, copies of the attached notice marked "Appendix." n10 Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by an authorized representative of

Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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n10 In the event that this Order is enforced by a Judgment of a 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."

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(b) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

> WE WILL NOT threaten union shop stewards with discipline for refusing to submit to questioning by our counsel or other representatives, or to submit written material kept in the course of the steward's representation of employees, concerning any matter involving a unit employee when the steward is contractually bound or authorized to represent such employee in a grievance or arbitration proceeding and the steward has acted in such representational capacity.
>
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

COOK PAINT AND VARNISH **[**16]** COMPANY

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

REPORT OF THE GENERAL COUNSEL

This report covers selected cases of interest that were decided during the period from March through September 30, 1994. It discusses cases which were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. It also summarizes cases in which I sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the Act.

Frederick L. Feinstein

Frederick L. Feinstein
General Counsel

getting the Employer to either sign a bargaining agreement or cease doing business. The Union admitted as much when it told the Employer that the "games would stop" if the Employer would sign a contract. In addition, the evidence of unprotected substantial slow-down and sabotage activities supported the conclusion that the Union was engaged in an aggressive campaign to use the unprotected conduct of partial strikes to achieve its goals. The Union's campaign ultimately succeeded in closing down the Employer.

We further decided that, since the striking employees had to have known that they were participating in a strategy of intermittent strikes, each employee's conduct was unprotected regardless of whether he or she engaged in one, two, or all three of the unprotected stoppages. As the Board stressed in Pacific Telephone, supra, 107 NLRB at 1550, the employer there, faced with intermittent strikes that were totally disrupting its business, "was not required to pause during the heat of the strike to examine into the degree of knowledge of each [striker], all of whom were [acting on behalf] the same Union. It was sufficient . . . that each of the [strikers] was a participant in the strike strategy..." 107 NLRB at 1551-1552. Accordingly, we decided to dismiss the charges.

Discipline of Union Steward for Refusing to Cooperate with Employer Investigation

In another case considered during this period, we concluded that an employer could not lawfully discipline a union steward for refusing to provide it with a written account of an employee's conduct witnessed as a result of her performance of her duties as steward.

The Employer's plant manager had requested the steward to attend a meeting, along with an employee and the employee's supervisor, concerning possible discipline of the employee. At the end of the meeting the employee was terminated and the group left the office. As they walked into the adjoining hall, the employee allegedly told the plant manager that he was "a rotten, no good bastard, [and if the employee] had his money right now [he'd] drag [the manager] outside and kick his _____." The plant manager told the supervisor and the steward that he wanted statements from them setting forth what the employee had said. When the steward objected she was advised that she would be subject to discharge if she did not provide the

statement. The steward thereupon submitted the statement as directed.

We concluded that the threat of discharge unlawfully interfered with the individual's protected right to serve as union steward. Although the discharged employee's intemperate remarks may not have been protected, the steward would never have witnessed the outburst but for her role as steward. The outburst, which occurred as the parties were leaving the plant manager's office, was not viewed as separable from the events for which the steward's attendance had been required, but rather, was considered as part of the "res gestae of the grievance discussion." Cf., Thor Power Tool Company, 148 NLRB 1379, 1380 (1964), enf'd., 351 F.2d 584 (7th Cir. 1965). Further, even if the disciplinary meeting were found to have ended prior to the outburst, the steward's role was considered a continuous one, inasmuch as the discharged employee still had a right to file a contractual grievance protesting his discharge, and the steward would likely be involved in that process. It was therefore concluded that the threat occurred during a time when the individual was acting as steward.

Further, the threat was deemed to have a chilling effect on the steward's right to represent the dischargee and other employees in an atmosphere free of coercion. A requirement that stewards, under threat of discharge, prepare written reports on the conduct of employees they have been requested to represent, clearly compromises the steward's obligation to provide, and an employee's right to receive, effective representation. Employees will be less inclined to vigorously pursue their grievances if they know that the employer can require their representative to prepare reports on their conduct at such meetings, including spontaneous outbursts which may or may not be protected. The Board has also recognized that employer efforts to dictate the manner in which a union must present its grievance position may have a stifling effect on the grievance machinery and could "so heavily weigh the mechanism in the employer's favor as to render it ineffective as an instrument to satisfactorily resolve grievances." Hawaiian Hauling Service, Ltd., 219 NLRB 765, 766 (1975), enf'd., 545 2d 674 (9th Cir. 1976) (employee discharged for calling the general manager a liar during a grievance meeting on the employee's prior discipline.) By placing the steward under threat of discharge if she refused to supply the statement the Employer was deemed to have stifled vigorous opposition to its grievance/discipline decisions and to have heavily weighted the grievance process in its own favor.

While acknowledging that a union steward does not enjoy absolute immunity from employer interrogation, the Board, in its decision on remand in Cook Paint and Varnish Co., 258 NLRB 1230 (1981), held that an employer had unlawfully threatened to discipline a steward for refusing to submit to a pre-arbitration interview and refusing to make available notes taken by the steward while processing the grievance that was being arbitrated. The Board noted that the steward had not been an eyewitness to the events, and that his involvement occurred solely as a result of his processing the grievance as union steward. The Board then noted that the notes sought by the employer were the substance of conversations between the employee and the steward, and that such consultations were "protected activity in one of its purest forms." The Board concluded that to allow the employer to compel disclosure of such information under threat of discipline manifestly restrained employees in their willingness to candidly discuss matters with their representative. The Board added that such employer conduct cast a chilling effect over all employees and stewards who seek to communicate with each other over potential grievance matters and also inhibited stewards in obtaining needed information since the steward would know that, upon demand of the employer, he would be required to reveal the subject of his discussions or face disciplinary action himself.

We concluded that while there were factual differences, Cook Paint is consistent with a finding that the Employer's threat to the steward in the instant case violated the Act. Thus, while Cook Paint involved employer attempts to discover the contents of employee communications to a steward, both cases involve the sensitivity of a steward's status vis-à-vis the employees he/she represents. Thus, like the steward in Cook Paint, the steward herein was not involved in the misconduct that was the subject of the meeting or that occurred immediately thereafter, was present solely because of her status as steward, and was compelled under threat of discharge to provide a written account of an event to which there were other witnesses, making her version merely cumulative. If an Employer were permitted to threaten stewards with discipline for failing to cooperate in employer investigations in circumstances such as these, it would place a steward in a position of sharp conflict of interests, having to choose between protecting his job and providing effective and strenuous representation to the employee he was chosen to represent.

Accordingly, we authorized the issuance of an appropriate Section 8(a)(1) complaint.

United States Postal Service *and* American Postal Workers Union, Columbus, Ohio Area Local. Case 9-CA-13926(P)

June 19, 1980

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND TRUESDALE

On March 14, 1980, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, United States Postal Service, Columbus, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge: Upon a charge filed on May 31, 1979, by the American Postal Workers Union, Columbus, Ohio Area Local, referred to below as the Union, the Regional Director for Region 9 of the National Labor Relations Board (herein called the Board), on behalf of the General Counsel, issued the complaint herein on July 19, 1979, alleging that the Respondent, United States Postal Service, violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended,[1] by suspending employee Betram J. Wilson for 5 days without pay because he pressed a grievance. Respondent, by its timely answer, denied commission of the alleged unfair labor practices.

Upon the entire record, including the testimony and demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND THE LABOR ORGANIZATION INVOLVED

The Board has jurisdiction over the subject matter of the complaint by virtue of Section 1209 of the Postal Reorganization Act.[2] The facility involved in this case is Respondent's Air Mail Facility at Columbus, Ohio. It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Union is the recognized collective-bargaining representative of a unit of Respondent's employees at its Columbus, Ohio, mail facilities, including the Air Mail Facility and the Main Post Office at 850 Twin Rivers Drive. Article IV of the applicable current collective-bargaining agreement between Respondent and the Union is entitled "Grievance-Arbitration Procedure" and provides in pertinent parts:

> Section 1. Definition. A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.
>
> Section 2. Grievance Procedure—Steps

[1] We hereby affirm the Administrative Law Judge's conclusion that the factual situation at issue in this proceeding is comparable to prior cases wherein the Board has held that obscenities uttered by an employee as part of the *res gestae* of concerted protected activity were not so flagrant or egregious as to remove the protection of the Act and warrant the employee's discipline. E.g., *Firch Baking Company*, 232 NLRB 772 (1977); *American Telephone & Telegraph Co.*, 211 NLRB 782 (1974); *Thor Power Tool Company*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965). We also specifically reject the argument made in Respondent's exceptions that *Atlantic Steel Company*, 245 NLRB No. 107 (1979), mandates a different conclusion.

In *Atlantic Steel*, a Board panel agreed to defer to an arbitrator's decision that the respondent had lawfully discharged an employee for insubordination. The employee had asked his foreman a question about overtime assignments, had received an answer, and had then uttered an obscene characterization of the foreman or his answer as the foreman walked away. In finding that the arbitral decision upholding the employee's discharge was not repugnant to the Act, the majority emphasized that his obscenity was unprovoked and was made on the production floor during his working time. Apart from the procedural distinctions between Board review of an arbitral award under *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), and Board review of an administrative law judge's decision, *Atlantic Steel* is factually quite distinguishable from the present case. Wilson, the discriminatee herein, had received supervisory permission to discuss an employee's potential grievance, was engaged in the formal investigation of that grievance in his capacity as a steward, and uttered a single, spontaneous obscene remark, provoked at least in part by the failure of the supervisor with whom Wilson was speaking to provide an immediate and direct answer to Wilson's inquiries. We agree with the Administrative Law Judge that under these circumstances Wilson's use of obscene language was not so egregious as to remove the Act's protection from his grievance activities.

Member Jenkins did not participate in the *Atlantic Steel* Decision, and finds it unnecessary to distinguish that case.

[1] 29 U.S.C. §151, *et seq.*

[2] 39 U.S.C. §101, *et seq.*

> Step 1: (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance.

On April 17, 1979,[3] part-time flexible employee James Morgan, a bargaining unit employee who worked a 6-hour shift (4:30 a.m.–10:30 a.m.) at Respondent's Columbus, Ohio, Air Mail Facility brought a complaint to the Union's steward, Betram Wilson. Wilson, a 13-year employee of Respondent, was working as a claims and inquiry clerk at Respondent's Main Post Office at 850 Twin Rivers Drive, Columbus, Ohio. The two met in a hall at the Main Post Office after Wilson had obtained permission from his supervisor to leave his work station.

Wilson's duties as the union steward included investigation of employee complaints regarding supervisors, warnings and other disciplinary action, discrimination, and other matters affecting unit employees.

Part-time employee Morgan told Wilson that, after completing 6 hours of work at the Air Mail Facility, Respondent told him that he could have an additional 2 hours' work at the Main Post Office under conditions which annoyed Morgan. Morgan complained, that after a 15-minute drive from the Air Mail Facility, Respondent required that he wait an additional 1 hour and 45 minutes before clocking in. Morgan sought relief from what he considered to be an onerous condition. After making the complaint, Morgan left Wilson.

Immediately upon Morgan's departure, Wilson telephoned the Air Mail Facility and asked to talk to its acting manager, Otto Gage. When Gage got on the telephone, Wilson explained that he represented employee James Morgan and went on to ask about the 2-hour wait required before Morgan could clock in on his 2-hour shift at the Main Post Office.

Wilson and Gage discussed the matter at length. Gage did not provide a direct answer. Instead, he reminded Wilson that Morgan was a part-time employee and that he, Gage, could "work him six hours and send him home." The discussion moved to Morgan's entitlement to the same treatment as other part-timers who worked 8-hour shifts and some overtime.

Wilson pressed for an explanation of Morgan's 2-hour wait. Gage explained that this break in Morgan's work excused Respondent from paying him for his travel time. Wilson testified that at hearing this explanation he "told Mr. Gage that was a stupid, and asinine policy and . . . hung the phone up."

Gage's testimony does not contradict Wilson's account until the final comment by Wilson. According to Gage, he heard Wilson end their exchange with: "You know what, Mr. Gage? You are a stupid ass."[4]

Following this conversation, Gage complained by phone to his immediate supervisor about Wilson. That evening, about 5-1/2 hours after the incident, Gage drafted a memorandum to "Director, Processing Main Post Office, 850 Twin Rivers Dr . . . ." giving his version of his conversation with Wilson.

On or about May 4, Respondent issued a written notice of suspension, which Wilson received on May 7. The notice of suspension announced that Wilson was to be suspended for "five (5) working days beginning: 8:30 AM, May 21 . . . ." The notice went on to recite Gage's account of the incident of April 17, under the heading "CONDUCT UNBECOMING A POSTAL EMPLOYEE—ABUSIVE LANGUAGE." Wilson suffered the 5-day suspension without pay.

B. *Analysis and Conclusions*

The General Counsel contends that the Postal Service violated Section 8(a)(3) of the Act by suspending employee Betram H. Wilson for 5 days because he pursued a grievance on behalf of the Union. The General Counsel also argues that Respondent by this conduct also impaired its employees' Section 7 rights[5] and thereby violated Section 8(a)(1) of the Act. The Postal Service urges that "unprovoked name-calling of another human being for the pure purpose of 'effect'" was the reason for Wilson's punishment, and that he was not entitled to the Act's protection at the time of his misconduct. I find that Respondent's treatment of Wilson ran afoul of his rights under Section 7 of the Act for the following reasons.

In *Prescott Industrial Products Company*, 205 NLRB 51, 52 (1973), the Board provided the following guidance for the instant case:

> The Board has long held that there is a line beyond which employees may not go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service.

Application of the Board's policy, as stated above, is found in *Thor Power Tool Company*, 148 NLRB 1379, 1380 (1964), enfd. 351 F.2d 584, 587 (7th Cir. 1965).

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[3] Unless otherwise stated, all dates herein occurred in 1979.

[4] In view of my analysis and conclusions below, I find it unnecessary to resolve this issue of credibility.

[5] Sec. 7:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Sec. 8(a)(3).

There, an employee who was a member of a union grievance committee, lost his temper during an informal discussion of an employee's grievance, and referred to his plant superintendent as "the horse's ass." The employer thereafter discharged the employee because of this objectionable remark. The Board concluded that the discharge was unlawful. In reaching this result, the Board observed that the remark was "part of the *res gestae* of the grievance discussion . . . ." 148 NLRB at 1380. The Board also adopted the Trial Examiner's balancing of the employee's right to the protection of the Act while discussing a grievance with the impropriety of accompanying objectionable language, and the result favoring the employee. 148 NLRB at 1380, 1388–89.

Applying the Board's policy as exemplified in *Thor Power Tool, supra*, I reach the same result here. Employee Wilson, acting in his capacity as the Union's steward, was discussing a possible grievance on behalf of a unit employee and, thus, was engaged in activity protected by Section 7 of the Act. Cf. *Huttig Sash & Door Company, Inc.*, 154 NLRB 1567, 1571–72 (1965); *Thor Power Tool Company, supra*, 148 NLRB 1380, 1388–89. Assuming that Wilson used the words "stupid ass" toward Supervisor Gage, this utterance came in the course of that discussion and, thus, was part of the *res gestae.*

Finally, assuming that Wilson used that improper language, I find it to be no worse than that found in *Thor Power Tool, supra.* Accordingly, I find that, by suspending Wilson for calling Gage a "stupid ass" in the course of discussing a possible grievance, Respondent violated Section 8(a)(1) of the Act. In view of the remedy provided below, I find it unnecessary to determine whether Respondent also violated Section 8(a)(3) of the Act by suspending Wilson. *Ad Art Incorporation*, 238 NLRB 1124 (1978); *Merlyn Bunney and Clarence Bunney, partners, d/b/a Bunney Bros. Construction Company*, 139 NLRB 1516 (1962).

III. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take other appropriate actions to remedy its unfair labor practices. I therefore recommend that Respondent be required to make Bertram J. Wilson whole for wages lost by reason of the 5-day suspension levied upon him, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

I further recommend that Respondent be required to expunge and remove all records of and references to the suspension from all of Respondent's records, wherein that suspension is now noted, and that Respondent be ordered to post an appropriate notice to employees.

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The General Counsel's request for 9-percent interest is rejected in accordance with the Board's policy as set forth in *Florida Steel Corporation, supra.*

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recommended:

ORDER[7]

The Respondent, United States Postal Service, Columbus, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the National Labor Relations Act, as amended, by suspending or otherwise punishing employees because of the exercise of such rights.

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

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

(a) Make Bertram J. Wilson whole for any loss of pay he suffered by reason of his unlawful 5-day suspension. Said backpay shall be computed in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge and physically remove from its records any suspension notices and any references thereto relating to the suspension of Bertram J. Wilson for 5 calendar days beginning May 21, 1979.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Columbus, Ohio, facilities copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a 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."

Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives all employees these rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

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

WE WILL NOT suspend or otherwise punish any employees for exercising such rights.

WE WILL make Bertram J. Wilson whole for any loss of pay he may have suffered by reason of his suspension for 5 calendar days beginning May 21, 1979.

WE WILL expunge and physically remove from our records and files any suspension notices and any references thereto relating to the suspension of Bertram J. Wilson beginning May 21, 1979.

UNITED STATES POSTAL SERVICE

United States Postal Service *and* American Postal Workers Union, AFL-CIO (San Angelo, Texas Local). Case 16-CA-8366(P)

August 15, 1980

DECISION AND ORDER

BY MEMBERS JENKINS, PENELLO, AND TRUESDALE

On February 19, 1980, Administrative Law Judge Burton Litvack issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

We agree with the Administrative Law Judge's finding that Respondent violated Section 8(a)(1) of the Act by issuing warning letters to employees O'Harrow and Woods in connection with a grievance meeting held on February 2, 1979. In concluding otherwise, our dissenting colleague argues that, even if the events that culminated in the imposition of discipline were part of the *res gestae* of the grievance meeting, the employees' "insubordinate conduct" in ignoring an order to return to work was "so extreme" as to render their conduct unprotected. We find our colleague's argument unpersuasive.

In the first place, it is worth noting that the dissent discounts almost out-of-hand the reason most prominently advanced by Respondent for its conduct, i.e., the employees' alleged "loud, abusive and profane language," and instead insists that the reason Respondent acted was the employees' alleged refusal to return to work. Apparently the dissent recognizes that, in the circumstances here, Respondent could not rely on the employees' language as a lawful ground for imposing discipline; hence, the dissent seeks to focus on the employees' alleged "insubordination." However, the facts do not support the dissent's analysis.

In brief, this is not a case where employees adamantly refused to leave the meeting room when asked to pursue their grievance later and to return to work. Nor is this a case in which the employees tried to impede others who sought to leave. Here, the two employees followed the two supervisors back to the workroom floor. At least to this point their only "insubordination," if it can be called such, was in continuing to talk about their grievance as they walked along. When the employees and the supervisors reached the timeclock, Supervisor Love turned and said, "I am giving you a direct order. I want you to go back to work now." After what was by all accounts a momentary hesitation, and apparently before Love had to repeat the order, the two employees complied with it.

We agree with the Administrative Law Judge's conclusion that to permit Respondent to bifurcate the conduct in issue, as our colleague apparently is willing to do, "would enable an employer by its own whim to define the nature of protected activity . . . ." Moreover, from a practical standpoint, some latitude must be given to participants in these incidents. Indeed, although we might wish it otherwise, it is unrealistic to believe that the principals involved in a heated exchange can check their emotions at the drop of a hat. Of course, employees can lose the protection of the Act by conduct that fairly can be characterized as opprobrious or extreme. In the instant case, however, neither appellation is warranted. Thus, as shown above, the employees merely continued to dispute verbally the merits of a grievance after tempers had run high on both sides and after they were told to return to work. As indicated previously, the interval between being told to go back to work and the employees' compliance with that order was very brief and was not marked by violence or abusive language on their part. And Respondent does not contend, nor does the record show, that the employees' conduct had any adverse impact on the work of other employees, or otherwise had consequential disruptive effects. Accordingly, we see no reason to strip these employees of the protection afforded them by the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, United States Postal Service, San Angelo, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

MEMBER PENELLO, dissenting:

Contrary to my colleagues, I would reverse the Administrative Law Judge and find that Respondent did not violate Section 8(a)(1) and (3) by issuing warning letters to employees O'Harrow and Woods for their insubordinate conduct in ignoring direct orders to return to work at the end of a grievance meeting. As no exceptions were filed to

the Administrative Law Judge's recommendation that the other allegations of the complaint be dismissed, I would dismiss the complaint in its entirety.

The facts in this case may be stated briefly. Employees O'Harrow and Woods are president and vice president, respectively, of the Local Union which represents the employees at Respondent's facilities in San Angelo, Texas. In late January 1979, O'Harrow and Woods were warned verbally on several occasions by their supervisor, Robert Nichols, about talking while working next to each other on the distribution line. On February 2, 1979, they observed John Love, manager of mail processing, talking to two other employees on the distribution line. Thinking that this demonstrated that management had a double standard about employees talking while working on the distribution line, they asked Supervisor Nichols to arrange a meeting with Love about this problem. Love, Nichols, O'Harrow, and Woods then met in a small conference room where grievance meetings are usually held. After a heated discussion as to whether management had the right to talk to employees working on the distribution line, Love stated that the meeting was over, ordered O'Harrow and Woods to go back to work, and stated that they would resume the meeting later when everyone had calmed down. Love and Nichols then left the conference room, but O'Harrow and Woods followed them out into the distribution area stating that the Union would not tolerate this situation. As neither O'Harrow nor Woods had shown any signs of complying with Love's first order that they return to work, Love turned to them and stated, "I am giving you a direct order . . . . I want you to go back to work now." O'Harrow and Woods did not move or respond to this second order, but rather continued to harangue Love and Nichols. When Love started to repeat the order a third time, O'Harrow and Woods finally stopped arguing and walked away to their work stations.

On February 3, 1979, Nichols gave O'Harrow and Woods warning letters, signed by Love, which stated that they were being warned for insubordination. Specifically, both letters described the conversation at the meeting on February 2, 1979, noting that O'Harrow had "used loud, abusive and profane language," both letters stated that Love had terminated the meeting and had asked the employees to return to work, noting that neither employee had done so but rather they had "kept making attempts to interrogate Mr. Nichols and [Mr. Love]," and both letters noted that Love had to give them three direct orders to return to their work assignments before they would do so.

I agree with my colleagues that the Administrative Law Judge was correct in finding that O'Harrow and Woods were engaged in the informal resolution of a potential grievance at the February 2, 1979, meeting and that they were thus essentially insulated from discipline for insubordinate statements made to management officials during this protected collective-bargaining activity, unless their conduct was so opprobrious or extreme as to warrant the denial of such protection under the Act. I also agree with my colleagues that the conduct of O'Harrow and Woods during the grievance meeting in the conference room was not so opprobrious or extreme as to deny them the protection of the Act.[1] However, I disagree with the majority's conclusion that the conduct of O'Harrow and Woods after leaving the conference room at the end of the meeting was not so opprobrious or extreme that it became unprotected. Assuming, without deciding, that the Administrative Law Judge properly found that the events which occurred outside the conference room just after the meeting ended were part of the *res gestae* of the grievance meeting, I would conclude that the insubordinate conduct of O'Harrow and Woods in ignoring direct orders to return to work was, in the circumstances of this case, so extreme as to become unprotected.

In my opinion, the behavior of O'Harrow and Woods after Love terminated the grievance meeting went beyond verbal insubordination, since they engaged in overt acts by defying two of Love's orders that they return to work. Furthermore, it should be noted that their second refusal to return to work as ordered occurred in a production area during working time when other employees were likely to be present.[2] Under these circumstances, their overt acts of defiance would clearly tend to undermine Respondent's right to maintain order and respect. Thus, their failure to return to work when ordered to do so was not protected even though they continued to discuss their grievance. Therefore, I would find that Respondent did not violate Section 8(a)(1) and (3) of the Act when it disciplined O'Harrow and Woods for ignoring several direct orders to return to work.[3]

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[1] In this connection, I note that their only misconduct was O'Harrow's use of several profane words and one obscene word, none of which were used as epithets directed at the management officials, and this misconduct occurred in a private conference room out of the presence of other employees.

[2] The Board has usually considered such factors relevant to its determination as to whether an employee has lost the protection of the Act by opprobrious conduct while engaged in protected concerted activity. See, e.g., *Atlantic Steel Company*, 245 NLRB No. 10? (1979).

[3] Although the warning letters issued to O'Harrow and Woods described the events which occurred during the grievance meeting and

Continued

Moreover, it continues to disturb me that cases of this nature are still congesting the Board's docket and wasting the Board's scarce resources, at a time when the Board is struggling to cope with a dramatically expanding caseload and a growing backlog of cases awaiting hearing. This case should never have been litigated to a Board decision; rather it should have been deferred under *Collyer*[4] to the grievance and arbitration procedures agreed upon by the parties in their collective-bargaining agreement. The majority's decision here illustrates once again my colleagues' lack of wisdom in narrowing the application of *Collyer*. In view of the national labor policy favoring collective bargaining and the arbitration of disputes, the Board should encourage the parties to resort to their existing contractual methods for private dispute resolution rather than promoting litigation before the Board of such relatively minor issues. Accordingly, I would dismiss the complaint in its entirety.

refer to O'Harrow's use of "loud, abusive, and profane language" at the meeting, I would find that Respondent disciplined them solely because of their failure to return to work when ordered to do so. I am convinced that the references in the letters to the events of the meeting were merely included as background identifying the particular meeting involved and giving Respondent's position as to the legitimate reasons for Love's actions in terminating the meeting and ordering the employees back to work. I note that the record reveals that O'Harrow and Woods were involved in more than one grievance meeting on February 2, 1979, and that the warning letter issued to Woods also referred in identical wording to O'Harrow's language at the meeting and to the other events of the meeting even though Woods himself had not used any abusive or profane language or engaged in any insubordinate conduct during the meeting.

[4] *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971). My views on deferral have recently been restated at length in *Roy Robinson, Inc., d/b/a Roy Robinson Chevrolet*, 228 NLRB 828 (1977), and Member Walther's and my dissent in *General American Transportation Corporation*, 228 NLRB 808 (1977).

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge: This case was heard by me in San Angelo, Texas, on September 18 and 19, 1979, pursuant to a complaint issued by the Regional Director for Region 16 on May 25, 1979, pursuant to an original and a first amended charge filed by American Postal Workers Union, AFL-CIO (San Angelo, Texas Local), herein called the Local, on March 5, 1979, and April 30, 1979, respectively. The complaint alleges, in substance, that United States Postal Service, herein called Respondent, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, herein called the Act, by dealing directly with employees in derogation of their designated representative for purposes of collective bargaining, Section 8(a)(1) and (3) of the Act by issuing warning notices to employees because they engaged in union or other protected concerted activities, and Section 8(a)(1) of the Act by threatening employees with discipline and the issuing of written reprimands because of their union membership, activities, and desires. Respondent filed an answer, denying the commission of any unfair labor practices. All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Briefs were filed by counsel for the General Counsel and by Respondent and each has been carefully considered.

Upon the entire record in the case, and from my observation of the demeanor of the witnesses, and having carefully considered the post-hearing briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that jurisdiction is asserted herein by virtue of Section 1209 of the Postal Reorganization Act, 39 U.S.C. § 101, *et seq.*, herein called the PRA.

II. THE LABOR ORGANIZATIONS

Although the status of American Postal Workers Union, AFL-CIO, herein called the Union, is not alleged in the complaint, the record establishes that said entity engages in collective bargaining with Respondent, has negotiated successive collective-bargaining agreements with Respondent on a national basis, with the most recent of said agreements, effective from July 21, 1978, until July 20, 1981, and represents employees in the processing of grievances. Accordingly, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. *United States Postal Service*, 208 NLRB 948 (1974). Additionally, the complaint alleges, Respondent admits, and I find that the Local is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

1. Whether Respondent, on or about February 3, 1979, violated Section 8(a)(1) and (3) of the Act by issuing written reprimands to employees because said employees engaged in union or other protected concerted activities?

2. Whether Respondent, on or about February 2, 1979, violated Section 8(a)(1) of the Act by threatening to write up employees because of their union membership, activities, and desires?

3. Whether Respondent, on or about February 2, 1979, violated Section 8(a)(1) of the Act by orally threatening to file insubordination charges against employees because of their union membership, activities, and desires?

4. Whether Respondent, on or about March 28, 1979, violated Section 8(a)(1) and (5) of the Act by bargaining directly with its employees?

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Threats and the Warning Notices*

1. Facts

The record establishes that the San Angelo, Texas, Post Office consists of two separate facilities, a main building and a secondary facility called the Herring Station, and that during the period January through March

1979[1] Longino Monreal was the postmaster, John Love was the manager of mail processing, Robert Nichols was the supervisor of mails, and Hubert D. Sanders was a relief supervisor.[2] The record further establishes that the Union has represented postal clerks and other employees of Respondent for approximately 10 to 12 years, that the Union has negotiated successive collective-bargaining agreements with Respondent during the period, and that the Local, as the agent of the Union and pursuant to the national agreement, has negotiated local supplements to said agreement with the San Angelo, Texas, postmaster. It appears that beginning in November 1978, at approximately the time Monreal was appointed postmaster, and continuing through March 1979 relations between the Local and the San Angelo post office management gradually became strained and querulous. Thus, soon after he assumed office, Monreal instituted more stringent rules concerning the investigation and filing of employees grievances.[3] These changes, in turn, resulted in the filing of several grievances by the Local and, I believe, significantly contributed to the rather tense working atmosphere which seems to have existed by February.

With the foregoing as background, R. P. O'Harrow, a distribution clerk and president of the Local, and Jack Woods, another distribution clerk and vice president of the Local, testified that they were warned several times in late January for talking to each other while working. Both O'Harrow and Woods worked a 4 a.m. until 12.30 p.m. shift at the Herring Station facility and were stationed alongside each other on the distribution line. According to Woods, there was no work rule regarding talking to other employees while working, such had always been done, and no employee had ever been disciplined for talking while working. On February 2, O'Harrow and Woods commenced working at 4 a.m. and, according to Woods, by 5:30 a.m. supervisors had spoken to him two times regarding talking to O'Harrow while they were working. At approximately 5:30, O'Harrow observed John Love walk to the end of the distribution line and engage employees Norman McClausky and Kent Edborg in conversation. Believing that a double standard existed regarding talking on the distribution line, O'Harrow spoke to Robert Nichols, his supervisor, and asked Nichols if he had time to discuss a grievance. Nichols said that he did, and O'Harrow replied that he needed Woods and Love in the discussion.[4]

A few minutes later, Woods, O'Harrow, Nichols, and Love met in the small conference room in the back of the Herring Station.[5] O'Harrow testified that he began the meeting by asking Love if the latter were talking business with the clerks at the end of the line. Love replied that he was not, and O'Harrow asked if Love were "just passing the time of day?" Love replied that he was. O'Harrow then asked Love if he thought it was right for him to waste a clerk's time by standing there passing the time of day when Woods and O'Harrow were "counseled" a day or so before for doing the same thing. Love replied that "he didn't have to answer my questions and that the meeting was terminated." Love then turned to Nichols and said "put those fellows back to work and keep a close eye on them and if they get out of line, write them up." At that point, acccording to O'Harrow, Woods asked if they were going to have a grievance discussion or were they returning to work. When Nichols said nothing, Love turned to him and said, "This meeting is terminated. Put them back to work." On cross-examination, O'Harrow admitted that grievances usually were discussed after 8:15 a.m. and that, during the conversation, Love questioned the manner in which O'Harrow was talking to him.

Woods contradicted O'Harrow, testifying that he, and not O'Harrow, initiated the meeting by requesting permission from Nichols to have the meeting. According to Woods, O'Harrow began the meeting by asking Love why they were being reprimanded for talking while Love was "chit-chatting with the employees about things that didn't pertain to the post office business." Love replied that he could say anything he wanted to anyone about anything for as long as he wanted to and that he did not have to take that kind of talk from O'Harrow. Then, according to Woods, Love turned to Nichols and said, "Bob, put these two guys back to work, keep a close eye on them, and if they get out of line, write them up." Woods further contradicted O'Harrow, denying that anyone said that the meeting was terminated.

John Love testified that he arrived at work on February 2 at approximately 5 a.m. and that, after checking for personal mail, he walked to the end of the distribution aisle and spoke to employees McClausky and Edborg for

[1] All dates herein, unless otherwise specified, are in 1979

[2] The complaint alleges, the answer admits, and I find that Monreal, Love, Nichols, and Sanders are supervisors within the meaning of Sec. 2(11) of the Act.

[3] It is undisputed that, commencing in or about November 1978, Postmaster Monreal began instituting changes in the method whereby officials of the Local were permitted to investigate and process employee grievances. Among the changes instituted by Monreal were requirements that stewards state the amount of time necessary for the investigation of a potential grievance, that employees disclose to supervisors the nature of a potential grievance before receiving permission to see their union representative, that stewards could not type or "xerox" grievances while "on the clock," and that limitations were placed on the amount of time stewards were permitted to speak to potential grievants about problems. As stated above, grievances were filed by members of the Local regarding these changes.

[4] Art. XV of the current collective-bargaining agreement between Respondent and the Union sets forth the grievance-arbitration procedure. During the initial step in the process, the aggrieved employee discusses his grievance with his immediate supervisor. According to the collective-bargaining agreement, a union official may or may not be present. If the grievance is unresolved at the initial step, it must be appealed in writing to the head of the installation. Such constitutes step 2 of the grievance procedure.

It was undisputed that, to initiate the grievance procedure, an individual must receive permission from the supervisor to either discuss a potential grievance with a local official or to discuss an actual grievance with his supervisor. However, the witnesses disagreed over what words initiate the procedure. Thus, Jack F. Woods testified that he would use the word "grievance" only if the matter involved a violation of the national agreement, while he would use the word "problem" if the matter involved anything less serious. On the other hand, John Love testified that employees always used the word "grievance" if they desired to meet with either a steward or their immediate supervisor. However, Love did admit that on occasion employees will just state that they have a problem. In these cases, according to Love, the supervisor will follow by asking if the matter involves a grievance.

[5] The conference room is a sparsely furnished room consisting of a double desk, chairs at both ends of the desk, and a small stool by one of the walls.

approximately 2 minutes. At approximately that same time, according to Robert Nichols, he was called over by O'Harrow and Woods who stated that they would like to speak to Love. Nichols thereupon walked over to Love and, according to Love, told the latter that Woods and O'Harrow wanted a meeting because "they think that we can iron out some of the problems we have been having around here if we get together and have a little discussion." Love assented to the meeting, and, a few minutes later, Nichols brought O'Harrow and Woods to the conference room where Love was waiting for them. According to both Love and Nichols, O'Harrow sat down on one of the desk chairs, leaned back in the chair, placed his legs on the desk, and clasped his hands around the back of his head. Love and Nichols generally corroborated each other as to what was said during the meeting. Thus, they testified that O'Harrow began the meeting by asking Love, "What the hell were you talking to those two employees about?" Love asked O'Harrow what he meant, and O'Harrow replied that he wanted to know if Love was talking about official business or "were you just bullshitting with the employees?" Love responded that he did not appreciate the way O'Harrow was talking to him and asked O'Harrow not to speak in that manner. O'Harrow thereupon accused Love of evading the issues and responded that he would speak to Love with "any language I damn well please in here." O'Harrow then asked once again whether Love was "just bullshitting with the employees." Love responded that what he was talking about with the two employees was not official business and that such was none of O'Harrow's business either. At that point, both Woods and O'Harrow stated that Nichols had spoken to both of them about excessive talking and that, if management were going to talk to the employees about excessive talking, management had no right to talk to the employees. At that point, with O'Harrow and Woods repeating that management was unfair, Love announced that the meeting was over, that he wanted O'Harrow and Woods to go back to work, and that they would resume the meeting when everyone had calmed down. Love and Nichols then left the room. However, O'Harrow and Woods followed, repeating that the Union would not tolerate what was happening. The four of them reached the employee timeclock, and Love turned to O'Harrow and Woods, stating, "I am giving you a direct order. I want you to go back to work and I want you to go back to work now." Neither O'Harrow nor Woods moved; however, as Love attempted to repeat the command, the two employees just stopped talking and walked away. During the meeting, according to Nichols, O'Harrow and Woods were not yelling but rather were "just talking loud" and they used no curse words other than "bullshitting." Finally, both Love and Nichols denied that Love ordered Nichols to watch O'Harrow and Woods and to write them up if necessary.

Robert Nichols testified that, at 8:15 that morning, Woods approached him and said that he wanted to talk to his steward. Nichols replied that Woods should go to the conference room and that he would tell O'Harrow about the meeting. Nichols thereupon proceeded to look for O'Harrow but could not find him. Meanwhile, according to O'Harrow, he was likewise searching for Nichols in order to obtain permission to speak to Woods about a grievance. While looking for Nichols, O'Harrow passed through Love's office. According to O'Harrow, Love asked if he could help. O'Harrow replied, "I don't suppose so unless you know where Robert Nichols is." Love responded that he did not know where Nichols was and asked why O'Harrow wanted him. O'Harrow replied that he wanted to discuss a grievance, and Love replied, "I have already told him and Woods that you cannot discuss the grievance." According to O'Harrow, he and Love then walked out of Love's office and were joined by P. G. Ecomomidas, the customer service manager. O'Harrow testified that he asked Ecomomidas why he was not being given permission to discuss a grievance, and Ecomomidas replied that he did not know. At that point, according to O'Harrow, Monreal, the postmaster, walked over to them and asked what the problem was. After O'Harrow told him, Monreal suggested that they go into the office.

By this time, according to O'Harrow, both Nichols and Woods had joined them. Accordingly, Monreal, Love, Nichols, Woods, and O'Harrow entered an office where H. D. Sanders was already present. Monreal began the discussion by asking Love what was wrong. Love replied that he told O'Harrow that the latter could not discuss a grievance. O'Harrow asked Love why, and Love replied, "the next time you put your finger in my face and talk to me that way I am going to file insubordination charges against you." O'Harrow responded, asking Love why he wanted to file insubordination charges against him. Love replied, "You're not going to talk to me that way and poke your finger in my face and the next time you do it, I'm going to charge you with insubordination." To that, according to O'Harrow, he said, "Why don't you go ahead and charge me with insubordination?" Love responded, "I will the next time you poke your finger in my face and talk in that manner." At that point, Monreal said that, since Nichols had given O'Harrow and Woods permission to discuss the grievance, he (Monreal) would permit them to go ahead and discuss the grievance, and the meeting ended at that point. On cross-examination, O'Harrow admitted that he did not deny Love's accusation that he (O'Harrow) put his finger in Love's face but averred that he had no knowledge to what Love was referring.

Love testified to a different version of the facts. Thus, according to Love, at approximately 8:30 a.m. on February 2, O'Harrow came through his office walked into the outer office, and then came back into Love's office. Love asked if he could help. O'Harrow replied, "Who the hell made you the official helper around here." O'Harrow then turned to leave again, but Love stood up, stating "What in the world is wrong with you." At that point, with Love standing no more than a foot from O'Harrow, the latter turned around and said, while pointing a finger at Love's face, "Get your ass back in your office and get back there now." According to Love, he replied that O'Harrow could not speak to him like that. O'Harrow responded by asking Love what the latter was going to do about it. Love replied that he

could give O'Harrow a warning letter or write him up. O'Harrow then asked if Love had any witnesses, and after Love said that he did not, O'Harrow replied that it was Love's word against his. Love responded that he could still give O'Harrow a warning letter, and O'Harrow turned and left the office.

Love further testified that, at approximately 8:45 a.m., O'Harrow came back through his office carrying a brief case. Ecomomidas was in Love's office, and Love asked O'Harrow never to stick his finger in Love's face again or talk to Love like he did previously. O'Harrow asked if Love was threatening him. At that point, Ecomomidas interrupted, saying that such was not a threat but that Love just did not want O'Harrow talking like that. O'Harrow responded by again pointing his finger at Love and saying, "I will talk anyway I want to." According to Love, Monreal then entered the room and asked what was going on. O'Harrow responded by saying that Love was obstructing the grievance procedure. Love replied that he did not want O'Harrow sticking his finger in Love's face and talking to him like he had done. O'Harrow repeated that Love would not let him discuss a grievance. Monreal told him to go ahead and have the discussion, and the meeting ended [6]

Jack Woods testified to the following conversations on the morning of February 2. At approximately 10 a.m., after the first class mail had been distributed, he and Nichols were in the conference room waiting for O'Harrow to arrive. John Love entered the room and told Nichols that, unless Woods told him specifically what he wanted to discuss, he would not allow Woods to speak to O'Harrow. Woods replied that, under those circumstances, he did not want to have a meeting with O'Harrow at that time and left the conference room to return to work. Neither Nichols nor Love denied the occurrence of, or the substance of, this meeting. Woods next testified that, at approximately 12 noon, he and O'Harrow walked into Monreal's office where Love and Ecomomidas were already present. According to Woods, he and O'Harrow asked Monreal for permission to have a grievance meeting. Monreal said that they could have the meeting because Nichols had previously given permission. At that point, Love turned to O'Harrow and said that, if he ever spoke to him that way again, he (Love) would write him up for insubordination. O'Harrow did not corroborate the occurrence of this meeting, and Woods did not recall any 8:30 or 9 a.m. meetings with Monreal on that day.

On February 3, Nichols gave O'Harrow a warning letter, dated February 2 and signed by Love. The letter stated the following reasons for the warning:

> 1. Insubordination: Specifically on 2-2-79 you and Full-time Clerk J.S. Woods . . . requested, thru your immediate Supervisor R.L. Nichols, a meeting between the four of us. At 05:05 this requested meeting was held. At that time you questioned my talking to employees on the work room floor, because you had had a discussion with Mr. Nichols that concerned excessive talking on the previous day. You used loud, abusive, and profane language. When I asked you to refrain from using such language in our conversation, you stated, "I will use any language that I damn well please." At this point I terminated the meeting and asked you and Mr. Woods to return to your work assignment. You and Mr. Woods did not comply with my request and kept making attempts to interrogate Mr. Nichols and myself. I had to give you and Mr. Woods three direct orders to return to your work assignment before you would do so.
>
> 2. Insubordination: Specifically on 2-2-79 at 08:30 you came into my office carrying an attache case. You walked thru my office into the outer office and returned. As you were leaving I asked if I can help you and you replied, pointing a finger in my face, "who appointed you helper around here?" I stated that maybe you should return to your work assignment and you told me "shut up and get back into your office." I asked you to remove your finger from my face and to not talk to me in that manner. You asked me what I was going to do about it and I stated that I would give you a letter of warning. You said "good, let's get it on."

Also on February 3, Nichols gave a warning letter, dated February 2 and signed by Love, to Jack Woods. The letter stated the following reason for the warning:

> Insubordination: Specifically on 2-7-79 you and Full-time Clerk R. P. O'Harrow . . . requested thru your immediate Supervisor R. L. Nichols a meeting between the four of us. At 05:05 this requested meeting was held. At that time Mr. O'Harrow's language was loud, abusive, and profane. I terminated the meeting and asked you and Mr. O'Harrow to return to your work assignment. You and Mr. O'Harrow did not comply with my request and kept making attempts to interrogate Mr. Nichols and myself. I had to give you and Mr. O'Harrow three direct orders to return to your work assignment before you would do so.

2. Conclusions

Paragraph 6(a) of the complaint alleges that Respondent violated Section 8(a)(1) of the Act when Love allegedly instructed Nichols to put O'Harrow and Woods back to work, to watch them, and to write them up if necessary. O'Harrow and Woods attributed this statement to Love during the 5.30 a.m. meeting in the Herring Station conference room on February 2. Both Nichols and Love specifically denied that Love made such a statement. I credit their denials. Neither O'Harrow nor Woods impressed me as forthright or truthful witnesses

[6] Love's testimony was corroborated by other witnesses. Thus, Hubert Sanders testified that, while he was sitting in an outer office during the morning of February 2, he overheard Love say several times, "I am asking you, please, not to shake your finger in my face," and that he heard O'Harrow reply, "What are you going to do about it?" He then heard Love respond, "I will write you up." Also, Robert Nichols, who testified that he was not present during any of the latter conversations between Love and O'Harrow, testified that while he was searching for O'Harrow at approximately 8:30 that morning, he heard Love state, "I asked you, please, Pat, don't put your finger in my face again." Finally, Monreal corroborated the version of the conversation given by Love after Monreal entered the discussion with O'Harrow.

and both appeared vindictive toward Respondent because of the procedural changes which were instituted by Monreal. Also, on some points, they specifically contradicted each other and, on others, they could not corroborate each other. Moreover, I found incredible O'Harrow's assertion that he did not know to what Love was referring during their later conversation of that morning when Love accused O'Harrow of shaking his finger at Love and speaking in an insubordinate manner. This is especially compelling, for O'Harrow neither denied Love's accusation at the time nor demanded an explanation as to what Love was talking about. Finally, in contrast to O'Harrow and Woods, Love and Nichols appeared to be honest and candid witnesses and generally corroborated each other where necessary. Accordingly, I credit the testimony of Love and Nichols regarding this conversation and shall recommend that paragraph 6(a) of the complaint be dismissed.

As to paragraph 6(b) of the complaint, inasmuch as Love admitted that, during his 8:30 a.m. conversation with O'Harrow on February 2, he threatened O'Harrow with a warning letter, the determination as to whether said statement was violative of Section 8(a)(1) of the Act depends upon an analysis of the surrounding circumstances. In this regard, for the aforementioned reasons and inasmuch as his testimony was corroborated by other witnesses, I credit Love as to this conversation and specifically discredit the testimony of O'Harrow. Thus, I believe that Love uttered his threat to O'Harrow only after the latter shook his finger in Love's face and ordered Love to "get your ass back in your office and get back there now" and after O'Harrow sarcastically demanded to know what Love could do about O'Harrow speaking in that manner. Further, while O'Harrow may well have been searching for Nichols to ask permission to investigate a grievance when he entered Love's office, O'Harrow clearly was not engaged in protected activities when he spoke to Love in the above-described insubordinate manner. Moreover, there is no credible evidence that Love uttered his threat in response to any protected concerted activities in which O'Harrow may have been engaged. Rather, I believe that Love was responding to what he perceived as insubordination by an employee. "The right of an employer to maintain order and to insist on a respectful attitude by his employees toward their supervisor is an important one." *Court Square Press, Inc.*, 235 NLRB 106, 109 (1978). Accordingly, I shall recommend that paragraph 6(b) of the complaint be dismissed.

With respect to paragraphs 6(c), 7, and 8 of the complaint, Respondent admits that warning notices, dated February 2 and signed by John Love, were issued to employees O'Harrow and Woods but denies that said warning notices were issued in response to their attempts to process a grievance. Analysis of the two warning letters reveals that one of the reasons for the warning letter to O'Harrow and the sole reason for the warning letter to Wood was their conduct during the meeting with Love and Nichols at 5:30 a.m. in the Herring Station conference room on February 2. In particular, the letters assert that O'Harrow used "loud, abusive, and profane language," and that neither O'Harrow nor Woods complied with Love's request to return to their respective work assignments. In describing this meeting, counsel for the General Counsel contends that "O'Harrow and Woods were attempting to process a grievance," over supervisors speaking to them regarding talking when working while supervisors were permitted to interrupt the work of other unit employees during worktime and engage in nonofficial business. If, in fact, O'Harrow and Woods were engaged in the processing of a grievance, the Board has traditionally held that while employees are engaged in collective bargaining, including the presentation of grievances, they are essentially insulated from discipline for statements made to management representatives which, if made in another context, would constitute insubordination. *Ryder Truck Lines, Inc.*, 239 NLRB 1009, 1010 (1978). Moreover, "the lack of . . . diplomacy does not render conduct unprotected. Any attempt to dictate the exact language to be used in a collective-bargaining atmosphere can only have the affect of stifling that bargaining." *Hawaiian Hauling Service, Ltd.*, 219 NLRB 765, 766 (1975).

Respondent's defense that O'Harrow and Woods acted in an insubordinate manner during the 5:30 a.m. meeting rests upon three bases. First, Respondent argues that O'Harrow and Woods were not engaged in protected activity and, more specifically, that the meeting was not for the purpose of adjusting a grievance. In support of this argument, Respondent asserts that neither O'Harrow nor Woods announced to Nichols that they wished to hold a grievance meeting, that the proper parties for the first step of the grievance procedure were not present, that no grievance was ever filed over the incident, and that the purpose of the meeting was solely to "dress down" Love. While Respondent may be accurate that the technical procedures of the contractual grievance procedure were not followed, I nevertheless believe that the parties were involved in grievance adjusting during this meeting. Thus, Love admitted that, prior to the meeting, Nichols told him that the purpose of the meeting was that, "[O'Harrow and Woods] think that we can iron out some of the problems we have been having around here if we get together and have a little discussion." Moreover, even if the technical procedures of the grievance and arbitration machinery were not followed, "the informal resolution of latent grievances is a recognized, and indeed, essential component of . . . [a] grievance procedure. Without such informal resolutions, there is a risk of destroying the effectiveness of that procedure by weighing it down with formalized grievances." *Ryder Truck Lines, Inc., supra* at 1011. Also, both Love and Nichols admitted that the main subject of the meeting was the complaint by O'Harrow and Woods of unequal treatment—clearly, I believe, a grievable subject. Finally, I believe that employees must be assured of being treated as equals as much in informal meetings as informal ones and that they must be confident of being able to speak their minds without fear of discipline. If such fear exists, I believe that effective and, indeed, meaningful collective-bargaining can never occur.

Respondent next argues that, even if the 5:30 a.m. meeting constituted protected activity, O'Harrow and Woods engaged in such "opprobrious conduct" so as to

lose the protection of Section 7 of the Act. While the Board did recognize in *Hawaiian Hauling, supra*, that if an employee engages in opprobrious conduct during collective bargaining he may lose the protection of the Act, it has never really defined the term "opprobrious." However, in a recent decision, the Board held that it would examine four factors in determining whether an employee's conduct at a grievance meeting would result in the loss of the protection of the Act. *Atlantic Steel Company*, 245 NLRB No. 107 (1979). These factors include the location of the meeting, the subject matter of the meeting, the nature of the conduct, and whether any employer unfair labor practices may have provoked the outburst by the employee. Herein, while there is no evidence that Respondent committed any unfair labor practices which would have provoked the conduct of O'Harrow and Woods, their actions can hardly be classified as "extreme behavior." *Sea-Land Service, Inc.*, 240 NLRB 1146 (1979) (dissent of Member Penello). Thus, Nichols admitted that the only curse word used by O'Harrow was "bullshitting" and that neither O'Harrow nor Woods was shouting but rather merely "talking loud." Further, according to Nichols, the word "bullshitting" was uttered by O'Harrow during a question about what Love was talking to employees McClausky and Edborg that morning—"well, was it official business or were you just bullshitting with them?" Furthermore, the location of the meeting was the conference room which, I believe, was customarily used for grievance discussions, and I have previously held that the meetinq did, indeed, involve the informal adjusting of a matter which was perceived by O'Harrow and Woods as an employee grievance. Accordingly, while the conduct of O'Harrow and Woods may have been reprehensible to Love, it cannot be classified as "opprobrious" or "extreme" so as to deny O'Harrow and Woods the protection of Section 7 of the Act. *Sea-Land Service, Inc., supra*; *Ryder Truck Lines, Inc., supra*; *Thor Power Tool Company*, 148 NLRB 1379 (1964).

Finally, Respondent asserts that O'Harrow and Woods continued to argue with Love after the meeting had been terminated and that employees do not have the right to keep a supervisor captive to a barrage of "indiscriminate rhetoric" after a grievance meeting has ended. In support, Respondent cites *United States Postal Service*, 242 NLRB No. 39 (1978). Contrary to Respondent, I find that decision by the Board to be inapposite as it involved allegedly unlawful discipline for the act of *filing* a grievance, while the instant case involves discipline for conduct engaged in by union representatives during the *processing* of a grievance. Furthermore, Respondent has seemingly bifurcated the conduct of O'Harrow and Woods, finding protected that which occurred prior to Love's announcement and unprotected that which occurred thereafter. Such an argument, however, would enable an employer, by its own whim, to define the nature of protected activity, and I believe that such an argument is repugnant to the policies of the Act. Moreover, and contrary to the contention of Respondent, I believe that the entire conduct of O'Harrow and Woods during the 5:30 a.m. meeting was within the *res gestae* of the grievance meeting. *Atlantic Steel Company, supra*. Accordingly, I believe that the portion of the February 3 warning notice to O'Harrow which defines as insubordination O'Harrow's conduct during the 5:30 a.m. meeting is violative of Section 8(a)(1) and (3) of the Act. Likewise, I believe that the February 3 warning notice to Woods which cites Woods' conduct during the 5:30 a.m. meeting as insubordinate is also violative of Section 8(a)(1) and (3) of the Act. *Ryder Truck Lines, Inc., supra*; *Hawaiian Hauling Service, Ltd., supra*.

B. *The Alleged "Direct Dealing"*

1. Facts

According to the testimony of employee Louis C. Loe, a mail clerk at the Herring Station, and Hubert D. Sanders, a relief supervisor, Loe approached Sanders at approximately 10:30 a.m. on March 22 and requested permission to speak to O'Harrow. Sanders gave his permission and, thereafter, Loe and O'Harrow met in the conference room in the rear of the facility. A few minutes later, as O'Harrow and Loe were just beginning their meeting, Sanders entered the conference room and announced that he had overlooked some procedural matters. He turned to Loe and asked him for the nature of the meeting and how long Loe believed the meeting would last. Loe responded that he had a medical problem but that he did not know how long the meeting with O'Harrow would last. Thereupon, Sanders turned to O'Harrow and asked the same question. O'Harrow replied that he did not know and told Sanders that, unless the latter wished to discuss the grievance, he must leave the room. At that point, an argument ensued between O'Harrow and Sanders regarding the right of the latter to inquire into the nature of the grievance and the estimated time that it would take to investigate it. Finally, O'Harrow stated to Loe that he was going to terminate the grievance discussion because Sanders was interfering with the process. Thereupon, O'Harrow picked up his brief case and left the conference room. Sanders and Loe also left the room but continued their discussion outside. Sanders told Loe that he did not want to do anything which would interfere with Loe calling a doctor but that he should not permit a procedural dispute between the Local and management to interfere with his right to present a grievance. According to Sanders, Loe replied that he felt any sick leave discussions were questioning his integrity and stated, "I have tried it your way, now I'm going to try it theirs." The meeting essentially ended at that point.

Approximately 5 or 6 days later, Loe was on his way to the timeclock to punch out at the end of the day when he met Sanders. According to Loe, Sanders initiated the discussion, stating, "Louie, I know you have a health problem. I haven't seen your grievance and until I have seen your grievance, I can't rule on it." Loe replied that he would have to talk to O'Harrow. Sanders responded, "You don't need Pat . . . or anyone else to represent you in a grievance. You can come to me, we can discuss it, and chances are we can work something out." According to Loe, he responded that he would have to see O'Harrow and walked away. For the most part, Sanders' version of the conversation corroborates

that of Loe. Thus, according to Sanders, he began the conversation by asking Loe if he had filed a grievance. Loe responded that he had not and, according to Sanders, he replied, "You know, until you discuss this with your supervisor, until he knows what the problem is, there is nothing in the world that he can do for you. You can sit down and talk to your supervisor about it. You don't have to have the Union at step one to discuss a grievance, you can sit down and talk to your supervisor and maybe you can work it out . . . ." Sanders testified that Loe ended this conversation the identical way he ended their earlier meeting, stating, "I have tried it your way, now I'm going to try it theirs."

2. Conclusions

Counsel for the General Counsel, without supplying any case support, argument, or rationale, asserts that Sanders' conduct constituted direct dealing with bargaining unit employees in violation of Section 8(a)(1) and (5) of the Act. Respondent does not dispute that Sanders invited Loe to discuss a grievance but contends that Sanders' invitation was merely a restatement of the collective-bargaining agreement. Respondent further argues that, even if Sanders attempted to individually bargain with Loe, such should not be deemed unlawful inasmuch as it had a negligible impact on the Local's ability to act as the bargaining representative for Loe. As noted above, step one of the contractual grievance and arbitration procedure contemplates a meeting between the grievant and his immediate supervisor, and "the employee, if he or she so desires may be accompanied and represented by the employee's steward or a Union representative." Thus, the contract makes permissible, but not mandatory, that an employee be accompanied by a union representative. Moreover, analysis of the testimony of both Loe and Sanders leads to the inescapable conclusion that Sanders was, in fact, merely setting forth for Loe what the contract provides—that, at the initial stage of the grievance procedure, Loe would have to meet with Sanders and that, if he so chose, Loe did not need a union representative present when he spoke to Sanders.[7] Furthermore, there is no evidence that Sanders pursued the matter with Loe or coerced Loe into discussing the merits of the grievance, that Sanders' actions in any way hindered Loe in filing a grievance over his problem, or that either Loe or the Local, on behalf of Loe, ever attempted to file a formal grievance over Loe's problem. Accordingly, I do not believe that, by a preponderance of the evidence, General Counsel has established that Respondent violated Section 8(a)(1) and (5) of the Act by dealing directly with bargaining unit employees. Accordingly, I shall recommend that paragraph 13 of the complaint be dismissed.

[7] Clearly, by the wording of the grievance-arbitration provision of the existing collective-bargaining agreement, the Union has expressly waived any mandatory right to be present during first-step grievance meetings. Such a waiver has been sanctioned by the Board and the courts. *The Dow Chemical Company*, 215 NLRB 910 (1974), reversed on other grounds *United Steel Workers of America, AFL-CIO* v. *N.L.R.B.*, 536 F.2d 550 (3d Cir. 1976).

Conclusions of Law

1. The National Labor Relations Board has jurisdiction over this matter by virtue of Section 1209 of the Postal Reorganizational Act.
2. The Union and the Local are labor organizations within the meaning of Section 2(5) of the Act.
3. By issuing a warning notice, which is partially based on his conduct during the presentation of a grievance, to employee R. P. O'Harrow, Respondent violated Section 8(a)(1) and (3) of the Act.
4. By issuing a warning notice, which is solely based upon his conduct during the presentation of a grievance, to employee Jack F. Woods, Respondent violated Section 8(a)(1) and (3) of the Act.
5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent did not violate Section 8(a)(1) and (5) of the Act by dealing directly with its employees.
7. Respondent did not violate Section 8(a)(1) of the Act by threatening its employees with the imposition of any disciplinary action or by threatening to write them up because of their union membership, activities, and desires.

Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully issued a letter of warning to employee Jack F. Woods, I shall recommend that it be required to revoke and expunge from its records all copies of said letter and take no action against Woods based, in whole or in part, on that warning letter. Having also found that Respondent unlawfully issued a letter of warning to employee R. P. O'Harrow based, in part, on his conduct during the presentation of a grievance, I shall recommend that it be required to revoke and expunge from its records those portions of all copies of said letter which refer to O'Harrow's conduct during the 5:30 a.m. meeting on February 2 at the Herring Station and take no action against O'Harrow based, in whole or in part, upon that portion of the letter of warning which refers to O'Harrow's participation in said meeting.[8]

Upon the basis of the entire record, the findings of fact, and the conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

[8] I have previously concluded herein that O'Harrow was acting in an insubordinate manner when he confronted Love in the latter's office at 8:30 a.m. on February 2. Accordingly, I concluded that Love's threat to file charges based on that incident was not unlawful. Thus, insofar as the February 3 warning notice refers to that incident, I find it to be lawful. Moreover, inasmuch as the two incidents appear to be separate and unrelated and as the later confrontation appears to be separate grounds for insubordination, I shall not order that the entire letter be revoked and expunged from Respondent's records.

ORDER[9]

The Respondent, United States Postal Service, San Angelo, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Issuing letters of reprimands to or threatening to discharge or discipline employees because of their protected participation in grievance meetings.

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

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Revoke and expunge from its records the letter of warning issued to Jack F. Woods on February 3, 1979, and take no action against him based, in whole or in part, on that reprimand.

(b) Revoke and expunge from its records those portions of the letter of warning issued to R. P. O'Harrow on February 3, 1979, which refer to his participation in a 5:30 a.m. meeting on February 2 at the Herring Station and take no action against him based, in whole or in part, on that portion of the letter of warning.

(c) Post at its San Angelo, Texas, facilities copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint should be dismissed insofar as it alleges that Respondent violated Section 8(a)(1) and (5) of the Act by direct dealing with its employees and that Respondent violated Section 8(a)(1) of the Act by threatening to discipline employees or to write up employees because of their union membership, activities, and desires.

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that this Order is enforced by a Judgment of a 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."

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT issue letters of reprimand to our employees or threaten them with discharge or discipline because of their protected participation of grievance meetings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them in the Act.

WE WILL revoke and expunge from our records all copies of the letter of warning issued to Jack F. Woods on February 3, 1979, and WE WILL take no action against Jack F. Woods based, in whole or in part, on that letter of warning.

WE WILL revoke and expunge from our records those portions of all copies of the letter of reprimand issued to R. P. O'Harrow on February 3, 1979, which refer to his participation in a grievance meeting and WE WILL take no action based, in whole or in part, on that portion of said letter of warning.

UNITED STATES POSTAL SERVICE

United States Postal Service *and* Patricia L. Moore.
Case 32-CA-1311(P)

September 30, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On March 26, 1980, Administrative Law Judge David P. McDonald issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent suspended Union Steward Patricia Moore solely because of insubordination to Supervisor Ward on July 17, 1978. We find, contrary to the Administrative Law Judge, that Moore was suspended for engaging in protected union and concerted activity, in violation of Section 8(a)(1) and (3) of the Act.

Otis Ward was, at all pertinent times, a supervisor on the 9-to-5:30 tour at Respondent's Bulk Mail Center involved herein. The incidents which led to Moore's suspension occurred on July 17 when Ward discovered employees Carson, Welch, and Goepfert in break areas rather than at their work stations after the final production count sheets had been collected but before the work shift had ended. Ward addressed each of the employees separately, telling them "officially" that "you are not on your job," warned them, "Don't let it happen again," and subsequently entered disciplinary warnings in their records. The employees then met with Moore, their union steward, related what had transpired with Ward, and requested her advice and assistance. Moore agreed to investigate the incident and then left her work station for the purpose of conducting this union business without first obtaining her supervisor's (Ward's) permission to do so as required by the contract. Moore appeared as Ward began to explain the work schedule to the employees and was told by Ward that "This is not union business."[1] Moore responded by asserting her right to represent the employees. During the course of the argument which ensued, Ward gave Moore several direct orders to return to her workplace. Moore ignored the orders, protesting that she had a right to remain with, and represent, the men. Ward threatened to write her up if she did not return to work, but Moore kept insisting that she had a right to remain with the employees, telling them that they did not have to speak with Ward without the presence of their union steward. Moore finally left, and Ward proceeded to instruct the men that production work does not stop when the production sheets are collected but continues until 5:15, followed by 10 minutes of cleanup of the work area for the employees on the next shift. After the meeting, the employees told Moore that they had not been disciplined. Moore inquired whether Ward had said anything about writing her up for disobeying him and requested their assistance if he did so. On July 21, Respondent issued Moore a 5-day suspension notice, effective July 26, 1978, alleging insubordination for refusing to obey Ward's orders on July 17.

As previously noted, the Administrative Law Judge found that Moore was suspended solely because of insubordination to Ward. He also found no interference with the employees' Section 7 rights because Ward's instructions to the three employees constituted a "run-of-the-mill shop-floor" conversation which did not involve their protected rights and, consequently, did not entitle them to union representation, under the doctrine of *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975). He concluded, therefore, that Moore's attempted intervention on the employees' behalf was not protected activity. Moreover, the Administrative Law Judge noted Moore failed to comply with the collective-bargaining agreement requirement that she obtain permission from her supervisor (Ward) before leaving her work station to engage in union business.

We do not agree with the foregoing analysis of the Administrative Law Judge. Assuming that Ward's instructions to the employees did not involve their Section 7 rights, his "official" warning to them, which they, in turn, presented to Moore as informal grievances, clearly involved those rights and was the sole basis for Moore's intervention. Moore's effort to investigate those grievances at the request of the disciplined employees was within the scope of her official union functions and constituted protected concerted activity.[2] Ward's

[1] Ward admitted that he assumed Moore was on union business because that was the only time Moore spoke to Ward.

[2] In view of our disposition herein, we find it unnecessary to pass upon the Administrative Law Judge's analysis if the applicability of the *Weingarten* doctrine. Contrary to the apparent assumption of the Administrative Law Judge, the protected nature of a union steward's conduct is not

Continued

opening statement to Moore, i.e., this is not union business, made it abundantly clear to Moore that Ward was bent on preventing her from performing her official duties and also plainly demonstrated the futility of her requesting permission to engage in union business. While we agree with the Administrative Law Judge that union stewards are not immune from being disciplined for insubordination, we find no insubordination here. We find, instead, a conscious intent to preclude Moore from carrying out an official, and protected, union function, which Moore protested, without engaging in conduct which can be reasonably and objectively viewed as insubordinate.[3] Certainly, Moore's conduct involved neither a refusal to work nor a disruption of work production, and her conduct did not exceed "acceptable bounds" and lose the protection of the Act.[4] Ward may have considered Moore's conduct as a challenge to his authority, but the fact remains that he provoked the confrontation by his unwarranted interference with Moore's protected right to investigate the grievances.

Accordingly, we find that Respondent's suspension of Moore interfered with her protected union and concerted activity, in violation of Section 8(a)(1) and (3) of the Act. We shall therefore order Respondent to cease and desist from engaging in the conduct found unlawful herein, to post an appropriate notice, and to make Moore whole for any loss of wages or other benefits she suffered as a result of her suspension,[5] and to expunge any record of her suspension.

entirely dependent on whether the employees involved were entitled, under *Weingarten*, to request union representation. Rather, so long as his or her efforts do not exceed "the boundaries of acceptable conduct," a union representative's seeking to honor an activity. *Quality Manufacturing Company*, 195 NLRB 197 (1972). See also *General Motors Corporation, Inland Division*, 233 NLRB 47 (1977).

[3] See *Pittsburgh Press Company*, 234 NLRB 408, 411-412 (1978).

[4] Contrary to Member Penello, Moore's conduct did not constitute insubordination providing "ample justification" for her suspension. Rather, Moore's efforts on behalf of the employees—though persistent and adamant—were not so injurious or disruptive as to be unprotected. Moore's actions, at worst, were insufficiently serious to deprive an employee performing his or her duties as a steward of the protection of the Act. See *Caterpillar Tractor Company*, 242 NLRB 523 (1979).

[5] Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

Inasmuch as the record refers to an unrelated grievance arbitration proceeding involving Respondent's alleged discharge of Moore prior to the effective date of her suspension found unlawful herein, we shall defer to the compliance stage of this proceeding resolution of any potential impact therefrom on the instant backpay order.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the Administrative Law Judge's Conclusion of Law 2:

"2. By discriminatorily suspending Patricia L. Moore by notice of July 21, 1978, for engaging in protected union and concerted activity in the performance of her duties as union steward, Respondent has violated Section 8(a)(1) and (3) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, United States Postal Service, Richmond, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against employees for engaging in protected union and concerted activity while performing the duties of union steward.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

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

(a) Make whole Patricia L. Moore for any loss of earnings occasioned by her disciplinary suspension issued on July 21, 1978, in the manner described in this Decision.

(b) Expunge any record of the disciplinary suspension of Patricia L. Moore issued on July 21, 1978.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its San Francisco, California, place of business copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[6] In the event that this Order is enforced by a Judgment of a 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."

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER PENELLO, dissenting:

Contrary to my colleagues, I would affirm the Administrative Law Judge's finding that the sole reason Respondent suspended employee Moore was because of her insubordinate conduct directed at Supervisor Ward.

Briefly, the record reveals that Supervisor Ward discovered three employees away from their work stations after the final production work sheets had been collected but the shift had ended. Ward explained to them that work did not stop until 5:30 and warned them not to let it happen again. The employees then informed Union Stewad Moore as to what took place with Ward. Meanwhile, Ward decided to explain to the employees the rules concerning the work scheduled for the end of the day. As he attempted to do so, Moore arrived on the scene and interrupted Ward's presentation by telling the employees that they could quit work when their production sheets had been turned in. The argument became more heated in the presence of 15 or 20 employees. Ward gave her several direct orders to return to her work station but Moore continued to argue and interfere with Ward's attempt to instruct the employees as to the correct work schedule. Because of this disruption, Ward was forced to continue the discussion with the employees in a private office. Initially, Moore attempted to join the discussion in the office and disobeyed several direct orders by Ward to return to her work area. Finally, Moore left and was subsequently suspended.

In my view, Respondent had ample justification for suspending Moore for insubordination. Moore successfully prevented Ward from discussing the work schedule with the employees on the work floor. In the presence of 15 to 20 employees, Moore not only intirrupted the discussion but also attempted to countermand Wards' express instructions to the employees concerning the correct workd schedule and ignored several direct orders to return to her work area. Such conduct undermined Wards' authority placing him in a position where it appeared that he could not function as a supervisor. Futhermore, under the collctive-bargaining agreement, Moore had no right to leave her work area to conduct union business without first obtaining permission from her supervisor. The record discloses that the practice has been for the steward to contact the supervisor when reporting to work in the morning and arrange a schedule for conducting an investigation. Moore failed to follow this procedure. Under these circumstances, I would find that Respondent did not violate Section 8(a)(1) of the Act by suspending Moore and would, therefore, dismiss the complaint in its entirety.

APPENDIX

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

WE WILL NOT suspend or otherwise discipline, or take any other discriminatory action against, employees because they engaged in protected union and concerted activities while performing the duties of a union steward.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL reimburse Patricia L. Moore for any loss of wages or other benefits occasioned by her suspension issued on July 21, 1978, plus interest.

WE WILL expunge from all records any and all references to the suspension of Patricia L. Moore issued on July 21, 1978.

UNITED STATES POSTAL SERVICE

DECISION

STATEMENT OF THE CASE

DAVID P. MCDONALD, Administrative Law Judge: This matter was heard in Oakland, California, on May 24, 1979.[1] The complaint, issued November 30, by the Regional Director of the National Labor Relations Board for Region 32, is based upon a charge filed October 19, by Patricia L. Moore, an individual. The complaint alleges that the United States Postal Service, herein called the Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act.

All parties were afforded full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Post-hearing briefs were filed on behalf of the General Counsel and the Respondent.[2] Upon the entire record,

[1] All dates herein refer to 1978, unless otherwise indicated.

[2] The General Counsel's unopposed motion to make certain corrections in the transcript is hereby granted.

and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Postal Reorganization Act, 39 U.S.C. 1201-1209, herein called PRA, provides, *inter alia*, that the United States Postal Service shall be subject to the provisions of the National Labor Relations Act, to the extent not inconsistent with provisions of the PRA.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits and I find that the Mailhandlers Union, Local 302, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The unit of the Postal Service involved in this controversy is the Respondent's San Francisco Bulk Mail Center, herein called the BMC, located in Richmond, California. Otis Ward has been employed by the Postal Service for 22 years and as a supervisor during the last 10 years. On July 17, he was in charge of Tour 2, ring 1 and ring 2 of the nonmachinable outsiders, herein called NMO.

The NMO section is divided into two work areas called rings. The mailhandlers manually sort parcels, which cannot be sorted by machine because they are either too heavy, awkward, or fragile. The procedure consists of mailhandlers sorting the parcels from a belt to various roller table arms and then by zip code into containers that are transported to stallo.

Tour 2 begins at 9 a.m. and extends to 5:30 p.m. Between 5:15 p.m. and 5:25 p.m. the handlers are required to clean up their work area in preparation for the next tour.

At 5:25 p.m. the employees are allowed to leave the work area and washup.

During the day the supervisor or his designee, hourly, collects production sheets (count sheets) in the NMO area. These sheets provide management with an accurate assessment of the volume of mail which is placed on the conveyor belts by the employees. The supervisor tallies the information and post the results on a bulletin board. The last production sheet pickup is normally between 5 and 5:15 p.m.

On July 17, Ward sent an employee to pick up the sheets from the far end of the work area while he proceeded to ring 2. Upon arrival he observed only two or three employees instead of eight. Bobby Welch, Edward Carson, and Glen Goepfert were among the missing men. In an effort to locate the missing employees he entered the cafeteria where he found Bobby Welch. Welch explained he thought he was through for the day since the production slips had been picked up. Ward claims he explained to him that work did not stop until 5:30 and added, "Just consider this a discussion. You know that this had been discussed. Don't let it happen again." He then observed Edward Carson sitting at another table, who explained everyone had left so he went to the cafeteria since he had nothing else to do. In the adjoining locker room, Goepfert, who was playing dominos, did not offer an explanation for his absence from the work area. Ward spoke to both men separately and reiterated the discussion he had with Welch. As he left the area he jotted down the information concerning the discussions in his notebook and proceeded to ring 1. He testified that it was his usual custom to jot down discussions in order to verify the conversation. If he failed to note an incident there was always the possibility that an employee would deny it in the future.

Neither Carson nor Goepfert testified at the hearing. However, Welch testified and substantiated Ward's recitation of the incident but provided a slightly different version as to the surrounding facts and conversations. Welch recalled that the three of them left the work area because no one was there. They assumed everyone had left because the count sheets had been picked up. Based on this assumption they slowly left the area and walked to the cafeteria, where he sat and smoked a cigarette. Otis appeared and stated to all of them, "Well, I'm going to make this official, You are not on your job." As he turned and walked out, the men glanced at each other with a bewildered expression and then followed him out the door. Together, Welch, Carson, and Goepfert proceeded to ring 1 where the timeclock is located and where they saw Pat Moore, the Union's shop steward.[3]

At that time Welch related the facts and asked her why did he make such a statement when, "there wasn't anybody else around the ring, what were we supposed to do, sit there and work by ourselves." Moore responded, "I will go talk to Otis about it, I will see what is the problem." To which, Welch said, "Okay."

Moore's memory of Welch's comments were slightly different. She asserts that Welch and Goepfert quoted Ward as stating, "You are out of your work area, this is an official discussion" and then they asked her it they had a grievance. Moore told them that she thought they might have a grievance, and if it were agreeable with them she would make an appointment with Otis to hear his version and then meet again through the official grievance procedure.[4]

The men then leaned on the railing of the break area which is on the work floor, near the timeclock and tour office. Ring number 1 is also located in the same area.

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[3] Although the record is void as to the exact location and the distance between the timeclock, break area, Tour office, and ring number 1, the testimony of Welch, Moore, and Ward would indicate that they are all located in the same general area and only a short distance apart.

[4] Moore described the grievance procedure as consisting of three steps

1. The shop steward meets with the grievant and investigates the problem. An appointment is made with the supervisor for a meeting to discuss the problem. The supervisor provides his answer in written form.

2. If the supervisor's answer is unacceptable the grievance is appealed to Richard L. Jacobs, the Respondent's employer labor relations officer for the San Francisco Bulk Mail Center. He conducts a hearing and provides a written decision

3. If Mr. Jacobs' decision is unacceptable the appeal is forwarded within the Union to be handed on a Regional level

Otis picked up the production sheets from ring number 2 about 5:15. At this time he observed the men by the break area and reflected upon Welch's assertion that he felt his work was finished when the sheets were picked up. Otis decided that he should explain to them the rules and regulations concerning the work scheduled for the end of each day. As he walked up to the group he said, "You really believe that we quit work at ten minutes to five?" As he began to explain he schedule, Miss Moore appeared and he turned to her and stated, "This is not union business."[5] She then began to tell the men they could quit work anytime their production sheets had been turned in. As the argument became more heated, a crowd of 15 to 20 employees began to listen. All Parties agree, Moore had not sought permission to leave her work station as required by the agreement between the Union and Respondent.[6] Ward gave her several direct orders to return to her work station, but she simply continued to argue and interfere with his attempts to instruct the men as to the correct work schedule. Since he was unable to confer with the men, he decided to use a private office and therefore he turned to the men, saying, "Will you three gentlemen come with me, please."[7] As he entered the office he requested several supervisors to leave and invited the men to enter.[8] As Moore began to enter, Otis asked, "Where are you going?" and she responded, "I'm going in there too." The argument intensified with both Otis and Moore raising their voices. Again he gave her several direct orders to return to her work area which she ignored and continued to argue. After several direct orders she suddenly and abruptly stopped and walked out. He then turned to the men and said:

> What I wanted to explain to you gentlemen outside was that we don't stop working when the survisor picks up the production sheet. We stop working at 5:15. We clean-up, push all the dollies, the floor dollies to their proper stall, push hampers, SP&R's or whatever, to their proper destination. This is all I wanted to tell you out there. You guys can get up and leave.

There was no evidence introduced which would indicate that Welch, Carson, or Goepfert requested the presence or assistance of a shop steward; nor was there any evidence that Otis guestioned or disciplined them at this meeting.

Moore asserts that immediately after her conversation with Welch, she approached Otis as he picked up the count sheet from ring 1. As she spoke, they were walking toward the Tour office, where he would complete his paperwork. She explained that the men had come to her concerning the "discussion" and she wanted to know what he thought was involved in the situation. Although he told her he did not want her to advise people they could quit when the count sheets were collected, she denied she had ever given such advice. She simply wanted the rules clarified since other supervisors had not objected to the practice of quitting when the sheets were collected. At this point, they were 10 to 15 feet from the Tour Office, people were gathering for washup and the men were in the break area near the Tour Office. Otis called over to Glen and Bobby. Moore testified:

> It looked like he wanted to discuss the problem with them . . . and I felt that considering that it looked like it was going to be based on the same subject matter, that I should be present and at any rate, he told me that he wanted me to leave, to return to my work assignment. And, I said that I had been requested to represent Bobby and Glen and I intended to do so.
>
> At the time, I think—I don't remember exactly all the words spoken it got rather heated. Voice were getting louder.

As Rick Peter, another supervisor for the Respondent, walked out of the inner office, he saw Moore shouting to the employees over Otis shoulder that they did not have to talk to Otis and advising "I wouldn't talk to them if there wasn't a shop steward." As the argument increased, Otis gave her several direct orders to return to her work station. Initially she responded by stating it was washup time and therefore there was not any work to perform. Then she repeated her statement that she represented these people and should be present. Otis again warned her that if she disobeyed his direct order he would write her up. As the group moved into the Tour office she observed several supervisors. Although she experienced some doubt in her mind as to the nature of the forthcoming meeting, she again refused to leave when ordered to do so by Otis. She was not certain if the men were about to be disciplined and summarized her position at the hearing by testifying:

> I can't say that I thought that it was going to be further disciplinary action, or what. I was concerned that Otis would not intimidate these people as far as their filing a grievance about a discussion that had already occurred, and I really was unclear as to what further actions would be taken against them. It was a concern of mine, but not in terms of determining whether I should be there or not. It was the intimidation factor that I was worried about.

Finally, upon hearing another direct order, she advised Bobby and Glen not go into the inner office but leave with her. They entered and she left the Tour office.

Ward admitted that whenever Moore approached him, he assumed she was on union business since that was the only time she spoke to him.

[6] Article XVII, section 3, Rights of Stewards:

> Section 3. Rights of Stewards. When it is necessary for, a steward to leave his work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, he shall request permission from his immediate supervisor and such request shall not be unreasonably denied.

[7] During his testimony, Welch claimed he feared a suspension would occur at the second meeting. However, on cross-examination, the following portion of his affidavit was read to him, "Otis told me and other employees to come with him to the Tour Office. I thought he was going to give us a discussion, I guess, like he did." He responded to this affidavit by answering, "I did not know what he was going to do."

Rick Peters, Bob Weiss, Don Blanchard, and Ralph Holmes were among the supervisors who left the room at Ward's request.

When Bobby and Glen came out of the office they explained to Moore that they had not been disciplined but simply received instructions as to the proper quitting time. Moore testified that Welch had told her the discussion in the cafeteria would be dropped. However, Welch did not mention the dismissal of the discussion in his testimony. In fact, he said he was so angry he was not "paying attention." Moore then inquired as to whether Otis had made any reference to her receiving a writeup for disobeying a direct order. Welch explained that nothing was mentioned concerning her insubordination. As they left the building she told them, "Well, I would like support in case it did, since they were there and saw everything that happened."

After the men left the office, Otis filled in a blank letter form indicating he had a discussion with them.[9] The form was then typed for his signature. Since he was off work the following 2 days, he did not sign the letters until July 20. Immediately, upon his arrival at home, he reduced the event of the day to writing. When he returned to work on July 20, he conferred with his superintendent, Al Bowen. Moore's personnel record indicated she had a prior incident of insubordination with another supervisor. His written report was submitted to Bowen with a recommendation to suspend Moore for 7 days (5 actual work days), due to her insubordination. Otis explained that as a result of her direct challenge to his authority in the presence of 15 to 20 employees he looked ridiculous, was prevented from exercising his duties as a supervisor, and in effect was run from the work floor by her interference. The recomendation was approved and a letter of suspension was issued on July 21.

Analysis

In *N.L.R.B.* v. *Weingarten*, 404 U.S. 251 (1975), the United States Supreme Court held that an employer violated section 8(a)(1) of the Act by denying an employee's request that a union representative be present at an investigatory interview which the employees reasonably believed might result in disciplinary action. The Board concluded that the Supreme Court's decision in *Weingarten* applied to any interview, whether labeled investigatory or disciplinary, so long as the employee reasonably believes the interview may result in disciplinary action. *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977), enforcement denied 587 F.2d 449 (9th Cir. 1978). Subseguently, the Board has overruled, in part, its *Certified Grocers* decision in *Baton Rouge Water Works Company*, 246 NLRB No. 161 (1979). Thus, the Board now holds that:

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

In the present case the supervisor held three separate meetings with the men. The first encounter occurred in the area of the cafeteria and locker room. At that time, Otis questioned the men as to why they were not working and informed them: "Just consider this a discussion. You know that this had been discussed. Don't let it happen again." None of the men requested the assistance of a union representative during this first meeting. Therefore, regardless of how this initial meeting is classified, the protections afforded by *Weingarten* simply do not arise since union assistance was not sought.

During the subsequent two meetings both outside and in the Tour Office, Otis never questioned the men. In vain, he attempted to instruct the men as to the proper work schedule. When it became impossible for him to speak due to Moore's shouting and general interference, he had no other choice but to move the meeting into a private office. Finally, with the door closed and without further interference he was able to review the schedule in a few minutes. Other than Otis, Welch was the only witness who attended the third meeting and who also testified. Although he readily admits he was not attentive, he did recall receiving instructions as to his work schedule. There was no evidence adduced which would allow one to find that the supervisor questioned or disciplined these men at either the second or the third meeting. He simply instructed and that does not fall within the purview of *Weingarten*. The Board has indicated that it will not apply the rule requiring representation at interviews "to run-of-the-mill shop-floor conversations," as, for example, the giving of instructions or training or needed corrections of work techniques, *N.L.R.B.* v. *Weingarten, supra*; *Quality Manufacturing Company*, 195 NLRB 197, 199 (1972); *AAA Equipment Service Company*, 238 NLRB 390 (1978). Therefore, the three occasions when Otis spoke to the men did not evolve into a situation which evoked the protection of *Weingarten* on their behalf. On the first occasion, they simply had not requested the assistance of a union representative. On the second and third occassions they were neither questioned nor disciplined but simply instructed as to the proper work schedule. Certainly, a work schedule under these circumstances is a "run-of-the-mill shop-floor conversation."

The General Counsel has urged that Ward's testimony is not creditable. I disagree. Whenever there are facts in conflict between Ward, Moore, and Welch, I credit Ward. He testified in a clear, concise, and convincing manner. Although cross-examined vigorously, his testimony remained largely consistent, with the only significant discrepancies being the type explainable by the effect of passage of time and the frailties of memory. See *Bruce Duncan Company* v. *N.L.R.B.*, 590 F.2d 1304, 1309 (4th Cir. 1979). In contrast, Welch seemed less responsive to the questions and he admitted he was so angry with Otis that he did not listen to everything and was only able to recall a few words. It should also be noted that he testified that he feared possible discipline when he was told to enter the Tour Office. However, when he

[9] Each letter was dated July 17, 1978, and indicated that the subject was: DISCUSSION, the following letter was identical except for the insertion of the name of the mailhandler and his social security number:

> On July 17, 1978 , I discussed the following infraction with:————————, ss# ————————: Employee was taking an unauthorized break in the Cafeteria at 4:50 p.m.

was confronted with a prior inconsistent statement from his affidavit, he changed his testimony and simply said he did not know what was going to happen. Although I find that much of Moore's recitation of the events is credible, her account of some disputed facts appear to have been designed to strengthen her own position by embellishing events favorable to her and by attempting to minimize those which were adverse to her. Consequently, I credit Ward in regard to the events of the day and in particular the question of insubordination.

A close review of the events reveal that many of the surrounding facts are not in conflict. It must be kept in mind that the initial conversation between Otis and Moore rapidly escalated into a heated confrontation. They both readily admit that they do not recall all of the statements which were made by the various parties. Apparently only 10 or 15 minutes expired from the time they walked toward the men until she finally left the Tour Office. Ring 1, the timeclock, rest area, and Tour Office are in the same general area and relatively close.

Moore admits that Otis repeatedly ordered her back to her duty station. She not only ignored his orders, but challenged his authority as a supervisor. Although he told her his talk dealt with nonunion business, she continued to raise her voice to such a degree that he could not converse with the men. Her persistent harassment forced him off the floor and into the Tour office.

The General Counsel argues that Moore was engaged in protected activity on behalf of the men for which she may not be disciplined and that her ultimate suspension was unlawful since it was based on her status and past activities as a union shop steward. The Respondent argues the suspension was based solely on her insubordination.

It is true that the Board has long held that the suspension of a union steward is unlawful under the Act when such suspension is based on his efforts to represent employees in furtherance of their protected concerted activities. *Melones contractors, a Joint Venture*, 241 NLRB 14 (1979). It is equally unlawful to suspend an individual based on her status and past activities as a union official. *The May Department Stores Company, d/b/a The May Company*, 220 NLRB 1096 (1975). However, in the present case the credible evidence indicated that the sole reason for her suspension was her gross insubordination. The circumstances surrounding Otis' instructions to the men did not involve their protected rights. Therefore, her actions on their behalf can not he classified as engaging in protected activity. In several recent cases the Board has reaffirmed its rule that a union steward is not immune from discipline when it is based on insubordinate conduct.[10] In *Armour-Dial, Inc.*, 245 NLRB No. 123 (1979), the suspension of the union president for 90 days did not violate the Act since it was based on his inducing workers to engage in an unlawful work stoppage.

The credible evidence substantiates the Respondent's argument that Moore's suspension was based solely on her insubordination and not in violation of Section 8(a)(1) and (3) of the Act. Accordingly, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the case by virture of Section 1209 of the PRA.

2. The General Counsel has failed to establish by a preponderance of the evidence that Respondent violated Section 8(a)(1) and (3) of the Act.

[Recommended Order for dismissal omitted from publication.]

[10] *Swank Construction Company*, 239 NLRB 844 (1978); *Jos. Schlitz Brewing Company*, 240 NLRB 710 (1979); *Unworld General, Inc., d/b/a Circle Import Export Company I Kelvin Internationale*, 244 NLRB 255 (1979).

United States Postal Service *and* New Haven Connecticut Area Local, American Postal Workers Union, AFL-CIO. Cases 39-CA-809(P) and 39-CA-1045(P)

22 November 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 19 November 1982 Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering briefs.

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 rulings, findings,[1] and conclusions of the judge only to the extent consistent with this Decision and Order.

The judge found that the Respondent issued a letter of warning to William Winn because of his protected activities, thereby violating Section 8(a)(3) and (1) of the Act. The Respondent has excepted to that finding, arguing that Winn was disciplined for cause and not because of his protected activities. We find merit in the Respondent's exceptions.

As more fully set forth in the judge's decision, Winn served as the Union's chief steward from 1976 to May 1981 and as an alternate steward from May 1981 to February 1982.[2] On 10 February Winn was reappointed chief steward. Although Winn was an aggressive steward[3] who enjoyed the loyalty of his coworkers, he was not a model employee. Winn had been given letters of warning in December 1980 and April 1981. He also was counseled orally on at least two occasions in 1980 and one in 1981.[4]

The incident which led to the issuance of the 11 February warning letter in issue related to a newly implemented policy about timeclock procedures and overtime. Under that policy employees were required to punch out for lunch at the exact minute their break was scheduled to start. Similarly, employees were required to punch back in at the exact minute their break ended. Employees who failed to punch their timecards precisely when due to resume work were docked overtime pay. When employees argued that precise clocking would be difficult on shifts where large numbers of employees had to punch the clock, the Respondent agreed that supervisors would be authorized to adjust the timecards of employees who were unable to comply with the policy due to congestion around the clock.

On 3 February Winn inadvertently punched out for lunch at 9:59, 1 minute early. When the lunch break ended, Winn, who desired to punch the clock at 10:29 in order to show a 30-minute lunch break, was unable to reach the clock because his coworkers were gathered there. Thus, he clocked back in at 10:30 and, as a result, would be docked for 1 minute of overtime. Winn approached Acting Supervisor Harold Feeley to have the card corrected, and Feeley responded that, inasmuch as he was only an acting supervisor, he would have to seek the approval of Mark Sullivan, manager of mail processing. A few minutes later Feeley advised Winn that Sullivan was unwilling to correct the timecard because he had witnessed no congestion near the clock.[5] Shortly thereafter, Sullivan appeared on the work floor and asked Winn what the problem was. Winn explained the situation which had existed. When Sullivan reiterated his refusal to correct the timecard, Winn became loud and argumentative. Sullivan accused Winn of putting on a show for the employees and Winn in turn accused Sullivan of being ignorant and belligerent. During the argument, Sullivan, who did not raise his voice, invited Winn to file a grievance about the timecard. Winn rejoined that he would file a grievance whenever an employee experienced a similar problem. Asked by Sullivan if he was threatening management, Winn responded that it was not a threat, that he intended to grieve all timecard adjustment problems. It is clear that during the confrontation several employees stopped working and looked on. When Sullivan told Winn to return to his work area, the latter did so and operations returned to normal. A short time later, Sullivan took Winn away from the work floor for a discussion of Winn's unruly conduct, and, again, Winn became loud and argumentative.

[1] Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Unless otherwise indicated, all dates hereinafter are in 1982.

[3] In a 3- to 4-month period in 1978 or 1979, Winn filed approximately 14,000 grievances, nearly all of which were later withdrawn by the Union.

[4] The judge admitted evidence concerning these incidents only to prove that disciplinary action was taken and not for purposes of proving the underlying conduct.

[5] The judge found that, in fact, the area near the timeclock was congested.

On 11 February Sullivan issued to Winn the following letter of warning:

> On Wednesday, 2-3-82, Supervisor, Walt Daniello, had to instruct you to stop shouting and disrupting operations on the workfloor.
>
> After that same day, you became loud and abusive towards me, shouting personal, derogatory remarks and threatening to file multiple grievances in order to harass management. When told to lower your voice, you refused to comply. At that point, I took you off the workfloor for a discussion, where you continued the shouting and your belligerant conduct.
>
> After our meeting, you spent over 25 minutes away from your assigned work area, in the mens' lavatory.[6] Just this past December, Supervisor Joe Gambardelia [sic] had to order you out of the lavatory after being absent from the assigned work area for an extensive period of time. I have personally observed you leaving the lavatory with folded newspapers in your back pocket, following long absences from your assigned work area.
>
> Your failure to perform work as assigned, disruptive conduct and lack of cooperation are unacceptable. As you have previously been made aware of your responsibilities and obligations in this area, in the future, these non-productive work habits and boisterous, verbal attacks on supervisors will not be tolerated and will lead to disciplinary action.

The judge found, and we agree, that Sullivan was motivated by two factors in giving the warning. One was Winn's insubordinate conduct on the work floor, specifically, shouting, making personal insults, and causing the cessation of normal operations. The other factor was Winn's threat to file multiple grievances. The judge found that the warning was "motivated in large part" by the latter factor and, therefore, that the disciplinary action taken against Winn was violative of Section 8(a)(3) and (1) of the Act. We disagree.

In *Wright Line*, 251 NLRB 1083 (1980), the Board set forth a test of causation to be applied in cases involving actions based on "dual" motives, one of which is permissible and one of which is unlawful. Under that test, the General Counsel is first required to establish a prima facie case sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision. If this is established, the burden then shifts to the employer to demonstrate that it had a legitimate, permissible reason for its actions such that the disciplinary action would have taken place even in the absence of the protected conduct.

In the instant case, the judge found, and we agree, that the General Counsel established a prima facie case. Thus, the warning letter on its face shows that it was motivated in part by Winn's promise to file grievances on behalf of all other employees whose timecards were not corrected when there was congestion at the timeclock. Clearly, such action would be protected concerted activity.[7] However, we further find that the Respondent has met its requisite burden of proof by demonstrating that it had a legitimate, permissible reason for disciplining Winn and that it would have done so even in the absence of Winn's protected activity.[8]

Winn, the Respondent showed, became excessively loud and insulting while discussing his timecard with Sullivan. When asked to contain himself, he would not. Ultimately, his actions caused fellow employees to stop work, albeit briefly, thus disrupting operations at the facility. The Respondent also showed that, over a 2-year period, Winn had been disciplined at least five times. In *Southwestern Bell Telephone Co.*, 260 NLRB 237 (1982), we stated that in the administration and resolution of grievances under the collective-bargaining agreement, because of the nature of these endeavors, tempers of all parties flare and comments and accusations are made which would not be acceptable on the plant floor.[9] However, here Winn was not engaged in the formal pursuit of a grievance. Rather, Winn reacted with insubordination when his request to have his timecard adjusted was refused. The Board recognizes the right of the employer to maintain order and respect in the conduct of its business.[10] Winn's derogation of a reasonable order to quiet down by continuing to shout on the work floor, hurling personal insults, and disrupting operations constituted unprotected activity and gave the Respondent a legitmate, permissible reason to discipline Winn, and we so find. We further find that the Respondent has met its burden to prove that it would have issued the warning to Winn even in the absence of his protected conduct. The record shows that Winn had been disciplined at least five

[6] The judge did not resolve the credibility conflict concerning the Respondent's allegation that Winn spent 25 minutes in the men's lavatory and Winn's denial of that allegation. In view of the result we reach herein, we find it unnecessary to decide this issue.

[7] See *Firch Baking Co.*, 232 NLRB 772 (1977); and *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686 (1st Cir. 1973).

[8] Member Hunter agrees that the Respondent's conduct in issuing a warning to Winn was motivated by Winn's insubordination, and that the Respondent would have imposed that discipline regardless of any other conduct engaged in by Winn.

[9] See also *Atlantic Steel Co.*, 245 NLRB 814 (1979); and *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946).

[10] *Southwestern Bell Telephone Co.*, supra.

times in the 2-year period preceding the warning in issue here, and that those instances of discipline related to conduct akin to that shown in the instant case. The record also shows that, in an effort to placate Winn and end the disruption of the workplace, Sullivan told Winn that he could file a grievance over Sullivan's refusal to change the timecard.

Based on the foregoing, we find, contrary to the judge, that Winn was issued the letter of warning because of his insubordinate conduct and that Respondent would have issued the warning even absent Winn's avowal to file numerous grievances if circumstances warranted it. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: These consolidated cases were heard by me on July 1 and 2, 1982, in Hartford, Connecticut. The charge in Case 39-CA-809(P) was filed by the New Haven, Connecticut Area Local, American Postal Workers Union, AFL-CIO (the Union), on August 27, 1981, and an amended charge in that case was filed on October 14, 1981. A complaint based on that charge was issued by the Officer-in-Charge of Subregion 39 on October 15, 1981. The charge in Case 39-CA-1045(P) was filed by the Union on March 8, 1982, and a complaint thereon was issued on April 12, 1982. Thereafter, on May 4, 1982, the complaints were consolidated for hearing.

In substance the allegations of the complaints are that William E. Winn was given written warnings on April 7, 1981, and February 11, 1982, because of his activities as a union shop steward and because of his other protected concerted activities.

Based on the entire record herein, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed, I hereby make the following

FINDINGS OF FACT

I. JURISDICTION

Jurisdiction is asserted by virtue of Section 1209 of the Postal Reorganization Act. The parties also agree that the Union involved is a labor organization within the meaning of Section 2(5) of the Act.

II. THE OPERATIVE FACTS

A. *Background*

The Union is the recognized collective-bargaining representative of certain of the Respondent's employees including the distribution clerks at at its Milford, Connecticut Post Office. William Winn, a distribution clerk has, at various times served as the Union's chief steward and as an alternative steward. In this respect, he was the chief steward from about 1976 to May 1981 and an alternate steward from May 1981 to February 1982. During the latter period, another employee, Roderick Kennedy, was the chief steward, but when he resigned the position on February 8, 1982, Winn was redesignated as the chief steward on February 10, 1982.[1]

The distribution clerks, of which there are about 18 to 20, work from 4 a.m. to 12:30 p.m. and they have their lunch break from 10 a.m. to 10:30 a.m. They are responsible for sorting the mail by letter carrier routes and they do so by taking trays of unsorted mail and placing them into cubbyholes in something which is called a distribution case. (Each clerk works at his own case.) As the delivery trucks leave the post office soon after 8 a.m., it is imperative that the mail be sorted by that hour because any mail left over will not be delivered until the following day. When the task of sorting the mail is not accomplished by 8 a.m., it is described as "missing the mail" or alternatively as a "first class failure." The record indicates that during a period prior to 1980 there was a high incidence of first-class failures. However, this problem, according to Winn, had largely abated at the time of the events herein.

The record also establishes that during a period prior to 1981, there was a considerable degree of friction between management and the Union due in part to a clash of personalities between Winn as chief steward and the post office's supervisors. In this respect, John Dirzus, president of the Union, testified that in January or February 1981 he had a conversation with the then Postmaster Gallagher regarding overall labor relations. He states that during this conversation he suggested that one of the problems was that Winn and Kennedy were strong personalities who had control over the work force and that this was resented by Sullivan and the other supervisors. Dirzus also testified that he told Gallagher that he (Dirzus) had heard that supervisors were going around and saying that Sullivan was out to get Winn and that the latter better watch himself. He states that Gallagher responded by saying that he thought this was wrong and that he would deal with it even if he had to discipline the supervisors.

In connection with the general labor relations atmosphere at the post office, it is noted that in 1978 or 1979, Winn, over a 3- or 4-month period, filed approximately 14,000 grievances involving such things as the floors and venetian blinds being dirty. All of those grievances were later withdrawn by the president of the Union. It is also noted that, according to Winn, labor relations calmed down after the leaving of Postmaster Brennen, and it appears that this cooling down occurred after the above-noted grievances were withdrawn.

Mark Sullivan assumed the position of manager of mail processing on November 29, 1981. Thereafter, on December 23, 1980 (prior to the 10(b) statute of limitations period), Winn was issued a written warning by supervisor Gambradella. The warning stated:

[1] Kennedy resigned his position as chief steward because he became eligible for a supervisory position in the post office.

> On 12-15-80 at 10:45 a.m. you became loud and abusive towards me when questioned about the nature of your union business.
>
> The U.S.P.S. Standards of Conduct . . . states that "Employees are expected to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons . . ."
>
> You have been made aware, on many occasions, of your obligations in this regard. This letter of warning will serve as written notice that further behaviour in this manner will result in the administration of progressive discipline.

The Union filed a grievance concerning the above-noted warning and it was settled in March 1981 at the third step of the grievance procedure. This settlement was memorialized in a letter dated April 2, 1981, from District Director Employee and Labor Relations J. A. Sprague, to Robert Caracciolo, a National vice president of the Union. In part, the letter reads:

> The grievant denies that he was abusive toward his supervisor. However, it appears that the grievant has been involved in similar situations in the past and that he contributed to the incident that occurred in this case.
>
> In an effort to resolve this matter and afford the grievant the opportunity to improve his conduct, the Letter of Warning will be removed from the grievant's record.
>
> The Union expects Management to conduct themselves in a business like and professional manner. It is also expected that Union officials will conduct themselves in a similar manner.

It is additionally noted that apart from a formal warning there is, pursuant to the collective-bargaining agreement, a lower level of discipline called a "discussion." (See art. 16, sec. 2 of the National Agreement.) A formal discussion is generally conducted in private between the employee and the supervisor involved, and does not result in any record being placed into the employee's official personnel record. However, such discussions are in the nature of warnings (albeit not grievable), and supervisors, as a matter of practice, make a memoranda of such discussions for their own records. In the present case, the Respondent introduced into evidence the memoranda of various "discussions" held with Winn from April 2, 1980, to February 5, 1981. By and large, these discussions involved alleged incidents where Winn left his work area, did less than the normal amount of work, made too much noise, and used loud, boisterous, and on occasion profane language.

B. *The Warning of April 7, 1981*

Five days after the previous warning to Winn had been withdrawn, he received another warning from acting Supervisor Anthony Vano.[2] The warning read as follows:

> This letter of warning is being issued to you due to your unsatisfactory work performance in distribution assignments. Deficient areas in your performance include:
>
> (1) Amount of work.
>
> (2) Constantly leaving your distribution case, to talk to others.
>
> (3) Obnoxious and disruptive conduct.
>
> (4) Lack of cooperativeness.
>
> As you have been made aware of your responsibilities and obligations in this regard prior to this letter, an improvement is anticipated. Failure to do so could result in further disciplinary action. You may appeal this action within 14 days of receipt as specified by Article XV, Section 2 of the National Agreement.

According to the General Counsel's theory, Winn and Kennedy were blamed by Vano for a "first class failure" which, according to Winn, occurred about April 5 or 6. He postulates that since neither Winn nor Kennedy could possibly be blamed for that occurrence, and given other evidence of animus against them, then the reason given for Winn's warning must be pretextual and therefore motivated by discriminatory reasons. The Postal Service takes the position that it did not blame either Winn or Kennedy for the "first class failure," and that the April 7 warning to Winn was not, in any way, related to or caused by that incident. In effect, the Respondent seems to argue that the General Counsel has created a strawman, which when knocked down, is being used to prove the allegation.

There is in fact, no dispute that about the first week of April 1981 the distribution clerks "missed the mail." In connection therewith, both Winn and Kennedy testified that they, and they alone, were blamed for that incident by Acting Supervisor Vano. In this respect, Winn testified that, after he received the warning, he asked Vano about it. He states that Vano said that the warning related to the fact that "we" missed the mail and that he was acting under orders from Sullivan. Similarly, Kennedy testified that, after the first-class failure, he had a formal discussion with Vano who told him that his work performance that morning was not satisfactory and that he (Kennedy) had not processed enough trays of mail. Kennedy asserts that, when he told Vano that he was mistaken and asked why he was being singled out, Vano replied that he was under instructions from Sullivan and that Kennedy was not the only person being disciplined.

Vano testified that, although there was a first-class failure, he did not blame either Winn or Kennedy for its occurrence as neither was at fault. He further testified that neither was disciplined because of that event. In the case of Kennedy, Vano states that he had a formal discussion with him on March 31, 1981 (prior to the first-class fail-

[2] Vano, who normally is a letter carrier, was assigned to be a temporary supervisor in the absence of the regular supervisor, Walter Daniello.

ure), relating to Kennedy's productivity.[3] Vano also states that the warning to Winn was not in any way related to the first-class failure, but rather was related to his observation of Winn's performance and conduct over approximately a 2-week period of time, during which he (Vano) was the acting supervisor. Vano further testified that before issuing the warning, he spoke to Sullivan about Winn's conduct and was told that Winn had had prior "discussions." According to Vano, he decided, with Sullivan's concurrence, that a letter of warning was the appropriate measure to take in Winn's case because of the prior "discussions." In relation to Winn's warning, Vano agrees that it is not unusual for distribution clerks to talk at their cases or to take breaks from time to time. He acknowledges that the nature of their work makes this imperative. He asserts, however, that from his observation, both Winn and Kennedy were excessive in this respect, that they were excessively noisy, and that this affected not only their performance but also the productivity of the other employees.

Following the warning to Winn, a grievance was filed by the Union. It appears from the record that this grievance was discussed at the first, second, and third steps of the contractual grievance procedure. Basically, the Union charged in the grievance that management was harrassing Winn on account of his union activities and that the warning was an improper imposition of discipline because Vano had not had a previous "discussion" with Winn. Curiously, although Winn asserts that the reason given by Vano for the warning was Winn's responsibility for the first-class failure, nothing in the grievance memoranda relates to that subject. That is, it appears that neither the Union nor the Company claimed, during the processing of the grievance, that the August 7 warning was in any way related to the first-class failure on April 5. Therefore, to this extent, the documentary evidence tends to support Vano's contention that the warning was not related to the first-class failure.

When the grievance was denied by the Respondent at the third step, the Union did not pursue it to arbitration.

C. *The Warning of February 11, 1980*

According to Winn, sometime in December 1981, he had a conversation with his supervisor, Joseph Gambradella. He states that Gambradella told him to watch himself and not do anything "off color" because Mark Sullivan was out to get him. Kennedy testified that on one occasion during the winter, when he was talking with Gambradella, he told the latter that he could not believe that Gambradella had told Winn that Sullivan was out to get him. He states that Gambradella responded by saying, "yes it was a fact."

Joseph Gambradella's testimony as to the above was as follows:

> Q. At anytime . . . have you advised or told Mr. Winn that Mr. Sullivan was out to get him?
>
> A. Specifically to get him, specifically?
>
> Q. Yes?
>
> A. No.
>
> Q. Did you say anything like that to Mr. Winn?
>
> A. I might have said something like that, that Mr. Sullivan's going to get all the 8 balls, that are not working. I might have said that.
>
> Q. Have you had any conversations with Mr. Sullivan . . . where he said anything regarding getting or taking retaliatory action against Mr. Winn?
>
> A. Not to my knowledge.
>
> . . . .
>
> Q. Have you had any conversations with him where he criticized Mr. Winn's conduct as a Union steward?
>
> A. He might have when they were discussing grievances at Step 2 or something like that.
>
> Q. Do you remember what he said?
>
> A. Like he was loud and boisterous during the step 2 meeting or whatever, maybe in that context, yes.
>
> Q. Did he ever suggest that maybe we ought to take disciplinary action against Mr. Winn because of his activity as a union steward?
>
> A. No.

In order to understand the events leading up to the February 11 warning, a certain amount of background is necessary. It appears that sometime in January 1982, the Postal Service instituted a timeclock policy to deal with unearned overtime. In essence, the then Officer-in-Charge of the Milford Post Office, Andrew Pace, announced, inter alia, that when employees took their lunch breaks they were required to clock out and back in at the precise times of their break. Thus, for the distribution clerks, since their lunch break was from 10 a.m. to 10:30 a.m., they were required to punch out at precisely 10 and punch back in at precisely 10:30. Employees who made a habit of not following this procedure were subject to formal disciplinary discussions. When employees, at a meeting, suggested that there might be occasions when they could not follow the procedure because of congestion at the timeclock, Pace agreed that, if an employee was unable to punch his card at the precisely correct minute because of congestion, the supervisor would adjust the employee's timecard to show the correct time.

On February 3, 1982 (7 days before Winn resumed the position as chief steward), Winn, through inadvertence, punched out for lunch at 9:59 a.m. Winn testified that he returned from lunch before 10:29 a.m. but because of congestion at the timeclock (due to people and materials near the clock), he could not punch in until 10:30 a.m., 1 minute after his allotted time for lunch. (As a result, he received credit for 59 minutes of overtime that day instead of for 60 minutes.) Winn testified that he then approached Harold Feeley, an acting supervisor, and asked him to change his timecard by 1 minute because he had been held up at the timeclock. Winn states that Feeley said he would have to bring the problem to Sullivan and that when Feeley came back from the office he denied Winn's request. According to Winn, when he asked why, Feeley said that Sullivan said he was late. Winn states that he told Feeley that Pace had agreed that the super-

[3] The Respondent introduced into evidence, as R. Exh. 2, a copy of Vano's notes relating to a "discussion" with Kennedy on March 31.

visors should alter the timecards when there was congestion, whereon Feeley said, "What do you want from me, I'm acting" (i.e., acting supervisor).

According to Winn, shortly after his conversation with Feeley, Sullivan came out and asked him what the problem was. He states that he explained the problem to Sullivan who nevertheless refused to alter his timecard. Winn asserts that he pressed Sullivan about his timecard, whereon Sullivan said that Winn was putting on a show for everybody and that he should "keep it down." Winn states he said that Sullivan was being ignorant, and that Sullivan repeated that he (Winn) was putting on a show, and demonstrating how loud he could yell. According to Winn, he rejoined that Sullivan was being boisterous himself, whereupon Sullivan told him to go back to his seat. According to Winn, he told Sullivan that he too was being belligerent and that he (Winn) was sorry "we had to go back to square one of . . . lousy labor relations." He states that he further told Sullivan that he would file a grievance everytime any of the employees had a similar timeclock problem. According to Winn, Sullivan asked, "are you threatening me," whereon he told Sullivan that he was not threatening, but that when he said he was going to file grievances he meant it. At this point, according to Winn, Sullivan directed him to go back to his seat and he did.

According to Winn, about 3 or 4 minutes later, Sullivan approached him and asked to see him privately. Winn states that Sullivan then counseled him about being loud and boisterous toward him and arguing on the work floor. He states that, during this discussion, he argued back and told Sullivan that if the latter wanted the conversation off the floor he should have indicated that immediately. Winn states that after the counseling he spoke to Kennedy (still the chief steward) and told him about what had happened, after which he made some calls to the Union in New Haven. Winn denies that he called Sullivan an "egotistical bastard," or that he spent 25 minutes in the men's room after his counseling by Sullivan.

With respect to the above, Kennedy testified that Winn could not punch his timecard on time because there was congestion at the timeclock that day. He confirms that Winn asked Feeley to change the timecard and referred Feeley to the prior agreement with Pace. Kennedy states that Feeley went to see Sullivan and that, when Sullivan came out, he told Winn that he would not change his timecard. Although not hearing all the words said, Kennedy testified that Winn started arguing with Sullivan and raised his voice. He also states that Sullivan accused Winn of putting on a show to impress the men and that he further accused Winn of disturbing the workroom floor. According to Kennedy, he heard Winn say that Sullivan was ignorant and belligerant and that he would file a grievance on behalf of anyone whose timecard was not corrected when there was congestion. Kennedy states that at this point, Sullivan asked if Winn was threatening him, to which Winn said that it was not a threat and that he (Winn) had filed a lot of grievances in the past. (Recall the 14,000 grievances previously filed by Winn.) Kennedy asserts that both Sullivan and Winn were yelling at each other although acknowledging that Sullivan's yell is a lot softer than Winn's. He states that he does not remember anyone swearing during this confrontation, but he does concede that other employees stopped work to see what was going on.

Sullivan testified that on February 3 he was standing out on the work floor with Feely when the men were clocking in from the lunch break and that he did not observe any congestion. He states that about 10:40 he was on the floor when Winn came over and started shouting about why he would not change Winn's timecard. According to Sullivan, Winn called him an "egotistical bastard" and said that he was ignorant and belligerent. Sullivan states that he told Winn to lower his voice and to knock off the personal insults, but that Winn continued to shout. According to Sullivan, he told Winn that if he wanted to file a grievance he could, whereon Winn said, "If you want grievances, we'll give you grievances; we're the guys who filed 14,000 grievances." He states he asked Winn if he were threatening to harass management, whereon Winn replied that it was not a threat, it was a promise. Sullivan asserts that he asked Winn to go into the swing room to talk privately, but that Winn kept up the shouting and the insults. According to Sullivan, he did not raise his voice to Winn's shouting and he states that, during this incident, the other employees stopped work to look. He states that he then spoke to Winn in the swing room, after which Winn requested time to call Dirzus in New Haven. Sullivan asserts that he was later told by Feeley that the latter had seen Winn go to the bathroom with a newspaper and stay there for 25 minutes.

Feeley was called as a witness by the Respondent. He testified that about 10:30 he was talking with Sullivan[4] when Winn came over about the timeclock problem. Feeley states that when he referred Winn to Sullivan, Winn then approached Sullivan and asked him to change his timecard. He states that Sullivan refused whereon Winn became very loud and Sullivan asked him to lower his voice. According to Feeley, Sullivan asked Winn if he were going to file 14,000 grievances and Winn answered affirmatively. (In this respect, Feeley testified that it was Sullivan and not Winn who first said anything about the 14,000 grievances.) According to Feeley, whereas Sullivan spoke in a normal speaking voice, Winn was talking in a loud voice. Although asserting that he heard the entire conversation between Winn and Sullivan, Feeley did not confirm the latter's assertion that Winn called Sullivan an "egotistical bastard." He also testified that later in the day Sullivan asked him if Winn had gone to the bathroom and at what time. Feeley states that he told Sullivan that Winn had gone at 11:40 a.m. with a newspaper, and had come out at 12:05.

As noted above, Kennedy resigned as chief steward on February 8 and Winn was officially appointed to that position on February 10. According to Kennedy, he told Sullivan on February 8 that Winn would be replacing him as chief steward.

[4] He also says that he did not see any congestion. However he concedes that at 10:30 a.m. he and Sullivan were engaged in conversation and that they were standing about 50 to 100 feet away from the timeclock.

On February 11, 1982, Sullivan issued a written warning to Winn. The warning read as follows:

> On Wednesday, 2-3-82, Supervisor, Walt Daniello, had to instruct you to stop shouting and disrupting operations on the workfloor.[5]
>
> After that same day, you became loud and abusive towards me, shouting personal, derogatory remarks and threatening to file multiple grievances in order to harass management. When told to lower your voice, you refused to comply. At that point, I took you off the workfloor for a discussion, where you continued the shouting and your belligerant conduct.
>
> After our meeting, you spent over 25 minutes away from your assigned work area, in the mens' lavatory. Just this past December, Supervisor Joe Gambardelia, had to order you out of the lavatory after being absent from the assigned work area for an extensive period of time. I have personally observed you leaving the lavatory with folded newspapers in your back pocket, following long absences from your assigned work area.
>
> Your failure to perform work as assigned, disruptive conduct and lack of cooperation are unacceptable. As you have previously been made aware of your responsibilities and obligations in this area, in the future, these non-productive work habits and boisterous, verbal attacks on supervisors will not be tolerated and will lead to disciplinary action.

In connection with the warning to Winn, Sullivan testified that he decided to give the warning because he did not think there was any reason for Winn to shout and cause a commotion on the workroom floor. Specifically, he mentioned the personal insults and the effect they had on stopping the operation. Sullivan states that he initially recommended to his superiors that Winn be suspended but was told that a warning would be the proper step in the progressive disciplinary system. Although Sullivan, in his testimony, asserted that the warning was not issued because of Winn's threat to file multiple grievances, that assertion cannot be credited in view of the specific reference to that subject in the warning letter itself.

According to Winn, about March 1, 1982, he had a conversation with Supervisor Ronald Joseph. He states that during this conversation Joseph said that he thought the argument over 1 minute was ridiculous, and that Winn should just stay out Sullivan's sight because, "he's going to get you if he gets the chance." Joseph, a witness called by the Respondent, testified, in substance, that he told Winn that Sullivan was going to get Winn if the latter did not stop the loud talking on the floor when he was arguing with Sullivan.

In connection with this case, it is finally noted that the collective-bargaining agreement, at article 15, section 1, defines a grievance as a "dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment." Grievances are not limited to complaints involving the interpretation, application, or compliance with these provisions of the agreement. Accordingly, the problem that Winn raised with respect to his timecard would clearly be a grievable matter under the terms of the collective-bargaining agreement, especially in view of the prior agreement by Pace relating to this subject matter.

[5] Daniello, however, did not testify in this proceeding.

Discussion

There is credible evidence in this case that at least for some time there has existed a fairly high level of tension between the management of the Milford Post Office and the Union's stewards at that location. It also seems apparent that a focal point of that tension related to the personality of Winn who, as a vigorous union steward, was perceived by some of the supervisors, including Sullivan, as enjoying the loyalty of the employees. It also seems, by Winn's own account, that the level of tension between the Union and management calmed down after the prior Postmaster, Brennen, had left the Milford facility. It is of course possible that Sullivan, even with the abatement of tension, continued to harbor resentment and suspicion of Winn. Nevertheless, in the context of this case, the General Counsel must establish that, in the particular circumstances which gave rise to the two warnings involved, those actions were motivated by discriminatory and nonlegitimate reasons.

Insofar as the April 7 warning, the General Counsel asserts that Winn and Kennedy were told by Vano that the reason for Winn's warning, as given to them by Vano (the first-class failure), cannot be true. He argues that it therefore follows that the reason must be a pretext. According to the General Counsel, if the reason for the warning is a pretext, it must be concluded that the warning was issued because of discriminatory reasons, given the past hostility between management and Winn who was an aggressive shop steward. In this respect, I can not help but admire the General Counsel's geometrically organized "proof." However, if one or more of his postulates gives way, then his ultimate conclusion would be significantly weakened.

The Respondent denies that the warning issued to Winn or the formal discussion given to Kennedy was, in any way, related to the first-class failure. That is, Vano testified that neither Kennedy nor Winn was responsible for that event and that neither was warned on that account. Thus, the Respondent's argument strikes at one of the key postulates of the General Counsel's theory, namely, his contention that the reason given for the warning was pretextual in nature.

Vano denied that neither his "discussion" with Kennedy nor his warning of Winn was related to the first-class failure. Rather, he asserts that based on his observation of their performance during the period when he was an acting supervisor he was faced with two employees who simply were not performing enough work and, in the case of Winn, was disturbing other employees during worktime. In this respect, I shall note here that I was favorably impressed by the demeanor of Vano, who struck me as an honest witness. Moreover, the documentary evidence tends to support Vano's assertion that the "discussion" with Kennedy and the warning to Winn were

not related to the first-class failure. In this regard, although Kennedy states that his formal discussion with Vano took place after the first-class failure the evidence, *as reflected by Vano's testimony and notes, indicates that* the "discussion" occurred on March 31, about 5 days before it occurred. Also, the documentary evidence reveals that the Union filed a grievance as to Winn's April 7 warning and the respective positions of the parties are set forth on the grievance forms. Yet there is not a single reference in any of the grievance forms to the first-class failure, and it does not appear that, at any time during the first three steps of the grievance procedure, either party contended that Winn's warning was related to that occurrence. To my mind this silence is damaging to the Charging Party's assertion that Winn had been told by *Vano that the warning was due to his responsibility for* the first-class failure. For if, as shown by the General Counsel, Winn could not have been at fault, it would seem logical that the Union would have used the same pretext argument during the grievance discussions. In fact, the absence of any discussion about the first-class failure during the grievance meetings (which of course were contemporaneous with the events), leads me to believe that the prextext argument is indeed a post hoc rationalization, intended to set up a strawman. As such, and because I shall credit the testimony of Vano, it is therefore recommended that this allegation be dismissed.

The warning issued to Winn on February 11 is, in my opinion, a more complicated issue. There is no doubt in my mind that on February 3, Winn asked to have his timecard changed to reflect the fact that he had taken a 30-minute lunch break, as required, and that he did not reach the clock on time due to congestion. There also is no dispute that, with respect to the timeclock situation, Pace, on behalf of management, had previously agreed with the employees that in the event an employee could not reach the timeclock on time a supervisor on duty would be authorized to change the timecard. While it may seem that Winn's request to change his timecard by 1 minute was a request over a relatively minor issue, it cannot be said that his problem was not a grievable matter under the terms of the collective-bargaining agreement. Moreover, as Winn was the alternative shop steward at the time, it cannot be said that his indication to Sullivan that he would file grievances everytime the Company refused to change timecards resulting from congestion was purely an individual as opposed to concerted complaint. Indeed, it seems to me that in some measure Sullivan issued the warning precisely because he feared that Winn, as a shop steward, would file multiple grievances as he had done in the past. This conclusion is of course based on the warning itself, which establishes prima facie that a reason for the warning was because of the perception that Winn, as shop steward, would file grievances relating to the timecard problem. Since the filing of grievances by employees and shop stewards is considered to be protected concerted activity, a warning issued to deter such activity would, a fortiori, be violative of Section 8(a)(1) of the Act.[6]

[6] See, e.g., *Firch Baking Co.*, 232 NLRB 772 (1977).

Nevertheless, the inquiry does not stop there, as the evidence clearly establishes that Winn, during his confrontation with Sullivan, began shouting on the workroom floor and that he called Sullivan ignorant and belligerent.[7] The evidence also indicates that it was Winn and not Sullivan who did the shouting as even Kennedy indicated that Sullivan's shout was a lot softer than Winn's. Additionally, it is concluded, based on the record as a whole, that Winn continued to shout after Sullivan told him to quiet down and that as a result of this argument the other employees stopped their work to watch what was going on.

In the context of protected activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves. Thus, in *Bettcher Mfg. Corp.*, 76 NLRB 526 (1948), the Board stated:

> A frank, and not always complimentary, exchange of views must be expected and permitted the negotiators if collective bargaining is to be natural rather than stilted. The negotiators must be free not only to put forth demands and counterdemands, but also to debate and challenge the statements of one another without censorship, even if, in the course of debate, the veracity of one of the participants occasionally is brought into question. If an employer were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method of retaliation), or employees would hesitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives.

We do not hold, of course, that an employee may never be lawfully discharged because of what he says or does in the course of a bargaining conference. A line exists beyond which an employee may not with impunity go, but that line must be drawn "between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in 'a moment of animal exuberance' (*Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293) or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service."

Similarly, in *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), the court affirmed the Board's conclusion that the employer violated the Act when it discharged a grievance committeeman who, during the course of a grievance meeting, called the employer's representative a "horse's ass."[8] The court stated:

[7] As Feeley did not corroborate Sullivan's assertion that Winn called the former an "egotistical bastard," I shall not conclude that this epithet was used.

[8] See also *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724 (5th Cir. 1970); *Southwestern Bell Telephone Co.*, 260 NLRB 237 (1982); *Postal Service*, 250 NLRB 4 (1980); *Max Factor & Co.*, 239 NLRB 804 (1978); and *Hawaiian Hauling Service*, 219 NLRB 765 (1975).

> As other cases have made clear, flagrant conduct of an employee, even though occurring in the course of section 7 activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946). Initially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed. In the instant case we cannot say that the Board's conclusion that Tinsley's remark was within the protection of section 7 was either unreasonable or capricious.

In *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), the Board was called on to decide whether an arbitrator's decision was repugnant to the Act where the arbitrator had sustained the discharge of an employee who, in the course of raising an overtime complaint, used obscene language to a supervisor during the regular work shift in the production area. The Board stated:

> According to the Administrative Law Judge, Chastain's question about overtime constituted a grievance and protected concerted activity. Therefore, when Chastain used the term "lying son of a bitch," or "m— f— lie" (or "liar"), the Administrative Law Judge reasoned that this conduct, as a part of the *res gestae* of the grievance, was also protected. As support for this conclusion, he relied on two lines of precedent. The first group of cases dealt with formal grievances or negotiating sessions which were conducted away from the production area. There, in the heat of discussion, an employee uttered an obscenity or used extremely strong language. In that context, the employee's conduct was found to be protected as part of the *res gestae*. Under the other line of precedent, represented by *Merlyn Bunney and Clarence Bunney, partners, d/b/a Bunney Bros. Construction Company*, and *Interboro Contractors, Inc.*, the Board concluded that an individual employee's complaint under the contract about working conditions constituted protected concerted activity. The employee in question, however, made no obscene or insulting statement.
>
> The Administrative Law Judge cited no decisions, however, and we know of none, where the Board has held that an employee's use of obscenity to a supervisor on the production floor, following a question concerning working conditions, is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract negotiations. To the contrary, the Board and the courts have recognized (as did the Administrative Law Judge in passing) that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act.
>
> The decision as to whether the employee has crossed that line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.
>
> To reach a decision, the Board or an arbitrator must carefully balance these various factors.
>
> Here the arbitrator considered the factors which the Board considers, and concluded that the employee's discharge was warranted and based on reasons not repugnant to the Act. He noted that the incident occurred on the production floor during working time (not at a grievance meeting), that the employee's question about overtime expressed legitimate concern which could be grieved, and that the supervisor had investigated and answered his question promptly; but, nevertheless, the employee had reacted in an obscene fashion without provocation and in a work setting where such conduct was not normally tolerated. He further considered the employee's past record and concluded that, considered together, this record established a reasonable basis for the discharge.
>
> We find nothing in the arbitrator's decision that is repugnant to the Act. Indeed, a contrary result in this case would mean that any employee's offhand complaint would be protected activity which would shield any obscene insubordination short of physical violence. That result would not be consistent with the Act. . . .

The distinction between protected, albeit exhuberant conduct in the context of a grievance or negotiation meeting, as opposed to similar conduct elsewhere, was further set forth in *New Process Gear, Div. of Chrysler Corp.*, 49 NLRB 1102 (1980).[9] In that case, the administrative law judge, in a decision adopted by the Board, dismissed an allegation involving a shop steward who, in the course of arguing about a work problem, refused the foreman's order to stop shouting and refused an order to leave the production office. The Administrative Law Judge stated:

> Respondent acknowledges that loud talk and cursing is not uncommon in a plant environment, however, it contends that personal insulting remarks such as those Allen directed towards Mooney do not have to be tolerated, specially when carried to the point of insubordination. I agree, a distinction between a steward's aggressive union activity and improper behavior is that, in the former, the steward diligently represents his constituents' interests

[9] See also *Postal Service*, 250 NLRB 4 fn. 1 (1980), where the Board held that a shop steward engaged in the "formal investigation" of a grievance did not lose the protection of the Act when he uttered a "single, spontaneous obscene remark" to a supervisor. However, the Board did note that the shop steward's remark was provoked, in part, by the supervisor's failure to answer his inquiries.

by seeing to it that the contract is not violated and that the grievances are presented fairly and with the primary purpose of obtaining satisfactory results in an amicable and procedurally correct manner. Improper or unprotected conduct is demonstrated by a steward who while processing grievances makes personal attacks on foremen and resorts to obnoxious obscenities. He refuses to follow the established procedure in an orderly manner to the point of insubordination. Such was Allen's conduct toward Foreman Mooney.

I reject the position of the General Counsel that Allen's conduct can be classified as shop talk. He pursued Mooney relentlessly and insubordinately. Moreover, Allen was not disciplined because he cursed Mooney but because he would not leave Mooney alone so that Mooney could do his job. Allen continued to follow Mooney while engaging in loud and abusive conduct and he threatened to continue to engage in such improper behavior for the remainder of the shift. It was at that point that Allen was suspended for insubordination.

The employees' right to engage in concerted activity may permit some lee-way for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. *NLRB v. Thor Power Tool Company*, 351 F.2d 584 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964). In *Calmos Combining Co., supra*, 184 NLRB 914, 915, in a strikingly similar situation as in the instant case, the Board stated:

> We agree with the Respondent that Harts' refusal to follow the direct order to stop shouting and his abusive language constituted unprotected activity . . . . Harts not only refused to cease shouting, but dared Oshins to discharge him. Thus, Harts' continued intransigence was not a part of the *res gestae* of the grievance discussion. Rather, the order to stop shouting was a reasonable and lawful order that should have been obeyed, and his refusal to do so was not related to Harts' protected processing of the grievance.

In view of the case law cited above, it seems to me that the question as to whether the February 11 warning to Winn was violative of the Act is precariously close. I have concluded that, although Winn had a legitimate basis for complaining about his timecard, he nevertheless escalated the argument with Sullivan to a point beyond which was reasonable given the nature of his complaint. There is also no doubt as to the fact that Winn kept shouting at Sullivan on the workroom floor after the latter told him to quiet down and return to his seat. In this regard, I also conclude that, during the confrontation, Winn made insulting statements to Sullivan and that the heated remarks by Winn attracted the attention of the other employees who stopped work. Further, the evidence in this case indicates that this was not the first time that Winn had been overly boisterous, and in connection with the settlement of a prior grievance involving Winn, both the Union and the Employer had mutually agreed that their respective representatives should conduct themselves in a professional and business like manner.

There is, in fact, little doubt in my mind that the type of overreaction by Winn is not the type of conduct which would be conducive to a rational and mutually productive collective-bargaining relationship. This is not to say, however, that his conduct on this occasion went beyond the pale or that the warning was privileged.

Unlike the facts in *Atlantic Steel Co.*, supra, *New Process Gear*, supra, and the other cases cited by the Respondent, I do not perceive that Winn's conduct was nearly as insubordinate as the activities referred to in those cases. For example, I have concluded that Winn did not use obscene language during his confrontation with Sullivan. Also, while it is true that the argument caused other employees to stop work, the evidence herein does not show that this confrontation, as in the case of *New Process Gear*, was of an extended or prolonged nature. Moreover, it is apparent from the warning letter itself that its issuance was motivated not merely because of Winn's boisterous conduct, but at least in equal measure because Winn had informed Sullivan that he would file grievances on behalf of other employees encountering the same problem. Although Sullivan may have perceived this "threat" as one which involved an intent by Winn to harass management with multiple grievances, it must be said that the problem at issue was, in fact, a grievable matter, and that Winn's position was consistent with the agreement made with Pace. In summary, I therefore conclude that the warning issued to Winn was motivated in large part because of Sullivan's concern that Winn, as shop steward, would file grievances pursuant to the collective-bargaining agreement. I also find that Winn's conduct on February 3, in connection with his conversation with Sullivan, was not so egregious as to remove his activity from the protection of the Act. Accordingly, it is concluded that the warning issued to Winn on February 11, 1980, was violative of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, the United States Postal Service, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing a letter of warning to William Winn on February 11, 1982, because of Winn's notification to management that he would file grievances pursuant to the collective-bargaining agreement, the Respondent violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except to the extent herein found, the Respondent has not violated the Act in any other manner.

[Recommended Order omitted from publication.]

▷
N. L. R. B. v. Acme Industrial Co.,
U.S.Ill. 1967.

Supreme Court of the United States
NATIONAL LABOR RELATIONS BOARD, Petitioner,
v.
ACME INDUSTRIAL CO.
No. 52.

Argued Nov. 14, 1966.
Decided Jan. 9, 1967.

Petition to review and set aside an order of the National Labor Relations Board, wherein Board filed cross petition to enforce order issued against employer. The Court of Appeals for the Seventh Circuit, 351 F.2d 258, set aside order and denied enforcement and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that order of Board requiring employer to furnish union information that would allow union to decide whether to process a grievance was consistent with express terms of National Labor Relations Act and with national labor policy favoring arbitration and union was not required to take grievance all the way through arbitration for determination of relevancy of requested information, notwithstanding provision for binding arbitration of differences concerning meaning of agreement.

Reversed and remanded.

West Headnotes

[1] Federal Courts 170B ⚷459

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk455 Decisions Reviewable and Grounds for Issuance
170Bk459 k. Labor Relations and Standards; Employers' Liability. Most Cited Cases
(Formerly 106k383(1))
Supreme Court granted certiorari to consider substantial question of federal labor law.

[2] ⚷1117

231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1116 Disclosure of Information Relevant to Bargaining
231Hk1117 k. In General. Most Cited Cases
(Formerly 232Ak179 Labor Relations)
Employer has general obligation to provide information that is needed by bargaining representative for proper performance of its duties. National Labor Relations Act, §§ 8(a) (5), (d), 10(a) as amended 29 U.S.C.A. §§ 158(a) (5), (d), 160(a).

[3] ⚷1113

231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1111 Duty to Bargain Collectively
231Hk1113 k. Nature and Scope of Duty in General. Most Cited Cases
(Formerly 232Ak179 Labor Relations)
Duty to bargain extends beyond period of contract negotiations and applies to labor-management relations during term of an agreement. National Labor Relations Act, §§ 8(a) (5), (d), 10(a) as amended 29 U.S.C.A. §§ 158(a) (5), (d), 160(a).

[4] ⚷1562

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)4 Proceedings
231Hk1559 Grievance Proceedings
231Hk1562 k. Disclosure; Discovery. Most Cited Cases

(Formerly 232Ak179 Labor Relations)
Employer had duty to furnish union information which was necessary in order to enable union to evaluate intelligently grievances filed. National Labor Relations Act, §§ 8(a) (5), (d), 10(a) as amended 29 U.S.C.A. §§ 158(a) (5), (d), 160(a).

[5] ⚖1678(2)

231H Labor and Employment
231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings
231HXII(I)1 In General
231Hk1669 Exclusive, Concurrent, and Conflicting Jurisdiction
231Hk1678 Grievances and Arbitration
231Hk1678(2) k. Particular Disputes. Most Cited Cases
(Formerly 232Ak506 Labor Relations)
Order of National Labor Relations Board requiring employer to furnish union information that would allow union to decide whether to process a grievance was consistent with express terms of National Labor Relations Act and with national labor policy favoring arbitration and union was not required to take grievance all the way through arbitration for determination of relevancy of requested information, notwithstanding provision for binding arbitration of differences concerning meaning of agreement. National Labor Relations Act, §§ 8(a) (5), (d), 10(a) as amended 29 U.S.C.A. §§ 158(a) (5), (d), 160(a); Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

****566 *433** Norton J. Come, Washington, D.C., for petitioner.
E. Allan Kovar, Chicago, Ill., for respondent.
Mr. Justice STEWART delivered the opinion of the Court.
In NLRB v. C & C Plywood Corp., 385 U.S. 421, 87 S.Ct. 559, 17 L.Ed.2d 486, decided today, we dealt with one aspect of an employer's duty to bargain during the term of a collective bargaining agreement. In this case we deal with another involving the obligation to furnish information that allows a union to decide whether to process a grievance.

In April 1963, at the conclusion of a strike, the respondent entered into a collective bargaining agreement with the union which was the certified representative of its employees. The agreement contained two sections relevant to this case. Article I, s 3, provided, 'It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work * * *.' In Art. VI, s 10, the respondent agreed that '(i)n the event the equipment of the ***434** plant * * * is ****567** hereafter moved to another location of the Company, employees working in the plant * * * who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering * * * employees at such location.'A grievance procedure culminating in compulsory and binding arbitration was also incorporated into the collective agreement.

The present controversy began in January 1964, when the union discovered that certain machinery was being removed from the respondent's plan. When asked by union representatives about this movement, the respondent's foremen replied that there had been no violation of the collective agreement and that the company, therefore, was not obliged to answer any questions regarding the machinery. After this rebuff, the union filed 11 grievances charging the respondent with violations of the above quoted clauses of the collective agreement. The president of the union then wrote a letter to the respondent, requesting 'the following information at the earliest possible date:

'1. The approximate dates when each piece of equipment was moved out of the plant.

'2. The place to which each piece of equipment was

moved and whether such place is a facility which is operated or controlled by the Company.

'3. The number of machines or equipment that was moved out of the plant.

'4. What was the reason or purpose of moving the equipment out of the plant.

'5. Is this equipment used for production elsewhere.'

The company replied by letter that it had no duty to furnish this information since no layoffs or reductions in ***435** job classification had occurred within five days (the time limitation set by the contract for filing grievances) prior to the union's formal request for information.

This refusal prompted the union to file unfair labor practice charges with the National Labor Relations Board. A complaint was issued, and the Board, overruling its trial examiner, held the respondent had violated s 8(a)(5) of the Act[FN1] by refusing to bargain in good faith. Accordingly, it issued a cease-and-desist order. The Board found that the information requested was 'necessary in order to enable the Union to evaluate intelligently the grievances filed' and pointed out that the agreement contained no 'clause by which the Union waives its statutory right to such information.'

> FN1. National Labor Relations Act, as amended, 61 Stat. 141, 29 U.S.C.A. s 158(a)(5).

[1] The Court of Appeals for the Seventh Circuit refused to enforce the Board's order. 351 F.2d 258. It did not question the relevance of the information nor the finding that the union had not expressly waived its right to the information. The Court ruled, however, that the existence of a provision for binding arbitration of differences concerning the meaning and application of the agreement foreclosed the Board from exercising its statutory power. The court cited United Steelworkers v. Warrior & Gulf Navig. Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409, the United Steelworkers v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403, as articulating a national labor policy favoring arbitration and requiring the Board's deference to an arbitrator when construction and application of a labor agreement are in issue. We granted certiorari to consider the substantial question of federal labor law thus presented. 383 U.S. 905, 86 S.Ct. 893, 15 L.Ed.2d 662.

****568** [2][3] There can be no question of the general obligation of an employer to provide information that is needed by ***436** the bargaining representative for the proper performance of its duties.National Labor Relations Board v. Truitt Mfg. Co., 351 U.S. 149, 76 S.Ct. 753, 100 L.Ed. 1027. Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.National Labor Relations Board v. C & C Plywood Corp., 385 U.S. 421, 87 S.Ct. 559, 17 L.Ed.2d 486;National Labor Relations Board v. F. W. Woolworth Co., 352 U.S. 938, 77 S.Ct. 261, 1 L.Ed.2d 235. The only real issue in this case, therefore, is whether the Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights under s 8(a)(5).

The two cases upon which the court below relied, and the third of the Steelworkers trilogy, United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424, do not throw must light on the problem. For those cases dealt with the relationship of courts to arbitrators when an arbitration award is under review or when the employer's agreement to arbitrate is in question. The weighing of the arbitrator's greater institutional competency, which was so vital to those decisions, must be evaluated in that context. 363 U.S., at 567, 581-582, 596-597,80 S.Ct. 1352, 1360-1361. The relationship of the Board to the arbitration process is of a quite different order. See Cary v. Westinghouse Corp., 375 U.S. 261, 269-272, 84 S.Ct. 401, 407-409, 11 L.Ed.2d 320.

Moreover, in assessing the Board's power to deal with unfair labor practices, provisions of the Labor Act which do not apply to the power of the courts under s 301, [FN2] must be considered. Section 8(a)(5) proscribes failure to bargain collectively in only the most general terms, but s 8(d) amplifies it by defining 'to bargain collectively' as including 'the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to * * * any question arising ***437** (under an agreement) * * *.'[FN3] And s 10(a)[FN4] provides: 'The Board is empowered * * * to prevent any person from engaging in any unfair labor practice * * *. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.' Thus, to view the Steelworkers decisions as automatically requiring the Board in this case to defer to the primary determination of an arbitrator[FN5] is to overlook important distinctions between those cases and this one.

FN2. Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. s 185.

FN3. Cf. United Steelworkers of America v. Warrior & Gulf Co., 363 U.S. 574, 581, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409;'The grievance procedure is, in other words, a part of the continuous collective bargaining process.'

FN4. 61 Stat. 146, 29 U.S.C. s 160(a).

FN5. See Sinclair Refining Co. v. N.L.R.B., 306 F.2d 569, 570 (C.A.5th Cir.).

But even if the policy of the Steelworkers Cases were thought to apply with the same vigor to the Board as to the courts, that policy would not require the Board to abstain here. For when it ordered the employer to furnish the requested information to the union, the Board was not making a binding construction of the labor contract. It was only acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. This discovery-type standard decided nothing about the merits of the union's contractual claims.[FN6] When the respondent****569** furnishes the requested ***438** information, it may appear that no subcontracting or work transfer has occurred, and, accordingly, that the grievances filed are without merit. On the other hand, even if it appears that such activities have taken place, an arbitrator might uphold the respondent's contention that no breach of the agreement occurred because no employees were laid off or reduced in grade within five days prior to the filing of any grievance. Such conclusions would clearly not be precluded by the Board's thresh-old determination concerning the potential relevance of the requested information. Thus, the assertion of jurisdiction by the Board in this case in no way threatens the power which the parties have given the arbitrator to make binding interpretations of the labor agreement.[FN7]

FN6. Cf. 4 Moore, Federal Practice 26.16(1), 1175-1176 (2d ed.):
'(I)t must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. * * * Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy.'
Id., at 1181:
'Examination as to relevant matters should be allowed whether or not the theory of the complaint is sound or the facts, if proved, would support the relief sought.'

FN7. This case, therefore, differs from N.L.R.B. v. C & C Plywood Corp., 385 U.S. 421, 87 S.Ct. 559, 17 L.Ed.2d 486, where the Board's determination that the employer did not have a contractual right to institute a premium pay plan was a de-

termination on the merits. See C & C Plywood, at 426 of 385 U.S., at 563 of 87 S.Ct. and n. 10.

Far from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim.[FN8] The expense of arbitration might be placed upon the union only for it to learn ***439** that the machines had been relegated to the junk heap. Nothing in federal labor law requires such a result.

FN8. See Fafnir Bearing Co. v. N.L.R.B., 2 Cir., 362 F.2d 716, 721:
'By preventing the Union from conducting these studies (for an intelligent appraisal of its right to grieve), the Company was, in errence, requiring it to play a game of blind man's bluff.'

[4][5] We hold that the Board's order in this case was consistent both with the express terms of the Labor Act and with the national labor policy favoring arbitration which our decisions have discerned as underlying that law. Accordingly, we reverse the judgment and remand the case to the Court of Appeals with directions to enforce the Board's order.

Reversed and remanded.

U.S.Ill. 1967.
N. L. R. B. v. Acme Industrial Co.
385 U.S. 432, 87 S.Ct. 565, 64 L.R.R.M. (BNA) 2069, 17 L.Ed.2d 495, 54 Lab.Cas. P 11,639

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NATIONAL LABOR RELATIONS BD. v. TRUITT MFG. CO.
U.S. 1956.

Supreme Court of the United States
NATIONAL LABOR RELATIONS BOARD, Petitioner,
v.
TRUITT MANUFACTURING CO.
No. 486.

Argued March 29, 1956
Decided May 7, 1956.

Proceeding wherein the Court of Appeals, Fourth Circuit, 224 F.2d 869, refused to enforce an order of the National Labor Relations Board which had found that an employer had failed to bargain good faith. The case came to the Supreme Court on Certiorari. The Supreme Court, Mr. Justice Black, held that an employer's refusal to attempt to substantiate a claim of economic inability to pay increased wages may support a finding of a failure to bargain in good faith.

Reversed.

Mr. Justice Frankfurter, Mr. Justice Clark and Mr. Justice Harlan, dissented in part.

West Headnotes

[1] Federal Courts 170B ⚿459

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk455 Decisions Reviewable and Grounds for Issuance
170Bk459 k. Labor Relations and Standards; Employers' Liability. Most Cited Cases
(Formerly 106k383(1))
Because of conflict of opinion as to whether employer's refusal to furnish information while claiming financial inability to pay wage increase might support finding of refusal to bargain in good faith, and because of importance of the question, Supreme Court granted certiorari. National Labor Relations Act, § 8(a)(5), (d) as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158(a)(5), (d); Labor Management Relations Act, 1947, § 204(a)(1), 29 U.S.C.A. § 174(a)(1).

[2] ⚿1118

231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1116 Disclosure of Information Relevant to Bargaining
231Hk1118 k. Particular Subjects of Disclosure. Most Cited Cases
(Formerly 232Ak179 Labor Relations)
In determining whether statutory obligation of good-faith bargaining has been met, National Labor Relations Board has right to consider an employer's refusal to give information about its financial status. National Labor Relations Act, § 8(a)(5), (d) as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158(a)(5), (d); Labor Management Relations Act, 1947, § 204(a)(1), 29 U.S.C.A. § 174(a)(1).

[3] ⚿1113

231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1111 Duty to Bargain Collectively
231Hk1113 k. Nature and Scope of Duty in General. Most Cited Cases
(Formerly 232Ak177 Labor Relations)
While Congress has not compelled agreement between employers and bargaining representatives, it does require collective bargaining in the hope that agreement will result. National Labor Relations

Act, § 8(a)(5), (d) as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158(a)(5), (d); Labor Management Relations Act, 1947, § 204(a)(1), 29 U.S.C.A. § 174(a)(1).

[4] 1114

231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1111 Duty to Bargain Collectively
231Hk1114 k. Good Faith in General. Most Cited Cases
(Formerly 232Ak179 Labor Relations)
Good-faith bargaining, as required by statute between employer and employees' representative, necessarily requires that claims made by either bargainer should be honest claims, and this is true of an asserted economic inability on part of employer to pay an increase in wages. National Labor Relations Act, § 8(a)(5), (d) as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158(a)(5), (d); Labor Management Relations Act, 1947, § 204(a)(1), 29 U.S.C.A. § 174(a)(1).

[5] 1767(2)

231H Labor and Employment
231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings
231HXII(I)6 Weight and Sufficiency of Evidence
231Hk1764 Refusal to Bargain Collectively
231Hk1767 Conduct Constituting Refusal
231Hk1767(2) k. Failure to Provide Information. Most Cited Cases
(Formerly 232Ak574 Labor Relations)
An employer's refusal to attempt to substantiate a claim of economic inability to pay increased wages may support a finding by the National Labor Relations Board of a failure to bargain in good faith. National Labor Relations Act, § 8(a)(5), (d) as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158(a)(5), (d); Labor Management Relations Act, 1947, § 204(a)(1), 29 U.S.C.A. § 174(a)(1).

[6] 1118

231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1116 Disclosure of Information Relevant to Bargaining
231Hk1118 k. Particular Subjects of Disclosure. Most Cited Cases
(Formerly 232Ak179 Labor Relations)
As to whether employees are entitled to substantiating evidence from employer which claims economic inability to pay increased wages, each case must turn upon its own facts, and inquiry must always be whether or not undercircumstances the statutory obligation to bargain in good faith has been met. National Labor Relations Act, § 8(a)(5), (d) as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158(a)(5), (d); Labor Management Relations Act, 1947, § 204(a)(1), 29 U.S.C.A. § 174(a)(1).

[7] 1767(2)

231H Labor and Employment
231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings
231HXII(I)6 Weight and Sufficiency of Evidence
231Hk1764 Refusal to Bargain Collectively
231Hk1767 Conduct Constituting Refusal
231Hk1767(2) k. Failure to Provide Information. Most Cited Cases
(Formerly 232Ak574 Labor Relations)
Under circumstances of the case, record on certiorari, including evidence that employer refused to furnish financial information while claiming economic inability to pay increased wages, supported National Labor Relations Board's finding of em-

ployer's refusal to bargain in good faith. National Labor Relations Act, § 8(a)(5), (d) as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158(a)(5), (d); Labor Management Relations Act, 1947, § 204(a)(1), 29 U.S.C.A. § 174(a)(1).

****754** Mr. ***149** David P. Findling, Washington, D.C., for petitioner.
Mr. R. D. Douglas, Jr., Greensboro, N.C., for respondent.
Mr. Justice BLACK delivered the opinion of the Court.
The National Labor Relations Act makes it an unfair labor practice for an employer to refuse to bargain in good faith with the representative of his employees.[FN1] ***150** The question presented by this case is whether the National Labor Relations Board may find that an employer has not bargained in good faith where the employer claims it cannot afford to pay higher wages but refuses requests to produce information substantiating its claim.

FN1.'Sec. 8. (a) It shall be an unfair labor practice for an employer-
'(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
'(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.' 49 Stat. 452-453, as amended, 61 Stat. 140-142, 29 U.S.C. ss 158(a)(5), 158(d), 29 U.S.C.A. s 158(a)(5), (d).

The dispute here arose when a union representing certain of respondent's employees asked for a wage increase of 10 cents per hour. The company answered that it could not afford to pay such an increase, it was undercapitalized, had never paid dividends, and that an increase of more than 2 1/2 cents per hour would put it out of business. The union asked the company to produce some evidence substantiating these statements, requesting permission to have a certified public accountant examine the company's books, financial data, etc. This request being denied, the union asked that the company submit 'full and complete information with respect to its financial standing and profits,' insisting that such information was pertinent and essential for the employees to determine whether or not they should continue to press their demand for a wage increase. A union official testified before the trial examiner that '(W)e were wanting anything relating to the Company's position, any records or what have you, books, accounting sheets, cost expenditures, what not, anything to back the Company's position that they were unable to give any more money.'The company refused all the requests, relying solely on the statement that 'the information * * * is not pertinent to ***151** this discussion and the company declines to give you such information; You have no legal right to such.'

****755** [1] On the basis of these facts the National Labor Relations Board found that the company had 'failed to bargain in good faith with respect to wages in violation of Section 8(a)(5) of the Act.'110 N.L.R.B. 856. The Board ordered the company to supply the union with such information as would 'substantiate the Respondent's position of its economic inability to pay the requested wage increase.'The Court of Appeals refused to enforce the Board's order, agreeing with respondent that it could not be held guilty of an unfair labor practice because of its refusal to furnish the information requested by the union. 4 Cir., 224 F.2d 869. In National Labor Relations Board v. Jacobs Mfg. Co., 196 F.2d 680, the Second Circuit upheld a Board finding of bad-faith bargaining based on an em-

ployer's refusal to supply financial information under circumstances similar to those here. Because of the conflict and the importance of the question we granted certiorari. 350 U.S. 922, 76 S.Ct. 211.

The company raised no objection to the Board's order on the ground that the scope of information required was too broad or that disclosure would put an undue burden on the company. Its major argument throughout has been that the information requested was irrelevant to the bargaining process and related to matters exclusively within the province of management. Thus we lay to one side the suggestion by the company here that the Board's order might be unduly burdensome or injurious to its business. In any event, the Board has heretofore taken the position in cases such as this that 'It is sufficient if the information is made available in a manner not so burdensome or timeconsuming as to impede the process of bargaining.'[FN2]And in this case the Board has held ***152** substantiation of the company's position requires no more than 'reasonable proof.'

FN2.Old Line Life Ins. Co., 96 N.L.R.B. 499, 503;Cincinnati Steel Castings Co., 86 N.L.R.B. 592, 593.

[2][3] We think that in determining whether the obligation of good-faith bargaining has been met the Board has a right to consider an employer's refusal to give information about its financial status. While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the hope that agreements would result. Section 204(a) (1) of the Act admonishes both employers and employees to 'exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions * * *.'[FN3] In their effort to reach an agreement here both the union and the company treated the company's ability to pay increased wages as highly relevant. The ability of an employer to increase wages without injury to his business is a commonly considered factor in wage negotiations.[FN4]Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition; employees have even voted to accept wage decreases because of such conditions.[FN5]

FN3. 61 Stat. 154, 29 U.S.C. s 174(a)(1), 29 U.S.C.A. s 174(a)(1).

FN4. See Sherman, Employer's Obligation to Produce Data for Collective Bargaining, 35 Minn.L.Rev. 24; Dunlop, The Economics of Wage-Dispute Settlement, 12 Law & Contemp. Prob. 281, 290; What Kind of Information Do Labor Unions Want in Financial Statements?, 87 J. Accountancy 368; How Collective Bargaining Works (Twentieth Century Fund, 1942) 453.

FN5. Daily Labor Report No. 156: A4-A5 (Bureau of National Affairs, Aug. 12, 1954); 35 Lab.Rel.Rep. 106; Union Votes Wage Freeze to Aid Rice-Stix, St. Louis Globe-Democrat, Nov. 25, 1954, p. 1, col. 4; Studebaker Men Vote for Pay Cuts, N.Y. Times, Aug. 13, 1954, p. 1, col. 5.

[4][5] Good-faith bargaining necessarily requires that claims made by either ****756** bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present***153** in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim. Such has been the holding of the Labor Board since shortly after the passage of the Wagner Act. In Pioneer Pearl Button Co., decided in 1936, where the employer's representative relied on the company's asserted 'poof financial condition,' the Board said: 'He did no more than take refuge in the assertion that the respondent's financial condition was poor; he refused either to prove his statement, or to permit in-

dependent verification. This is not collective bargaining. 1 N.L.R.B. 837, 842-843. This was the position of the Board when the Taft-Hartley Act was passed in 1947 and has been its position ever since.FN6We agree with the Board that a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith.

> FN6. See, e.g., Southern Saddlery Co., 90 N.L.R.B 1205, 1206-1207;McLean-Arkansas Lumber Co., 109 N.L.R.B. 1022, 1035-1038;Jacobs Manufacturing Co., 94 N.L.R.B. 1214, 1221-1222, enforced, 196 F.2d 680; and cases therein cited.

[6][7] The Board concluded that under the facts and circumstances of this case the respondent was guilty of an unfair labor practice in failing to bargain in good faith. We see no reason to disturb the findings of the Board. We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts.[FN7]The inquiry must always be whether or not under the circumstances of the particular case the ***154** statutory obligation to bargain in good faith has been met. Since we conclude that there is support in the record for the conclusion of the Board here that respondent did not bargain in good faith, it was error for the Court of Appeals to set aside the Board's order and deny enforcement.

> FN7. See National Labor Relations Board v. American Nat. Ins. Co., 343 U.S. 395, 409-410, 72 S.Ct. 824, 832, 96 L.Ed. 1027.

Reversed.

Mr. Justice FRANKFURTER, whom Mr. Justice CLARK and Mr. Justice HARLAN join, concurring in part and dissenting in part.

This case involves the nature of the duty to bargain which the National Labor Relations Act imposes upon employers and unions. Section 8(a)(5) of the Act makes it 'an unfair labor practice for an employer * * * to refuse to bargain collectively with the representatives of his employees,' and s 8(b)(3) places a like duty upon the union vis-a -vis the employer. Section 8(d) provides that 'to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.' 61 Stat. 142, 29 U.S.C. s 158(d), 29 U.S.C.A. s 158(d).

****757** These sections obligate the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith. 'Good faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily ***155** incompatible with stubbornness or even with what to an outsider may seem unreasonableness. A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination. The appropriate inferences to be drawn from what is often confused and tangled testimony about all this makes a finding of absence of good faith one for the judgment of the Labor Board, unless the record as a whole leaves such judgment without reasonable foundation. See Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456.

An examination of the Board's opinion and the position taken by its counsel here disclose that the

Board did not so conceive the issue of goof-faith bargaining in this case. The totality of the conduct of the negotiation was apparently deemed irrelevant to the question; one fact alone disposed of the case.'(I)t is settled law (the Board concluded), that when an employer seeks to justify the refusal of a wage increase upon an economic basis, as did the Respondent herein, good-faith bargaining under the Act requires that upon request the employer attempt to substantiate its economic position by reasonable proof.'110 N.L.R.B. 856.

This is to make a rule of law out of one item-even if a weighty item-of the evidence. There is no warrant for this. The Board found authority in National Labor Relations Board v. Jacobs Mfg. Co., 2 Cir., 196 F.2d 680. That case presented a very different situation. The Jacobs Company had engaged in a course of conduct which the Board held to be a violation of s 8(a)(5). The Court of Appeals agreed that in light of the whole record the Board was entitled to find that the employer had not bargained in good faith. Its refusal to open its 'books and sales records' for union ***156** perusal was only part of the recalcitrant conduct and only one consideration in establishing want of good faith.[FN1]The unfair labor practice was not founded on this refusal, and the court's principal concern about the disclosure of financial information was whether the Board's order should be enforced in this respect. The court sustained the Board's requirement for disclosure which 'will be met if the respondent produces whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demands.'196 F.2d 680, 684. This is a very far cry indeed from a ruling of law that failure to open a company's books establishes lack of good faith. Once good faith is ****758** found wanting, the scope of relief to be given by the Board is largely a question of administrative discretion. Neither Jacobs nor any other court of appeals' decision which has been called to our attention supports the rule of law which the Board has fashioned out of one thread drawn from the whole fabric of the evidence in this case.

FN1.'The respondent contends that it was under no statutory duty to confer with the union after the second meeting since all of the issues had been fully explored and the position of both parties expressed. Whether this was true, however, was a question of fact which the Board found adversely to the respondent. Since at both the meetings the respondent took the position that discussion of wage increases would be futile because it was financially unable to make them, and since it refused to discuss the other subjects at all, the Board was justified in concluding that the respondent had refused to bargain in good faith as the Act requires. Collective bargaining in compliance with the statute requires more than virtual insistence upon a prejudgment that no agreement could be reached by means of a discussion.'National Labor Relations Board v. Jacobs Mfg. Co., 2 Cir., 196 F.2d 680, at page 683.

The Labor Board itself has not always approached 'good faith' and the disclosure question in such a mechanical fashion. In Southern Saddlery Co., 90 N.L.R.B. 1205, the Board also found that s 8(a)(5) ***157** had been violated. But how differently the Board there considered its function.

'Bargaining in good faith is a duty on both sides to enter into discussions with an open and fair mind and a sincere purpose to find a basis for agreement touching wages and hours and conditions of labor. In applying this definition of good faith bargaining to any situation, the Board examines the Respondent's conduct as a whole for a clear indication as to whether the latter has refused to bargain in good faith, and the Board usually does not rely upon any one factor as conclusive evidence that the Respondent did not genuinely try to reach an agreement.'90 N.L.R.B. 1205, 1206.

The Board found other factors in the Southern Saddlery case. The employer had made no counterproposals or efforts to 'compromise the contro-

versy.' Compare, McLean-Arkansas Lumber Co., Inc., 109 N.L.R.B. 1022. Such specific evidence is not indispensable, for a study of all the evidence in a record may disclose a mood indicative of a determination not to bargain. That is for the Board to decide. It is a process of inference-drawing, however, very different from the ultra vires law-making of the Board in this case.

Since the Board applied the wrong standard here, by ruling that Truitt's failure to supply financial information to the union constituted per se a refusal to bargain in good faith, the case should be returned to the Board. There is substantial evidence in the record which indicates that Truitt tried to reach an agreement. It offered a 2 1/2-cent wage increase, it expressed willingness to discuss with the union 'at any time the problem of how our wages compare with those of our competition,' and it continued throughout to meet and discuss the controversy with the union.

***158** Because the record is not conclusive as a matter of law, one way or the other, I cannot join in the Court's disposition of the case. To reverse the Court of Appeals without remanding the case to the Board for further proceedings, implies that the Board would have reached the same conclusion in applying the right rule of law that it did in applying a wrong one. I cannot make such a forecast. I would return the case to the Board so that it may apply the relevant standard for determining 'good faith.'

U.S. 1956.
National Labor Relations Bd. v. Truitt Mfg. Co.
351 U.S. 149, 76 S.Ct. 753, 38 L.R.R.M. (BNA) 2042, 100 L.Ed. 1027, 30 Lab.Cas. P 69,932

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Disneyland Park and Disney's California Adventure, Divisions of Walt Disney World Co. *and* International Association of Bridge, Structural and Ornamental Iron Workers, Local 433, AFL–CIO. Case 21–CA–35222

September 13, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 15, 2003, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief and a reply brief. The General Counsel filed exceptions and a supporting brief and an answering brief.

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

The issue before the National Labor Relations Board is whether Disneyland Park[1], violated Section 8(a) (5) and (1) of the Act by failing to provide the Union with requested information. Having considered the decision and record in light of the exceptions and briefs, we adopt, for the reasons given by the judge, her dismissal of the allegation that the Respondent unlawfully refused to permit the Union to view subcontracts and files relating to the bidding and performance of the subcontracts. We reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with the dates of each subcontract, nature of the work, the dates upon which the work was performed, and the name of the subcontractors performing unit work. Accordingly, we dismiss the complaint in its entirety.

Background

The Respondent is engaged in the business of operating a retail hotel and two entertainment facilities: Disneyland Park and Disney's California Adventure. The Respondent and Union have been parties to successive collective-bargaining agreements covering job classifications involving primarily facility maintenance, repair, and rehabilitation. The latest collective-bargaining agreement initially concerned only Disneyland Park and was effective from March 1, 1998 to February 28, 2003. In 2000, as part of a deal to include the newly created theme park, Disney's California Adventure, the parties extended the existing collective-bargaining agreement to February 28, 2005. Section 23 of the contract, applicable only to Disneyland Park, provides, in pertinent part, that:

> During the terms of the Agreement, the Employer agrees that it will not subcontract work for the purpose of evading its obligations under this Agreement. However, it is understood that the Employer shall have the right to subcontract . . . , where the subcontracting of work will not result in the termination or layoff, or the failure to recall from layoff, any permanent employee qualified and classified to do the work.

In a February 11, 2001 letter, the Union's attorney, David Rosenfeld, requested, in pertinent part, that the Respondent provide the Union with information concerning the Respondent's subcontracts that were arguably within the Union's jurisdiction. In requesting the information Rosenfeld wrote that "The Union has observed that there have been a number of subcontracts within Disneyland for work covered by the agreement within Local 433's jurisdiction. The Union is concerned that such subcontracting may not comply with the terms of the agreement."

In a March 11, 2001 letter, Jennifer Larson, Respondent's labor/cast relations manager, answered that "Section 23 of the Collective Bargaining Agreement specifically allows for subcontracting of any work . . . when it will not result in the termination or layoff, or failure to recall from layoff, any permanent employee qualified and classified to do the work. [I]n light of the explicit language of the contract, [the information request is] apparently unnecessary . . . We would be happy to give your request further consideration if you could explain with some level of detail the relevance of this request . . . ."

On March 22, 2001, Rosenfeld responded by stating that the Union believed there had been an increase in subcontracts.

On April 3, 2001, Larson responded, stating that there had been no layoffs of Local 433 employees, and thus the Respondent did not believe that a contractual issue existed at that time. Larson offered to further consider the request if the Union would explain the relevance of the information to its role as the employees' collective-bargaining representative.

On April 9, 2001, Rosenfeld replied: "At least one iron worker has retired and has not been replaced. Additionally, no new steward has been hired at the new theme park. It is plain that Disneyland is reducing its work

[1] As discussed herein, although the complaint lists as Respondents both Disneyland Park and Disney's California Adventure, two divisions of Walt Disney World Co., the contract provision at issue in conjunction with the alleged violation applies only to Disneyland Park.

force and subcontracting additional work. It is for these reasons the information is requested."[2]

On May 10, 2001, Larson informed the Union: "you have failed to provide any reason which would lead to a viable claim under our Collective Bargaining Agreement. The Company has the explicit right to determine the number of employees and how they are utilized to run the business." Larson informed Rosenfeld that the Respondent did not believe it was obligated to furnish the requested information.

On June 17, 2001, Rosenfeld responded: "Your letter takes the position Disney will not provide any of the subcontracts. I want to make it plain we seek only subcontracts that involve work arguably or possibly performed by Iron Workers."

The Judge's Decision

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with a list of all subcontractors performing work within the Union's jurisdiction from January 1, 1999 to present, the date of each subcontract, the nature of the work, the name of the subcontractors, and the dates the work was performed. The judge deemed this information relevant to the Union's efforts in determining whether evidence exists of an attempt by the Respondent to evade its contract obligations through the erosion of unit work.

However, the judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to allow the Union to review the subcontracts or any files Respondent maintains regarding the bidding and performance of the contracts. The judge found that this information did not appear to be of probable or potential relevance to the question of whether the Respondent was evading its bargaining obligation, and that neither the Union's counsel nor the General Counsel explained how obtaining such information would assist the Union in determining whether the Respondent violated the agreement. The judge found that the Union's generalized, conclusory explanations of how the information would assist the Union in evaluating whether the Respondent violated the Act did not trigger an obligation on the Respondent's part to provide the information.

The Respondent's Exceptions

The Respondent contends that the judge erred in finding that it violated Section 8(a)(5) and (1) by refusing to furnish the Union with a list of all subcontractors performing work within the Union's jurisdiction from January 1, 1999 to present, the date of each subcontract, the nature of the work, the name of the subcontractors, and the dates the work was performed. The Respondent argues that the information requested by the Union is irrelevant under the terms of the collective-bargaining agreement, because the Respondent had the unfettered right to subcontract so long as the subcontracting did not result in the layoff or failure to recall from layoff a bargaining unit member. The Respondent noted that no member of the bargaining unit was laid off or denied recall. Further, the Respondent asserts that it cannot be found to have evaded the agreement because the agreement does not contain any provision requiring the Respondent to maintain its work force at a particular level, require them to refrain from reducing the work force, or otherwise protect the work force from reduction.

The Charging Party's Exceptions

The Charging Party argues the judge erred in finding that the Respondent did not violate Section 8(a)(5) and (1) by failing to provide information concerning the bidding process to the Union. The Charging Party contends that the judge cannot reasonably find, on one hand, that information relating to subcontracting is relevant, but on the other hand, find that information relating to the bidding process and performance of the contracts is irrelevant. The Charging Party further asserts that information relating to the bidding and performance of the contract is relevant because it could help the Union convince the Respondent to limit or reduce subcontracting. Thus, the Respondent was obligated to provide the information.

Applicable Law

An employer has the statutory obligation to provide, on request, relevant information that the union needs for the proper performance of its duties as collective-bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). This includes the decision to file or process grievances. *Beth Abraham Health Services*, 332 NLRB 1234 (2000). Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the Respondent must provide the information. However, where the information requested by the union is not presumptively relevant to the union's performance as bargaining representative, the burden is on the union to demonstrate the relevance. *Richmond Health Care*, 332 NLRB 1304 (2000); *Associated Ready Mixed Concrete, Inc.*, 318 NLRB 318 (1995), enfd. 108 F. 3d 1182 (9th Cir. 1997); *Pfizer, Inc.*, 268 NLRB 916 (1984), enfd. 736

[2] As noted above, this case concerns only Disneyland Park and sec. 23 of the collective-bargaining agreement. Thus, the Respondent's failure to hire a union steward for Disney's California Adventure is not relevant.

F.2d 887 (7th Cir. 1985).[3] A union has satisfied its burden when it demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Knappton Maritime Corp.*, 292 NLRB 236, 238-239 (1988).[4]

Information about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, is not presumptively relevant. Therefore, a union seeking such information must demonstrate its relevance. *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000).

The Board uses a broad, discovery-type standard in determining the relevance of requested information. Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. Id. To demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the nonunit information,[5] or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances. See *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000); *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018–1019 (1979), enfd. in relevant part 615 F.2d 1100 (8th Cir. 1980). Absent such a showing, the employer is not obligated to provide the requested information.

[3] Our dissenting colleague takes issue with our reliance on *Richmond Health Care*, supra and *Associated Ready Mixed Concrete*, Inc., supra, noting that those cases, unlike the instant case, were summary judgment cases involving newly certified unions. However, we cited those cases solely for the principle, which our dissenting colleague recognizes as current law, that a union must demonstrate the relevance of information requests concerning nonunit information, such as information concerning subcontracting.

[4] Our dissenting colleague contends that *Knappton Maritime Corp.* is inapplicable to the instant case because there, the information request concerned the existence of an alter ego relationship. She contends that the Board applies a different standard to information requests concerning subcontracting than it does alter ego relationships. However, her reliance on *Southern California Gas Co.*, 344 NLRB No. 8 (2005), is to no avail. In that case, while the judge did discuss the need for an information request to have a "logical foundation" and "factual basis[,]" he also found that there was "[a]mple objective evidence" to support the union's information request. Id., slip op. at 6. In making this finding, the judge referenced, inter alia, *Shoppers Food Warehouse*, 315 NLRB 258 (1994), a case, like *Knappton*, which concerned an alleged alter ego relationship. In sum, the Board applies a uniform standard for evaluating the relevance of information requests involving matters outside the bargaining unit, although it has sometimes articulated this standard using slightly different language.

[5] The union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information. *Island Creek Coal*, 292 NLRB 480, 490 fn. 19 (1989). See also *Schrock Cabinet Co.*, 339 NLRB 182 fn. 6 (2003).

Discussion

We find that the Respondent was not obligated to provide the Union with the requested information about subcontracting. Insofar as the judge found no merit to the allegations, we agree with her for the reason she cited and those set forth below. However, contrary to the judge's conclusions on those allegations that she upheld, we find that the Union failed to adequately support the relevance of the information. As previously shown, the requested information was not presumptively relevant because it concerned subcontracts. *Richmond Health Care*, supra. Further, the information's relevance was not apparent from the surrounding circumstances. Pursuant to section 23 of the collective-bargaining agreement, the Respondent could subcontract, provided that the subcontracting did not result in a termination, layoff or a failure to recall unit employees from layoff. However, the Union made no such claim. The Union explained only that it "observed that there [have] been a number of subcontracts within Disneyland for work covered by the agreement;" that it believed there had been an increase in subcontracts; and that "at least one iron worker has retired and not been replaced [and] no new steward has been hired at the theme park [thus] [i]t is plain that Disneyland is reducing its workforce and subcontracting additional work." We find these explanations insufficient, under the circumstances, to explain the relevance of the requested subcontract information. There was no claim that any employee had been terminated or laid off, and no claim that any employee, previously laid off, had not been recalled. Further, there was no claim that any such action was caused by subcontracting. Given that the unit appears to be sizeable,[6] the Respondent's failure to hire a replacement for one retiring employee does not, by itself, reasonably suggest that the Respondent was not honoring the collective-bargaining agreement. In order to show the relevance of an information request, a union must do more than cite a provision of the collective-bargaining agreement. It must demonstrate that the contract provision is related to the matter about which information is sought, and that the matter is within the union's responsibilities as the collective-bargaining representative. Here, it has not been shown that the Union had a reasonable belief supported by objective evidence that the information sought was relevant. Therefore, we find that the Union failed to meet its burden. Compare *Schrock Cabinet Co.*, supra (relevance demonstrated).

[6] Although the exact size of the unit is not clear, the fact that the unit is comprised of at least 53 job classifications suggests that this is a large unit.

Pratt & Lambert, 319 NLRB 529, cited by the dissent, actually supports our view. In that case, the union showed that three employees had lost their jobs, and no loss was due to retirement. By contrast, the Union here showed one loss, and that was due to retirement. It was not due to any of the events which would trigger an obligation to furnish information, i.e., termination or layoff or failure to recall.

We recognize that article 23 begins with a general sentence prohibiting the Respondent from subcontracting "for the purpose of evading its obligations under this Agreement." However, even assuming arguendo that this sentence is to be read independently from the remainder of the article, the Union never made the claim that any subcontracting had that evasive purpose. Nor were the surrounding circumstances such that the Respondent should have been aware that this was the Union's concern, and was its basis for requesting the information.

Finally, the judge relied on Union business agent Michael Couch's testimony, at the hearing, in finding that the Union's concern was that the Respondent was possibly evading its agreement obligations, and that the Union thereby demonstrated the relevance of the requested information. Michael Couch testified that he "noticed our guys, our bargaining unit employees in the shop, were sitting in the shop while non-union people were out there doing the work they normally do, which, to me, is a violation of the agreement." That testimony suggests, at most, that work was being subcontracted to nonunionized employers. It does not suggest, or even claim, that subcontracting caused terminations, layoffs, or nonrecalls. Nor does the testimony show that any subcontracting had an evasive purpose. Couch's testimony cannot serve to establish that the Union provided to the Respondent a sufficient factual basis to establish relevance at the time the information request was made.[7] Furthermore, relevance was not shown for the first time at the hearing. As mentioned above, Couch's testimony did not explain how the requested information would be relevant to support an arguable violation of the contract.

We do not suggest that the union, in order to acquire the information must prove a breach of contract. We simply conclude that the union must claim that a specific provision of the contract is being breached and must set forth at least some facts to support that claim. For example, if the Union here had clarified that employees had been laid off, and if it had backed up that claim with facts showing the layoffs, a different result may well have been obtained.[8]

[7] *Allison Co.*, supra at 1367 fn. 23 (2000); *Brazos*, 241 NLRB at 1018–1019 (1979). We do not pass on whether such a belated request, if supported, would trigger an obligation to supply the information.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 13, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

In finding that the Union was not entitled to the subcontracting information it requested, the majority reaches a result that is at odds with well-settled principles. Here, the parties' collective-bargaining agreement includes a provision on subcontracting, and the Union invoked that provision in seeking information, citing facts that prompted its concern that the agreement was being violated. No more was required to trigger the Respondent's duty to disclose the requested information. The majority's approach here would effectively require proof that the Union had a meritorious grievance. But that is not the law.

I.

A liberal, "discovery-type standard" governs information-request cases under Section 8(a)(5) of the Act. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). As the majority acknowledges, this standard applies even in subcontracting cases, where the relevance of the information must be established, not presumed.[1] All that is required is a showing of a "probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." Id. Thus, the "union's burden is not an exceptionally heavy one." *SBC Midwest*, 346 NLRB No. 8,

[8] Because the Union failed to back up its claim, we disagree with our dissenting colleague's statement that "the Union's factual assertions regarding the apparent erosion of the bargaining unit, coupled with its reference to the contract terms concerning subcontracting," satisfied its burden.

[1] Contrary to the Board's current approach, there are good reasons to treat subcontracting information as *presumptively* relevant, particularly where the information is sought in connection with a potential or pending contractual grievance. Subcontracting is a mandatory subject of bargaining under the Act. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 213–214 (1964). And when a collective-bargaining agreement specifically addresses subcontracting, the union's efforts to police the agreement obviously implicate its representational function.

slip op. at 3 (2005) (finding an 8(a)(5) violation involving request for subcontracting information).

The asserted need to police compliance with a contract provision on subcontracting can establish the relevance of subcontracting-related information, apart from any showing that an actual grievance has or would have merit. See, e.g., *Schrock Cabinet Co.*, 339 NLRB at 182 fn. 6 (2003) (union established relevance by advising employer that it requested information "for the purpose of assessing potential grievances pursuant to the parties' existing collective-bargaining agreement").[2] Only where a union has "no basis for even suspecting that the [employer] might be in breach" of a contractual subcontracting provision will the Board reject a claim for subcontracting information. *Detroit Edison Co.*, 314 NLRB 1273, 1275 (1994).[3]

II.

The facts here are straightforward. Over the course of more than 4 months, the Union requested, and the Respondent declined to provide, information relating to the Respondent's subcontracting practices.

With respect to Disneyland Park, article 23 of the agreement provides that the Respondent "will not subcontract work for the purpose of evading its obligations under this Agreement," but permits contracting under specified circumstances. Those circumstances include where subcontracting will not result in the termination, layoff, or failure to recall employees. With respect to Disney's California Adventure, the agreement granted the Respondent the "unrestricted right to subcontract or outsource work," except where the subcontracting is permanent and results in layoffs.

Beginning with a letter dated February 11, 2001, the Union stated that it had observed "a number of subcontracts within Disneyland for work covered by the agreement within Local 433's jurisdiction" and expressed its "concern that such subcontracting may not comply with the terms of the agreement." The Union asked the Respondent to provide a list of all subcontractors that performed work within its jurisdiction since January 1, 1999, the date of the subcontract, the nature of the work, the dates on which it was performed, and the name of the subcontractor. The Union also sought to review the subcontracts and associated files regarding the bidding and performance of those contracts.

Describing the task of gathering more than 3 years of data as "onerous" and "oppressive," the Respondent asked the Union for a more detailed explanation of relevance, as well as whether the Union was claiming that subcontracting had resulted in the loss of work for permanent employees.

The Union modified its request, asking only for the past year's subcontracts and stating it had observed that the number of subcontracts had increased. The Respondent replied that the contract allowed for subcontracting absent a layoff, and repeated its request for a more detailed explanation of relevance. The Union asserted that the Respondent was reducing its work force and pointed to the Respondent's failure to replace retired iron worker Richard Halashak, and to the fact that no steward had been hired for the California Adventure theme park. The Respondent countered that not replacing one employee is not a contract violation and characterized the request for the past year's subcontracting history as unreasonable. The Union answered that it was asking only for subcontracts affecting work within its jurisdiction. The Respondent did not reply.

At the hearing in this case, the Union reiterated the basis for the information requests. Business agent Couch testified that "our guys, our bargaining unit employees in the shop, were sitting in the shop while non-union people were out there doing the work they normally do, which, to me, is a violation of the agreement."

III.

The majority holds that the "Union failed to adequately explain the relevance of the requested information." In the majority's words:

> In order to show the relevance of an information request, a union must do more than cite a provision of the collective-bargaining agreement. It must demonstrate that the contract provision is related to the matter about which the information is sought, and that the matter is within the union's responsibilities as the collective-bargaining representative.

But this test, as the majority articulates it, was met. In seeking information about subcontracting, the Union cited a contract provision that governed subcontracting; the provision obviously was "related to the matter about which the information [was] sought." Policing the con-

[2] Indeed, in *Meeker Cooperative Light & Power Assn.*, 341 NLRB 616, 618 (2004), the Board found an 8(a)(5) violation even where the collective-bargaining agreement had *no* specific provision related to subcontracting. See also *W-L Molding Co.*, 272 NLRB 1239, 1240–1241 (1984) (finding violation despite contractual provision reciting that "nothing in this Agreement shall be construed or interpreted to restrict the right of the Company to subcontract production," based on asserted attempt by employer to evade striker-recall agreement).

[3] As one leading treatise observes, "a union is entitled to information regarding the subcontracting of work even though the employer insists it is complying with the contract requirements." 1 American Bar Association, Section of Labor & Employment Law, *The Developing Labor Law* 936 (5th ed. John E. Higgins Jr., ed. 2006) (footnote collecting cases omitted).

tract, in turn, obviously was part of the Union's representative responsibilities.[4] This is not a case, then, like *Island Creek Coal*, supra fn. 4, where the union merely offers a "generalized, conclusionary explanation," such as the need "to intelligently and effectively represent the bargaining unit employees," with no mention of a possible contract violation at all. 292 NLRB at 490 fn. 19.

The real crux of the majority's position is its view that the Union failed to point to facts that "reasonably suggest that the Respondent was not honoring the collective-bargaining agreement" and that the Union did not demonstrate "a reasonable belief supported by objective evidence that the information sought was relevant." The majority interprets the agreement to prohibit subcontracting only where it results in a layoff or a failure to recall employees from layoff, and observes that the Union cited no actual layoff or failure to recall. As for the agreement's prohibition against subcontracting by the Respondent "for the purpose of evading its obligations under this Agreement," the majority asserts that the Union neither claimed that subcontracting had that purpose, "nor were the surrounding circumstances such that the Respondent should have been aware that this was the Union's concern."

In apparently demanding reliable, objective evidence that an actual violation of the contract has occurred *before* information must be provided, the majority sets the bar for the Union higher than our precedent supports.[5] See, e.g., *W-L Molding Co.*, supra, 272 NLRB at 1240 (actual instances of contract violations not required, nor must information that triggered information request be "accurate, nonhearsay, or even ultimately reliable"). See also *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186–1188 (1997), enfd. 157 F.3d 222 (3d Cir. 1998).

Here, the Union pointed not only to a relevant contractual provision, but also to facts prompting its concern that the contract might have been violated: an apparent increase in the volume of subcontracts and a possible decrease of two bargaining-unit positions (the Respondent's failure to replace a retired employee and its failure to hire a steward), coupled with the union business agent's observation that unit employees seemed to be idle while subcontractors were busy with bargaining-unit work.[6] Given the contract's broad prohibition against subcontracting "for the purpose of evading . . . obligations" under the agreement, this factual basis was sufficient to support the Union's information request, even without an actual layoff.[7] In the circumstances of this case, the Union's factual assertions regarding the apparent erosion of the bargaining unit, coupled with its reference to the contract terms concerning subcontracting, fully satisfied the discovery-type standard that governs here.

The Board's precedent is instructive on this point. In *Pratt & Lambert, Inc.*, 319 NLRB 529 (1995), the union sought subcontracting information to police compliance with a contract provision that permitted subcontracting of maintenance work, provided it did not "result in the displacement" or "lead[] to layoff" of any maintenance employees. The Board rejected the employer's contention that the information sought was irrelevant because there had been no displacement or layoff of employees, citing the union's demonstration that the maintenance department "had lost approximately three employees over the course of a year and that those employees have not been replaced." 319 NLRB at 529 fn. 1. The Board observed that the evidence did not establish that the lost employees had retired, and that the interpretation of the contract provision was "not an issue that is properly before the Board. Id. The Union's showing here is comparable. While it may not suffice to demonstrate a violation of the parties' agreement, it is enough to trigger the Respondent's duty to disclose the requested information.

Tellingly, the majority relies on no case law that genuinely supports its position. In passing, the majority cites

[4] "Without question, information concerning subcontracting of unit work is relevant to a union's performance of its representational functions." *Island Creek Coal Co.*, 292 NLRB 480, 490 fn. 18 (1989), enfd. 899 F.2d 12222 (6th Cir. 1990). See, e.g., *AK Steel Corp.*, 324 NLRB 173, 184 (1997); *Ohio Power Co.*, 216 NLRB 987, 992 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).

[5] To begin, the majority errs in apparently relying on *Knappton Maritime Corp.*, 292 NLRB 236 (1988), to assert that a union must demonstrate a "reasonable belief supported by objective evidence for requesting . . . information" that is not presumptively relevant. *Knappton* involved not subcontracting information, sought in connection with the possible violation of a contractual provision, but rather information related to the existence of an alter ego operation. The majority cites no Board decision to support its suggestion that this standard applies in cases involving information requests concerning subcontracting, where a union in good faith invokes a contractual provision on that subject. Compare *Southern California Gas Co.*, 344 NLRB No. 8, slip op. at 5–6 (2005) where the Board adopted a judge's decision invoking a differently articulated standard (holding that information request concerning subcontractors, based on safety concerns, must be supported by "logical foundation" and "factual basis").

[6] The majority "assum[es] arguendo that relevance can be explained for the first time at the hearing." Board precedent, however, has long established this point. See, e.g., *Brazos Electric Power Cooperative*, 241 NLRB 1016, 1019 (1979), enfd. in relevant part 615 F.2d 1100 (5th Cir. 1980). See also *Contract Flooring Systems*, 344 NLRB No. 117, slip op. at 1 (2005).

[7] That provision sharply distinguishes this case from *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266 (1995), where the contract prohibited *only* subcontracting that resulted in "loss of continuity of employment or opportunities for permanent promotions" for unit employees and the number of unit positions during the relevant period had substantially *increased*.

clearly inapposite summary judgment decisions.[8] The majority also cites *Schrock Cabinet Company*, supra, but there the Board *found* a violation of Section 8(a)(5), relying on the union's assertion that it sought subcontracting information to consider potential grievances pursuant to the collective-bargaining agreement. 339 NLRB at 182 fn. 6. The Board reiterated that the "potential merits of any particular grievances" are immaterial. Id.

IV.

A union surely is not required to wait for the substantial erosion of bargaining unit work before it may properly seek information necessary to police compliance with a collective-bargaining agreement's subcontracting provision. Vigilant monitoring—what the Union sought to practice here—is consistent with the duty of fair representation.

Contrary to the majority, I would order the Respondent to provide the Union with the subcontracting information that it requested: a list of subcontractors performing work, the date of each subcontract, when the work was performed, and the name of the subcontractor. The judge correctly ordered production of this information. I would go further, however, in ordering the Respondent to permit the Union to review the subcontracts themselves and the Respondent's files regarding the bidding of subcontracts and their performance. That remedy is necessary to enable the Union to grasp the scope, scale, and nature of the

Respondent's subcontracting practices, and their congruity with the collective-bargaining agreement.[9]

Dated, Washington, D.C. September 13, 2007

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[8] The majority's reliance on *Richmond Health Care*, 332 NLRB 1304 (2000), in which the Board granted in part and denied in part the General Counsel's motion for summary judgment, is misplaced. In that case, the Board found that before bargaining for an initial contract, an employer unlawfully failed to provide a newly-certified union with a variety of information regarding the unit employees, but remanded for hearing the issue of whether information concerning subcontracting was unlawfully withheld. Most significantly, there was no contract in existence between the parties. *Associated Ready Mixed Concrete*, 318 NLRB 318 (1995), enfd. 108 F.3d 1182 (9th Cir. 1997), also cited by the majority, involved the same situation. In this case by contrast, the Respondent and the Union were parties to a collective-bargaining agreement and the Union's information request related directly to the Respondent's compliance with a subcontracting provision.

[9] See, e.g., *SBC Midwest*, supra, 346 NLRB No. 8, slip op. at 4.

Alan L. Wu, Atty., for the General Counsel.

Jeffrey K. Brown, Atty., of Los Angeles, California, for the Respondent.

Tom B. Fox, Director Labor Relations Disneyland Resort, of Anaheim, California, for the Respondent.

David A. Rosenfeld, Atty., of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This case was tried in Los Angeles, California, on March 31, 2003. Pursuant to charges filed by International Association of Bridge, Structural and Ornamental Iron Workers, Local 433, AFL–CIO (the Union), the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (the complaint) on October 9, 2002.[1] The complaint alleges that Disneyland Park and Disney's California Adventure, Divisions of Walt Disney World Co. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to furnish the Union with information necessary for, and relevant to, the Union's collective-bargaining representation obligations.

On the entire record and after considering the briefs filed by the General Counsel and Respondent and the oral argument of the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, with its primary offices and amusement park located in Anaheim, California, is engaged in the business of operating retail hotel and entertainment facilities. During the representative 12-month period preceding the complaint, Respondent derived gross revenues in excess of $500,000 and purchased and received at its amusement park goods valued in excess of $50,000 directly from points outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Collective-Bargaining Relationship

Respondent and the Union have been parties to successive collective-bargaining agreement, the latest of which is effective by its terms from March 1, 1998, to February 28, 2005 (the agreement). The agreement covers at least 53 separate work classifications associated, primarily, with facility maintenance, repair, and rehabilitation work.[3] The agreement was initially negotiated to run until February 28, 2003. In 2000, the parties agreed that the terms of the agreement would cover, as modi-

[1] All dates are in 2002 unless otherwise indicated.

[2] Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

[3] The classifications are listed in schedule A, subsection V of the agreement.

fied, a newly constructed and conjoining amusement park, Disney's California Adventure. The agreement was extended by 2 years; the modifications are reflected in the addendum to the agreement and apply only to Disney's California Adventure. The provisions relating to subcontracting are as follows:

> *SECTION 23*
> *SUBCONTRACTING*
>
> During the terms of the Agreement, the Employer agrees that it will not subcontract work for the purpose of evading its obligations under this Agreement. However, it is understood and agreed that the Employer shall have the right to subcontract when: (a) where such work is required to be sublet to maintain a legitimate manufacturers' warranty; or (b) where the subcontracting of work will not result in the termination or layoff, or the failure to recall from layoff, any permanent employee qualified and classified to do the work; or (c) where the employees of the Employer lack the skills or qualifications or the Employer does not possess the requisite equipment for carrying out the work; or (d) where because of size, complexity or time of completion it is impractical or uneconomical to do the work with Employer equipment and personnel.[4]
>
> Modifications applicable to Disney's California Adventure read:
>
> Section 23. Subcontracting
>
> The 1998 Maintenance Agreement at Disneyland is hereby modified to reflect that the prohibitions pertaining to subcontracting set forth in Section 23 shall have no force or effect and shall be replaced as follows:
>
> A. With respect to any operation as set forth in Section 2 (Recognitions), B.1 and/or B.2., of this Agreement, the Employer shall have the unrestricted right to subcontract or outsource this work or operation even if at some date subsequent to the effective date of this Agreement the Employer chooses to operate any of said facilities or operations under the terms of this Agreement.
>
> B. 1.a. With respect to any operation initially operated by the Employer under the terms of this Agreement, the Employer shall have the unrestricted right to subcontract or outsource this work/operation, but will discuss with the union the impact of such a decision prior to engaging in such subcontracting or outsourcing of work. Within thirty (30) days of the final selection of a vendor, the Company will provide the union with a description of the work to be performed by the vendor and the reasons that the Company is planning on subcontracting or outsourcing work. The union may then propose alternative or additional vendors for consideration by the Company prior to the final vendor selection being made. However, the final selection of the vendor shall be at the discretion of the Company.
>
> b. Where the decision of the Company to outsource and/or subcontract work on a permanent basis, as outlined in paragraph B. 1 above, results in the layoff of Regular employees, the Company agrees to subcontract or outsource exclusively to "union contractors . . .
>
> . . . .
>
> 2. The process described . . . above shall apply only to work that is being permanently subcontracted or outsourced and not to any work that is being subcontracted or outsourced on a temporary or seasonal basis, as well as for special events or one time events. . . For this type of work or operation, the Company shall have the unrestricted right to subcontract or outsource to the vendor of its choice.[5]

[4] This subcontracting provision applies only to the amusement park Disneyland.

B. The Union's Request for Information

In late 2001, at a meeting between Respondent and the Craft Maintenance Council, Mr. Couch expressed the Union's concern with Respondent's subcontracting of bargaining-unit work. In early 2002, while present at the amusement park, Mr. Couch saw employees of two companies, Welding Unlimited and Parrot Construction, performing work he believed to be within the bargaining-unit parameters. Mr. Couch could not find the companies' names on a list of employers signatory to collective-bargaining agreements with the Union. He believed the two companies to be "nonunion" based on that and on union steward reports.[6] At that time, and at all relevant times, no employee covered by the agreement's unit description was on layoff.[7]

By letter dated February 11, the Union's attorney, David A. Rosenfeld (Mr. Rosenfeld), wrote to Respondent in pertinent part as follows:

> . . . The Union has observed that there [have] been a number of subcontracts within Disneyland for work covered by the agreement within Local 433's jurisdiction. The Union is concerned that such subcontracting may not comply with the terms of the agreement.
>
> Please provide a list of all subcontractors which have performed work within Local 433's jurisdiction for the period of January 1, 1999 to present. For each such subcontract, provide the date of the subcontract, the nature of the work, the dates upon which it was performed and the name of the subcontractor.

These provisions are modifications of the agreement made in 2000 and apply only to Disney's California Adventure.

[6] Union steward, Thomas G. Martin, confirmed he had told Mr. Couch that employees of Welding Unlimited and a Parrot Construction subcontractor had performed work that fell within the agreement unit description and that the employees had said they were not members of the Union.

[7] As necessary, Respondent hires temporary employees to supplement the work force as in a recent renovation of the Matterhorn ride. At the conclusion of the work, Respondent issues such employees a notice that states "end of assignment." The agreement provides, at Section 21 C. 4, that such temporary employees "shall not be utilized longer than 180 consecutive calendar days as a Casual-Temporary employee" without being converted to regular employee status. No party contends that such temporary employees are "laid off" when their work assignments end.

> Please allow us an opportunity to review the subcontracts and any files which Disneyland maintains regarding the bidding of that contract and the performance of the contract.

By letter dated March 11, Jennifer L. Larson (Ms. Larson) labor/cast relations manager for Respondent answered, in pertinent part, as follows:

> As you know, Section 23 of the Collective Bargaining Agreement specifically allows for subcontracting of any work under the circumstances listed. In fact, one of the terms of that section provides that subcontracting is allowed when "it will not result in the termination or layoff, or the failure to recall from layoff, any permanent employee qualified and classified to do the work." Is the Union claiming that this condition exists? Attempting to gather information regarding subcontracts over a three plus year period would be quite onerous, oppressive and, in light of the explicit language of the contract, apparently unnecessary. In any event, we would be happy to give your request further consideration if you could explain with some level of detail the relevance of this request. Additionally, if you could explain why you want us to go back for more than three years, especially since any conceivable grievance must be filed within 15 days of the occurrence or it is waived, it would be greatly appreciated.

The following exchange of letters, in pertinent part, then followed:

Letter dated March 22, Mr. Rosenfeld to Ms. Larson:

> This will acknowledge receipt of your letter of March 11. Why [don't] you begin by giving this information for the last year. The reason for this is that the Union believes that there has been an increase in subcontracts.

Letter dated April 3, Ms. Larson to Mr. Rosenfeld:

> As I explained in my previous letter, Section 23 of the Collective Bargaining Agreement specifically allows for subcontracting of any work under the circumstances listed. As there have been no layoffs of employees represented by the Iron Workers Local 433, we do not believe that this is an issue at this time. As I also explained in my previous letter, we would be happy to give your request further consideration if you could explain with some level of detail the relevance of this request, especially since any conceivable grievance must be filed within 15 days of the occurrence or it is waived.

Letter dated April 9, Mr. Rosenfeld to Ms. Larson:

> At least one iron worker has retired and has not been replaced. That ironworker is Richard Halashack. Additionally, no new steward has been hired at the new theme park. It is plain that Disneyland is reducing its work force and subcontracting additional work. It is for these reasons that the information is requested.

Letter dated May 10, Mr. Rosenfeld to Ms. Larson:

> Enclosed is my letter of April 9, to which I have not had a response. Please respond.

Letter dated April 10, Ms. Larson to Mr. Rosenfeld:

> Despite requesting some level of detail in your request, which is broad, burdensome to gather, and apparently unnecessary, you have failed to provide any reason which would lead to a viable claim under our Collective Bargaining Agreement. The Company has the explicit right to determine the number of employees and how they are utilized to run the business. You mention only one employee, who retired, and was not replaced. Such a determination is clearly within our rights under Section 6 of our Collective Bargaining Agreement, Management's Rights and is not a violation of Section 23, Subcontracting.
>
> The Company sees no reasonable claim that would necessitate providing a list of all subcontractors, the date of the subcontract, the nature of the work, the dates upon which it was performed and the name of the subcontractor, as requested.

Letter dated June 17, Mr. Rosenfeld to Ms. Larson:

> Your letter of May 10 takes the position that Disneyland will not provide any of the subcontracts. I want to make it plain that we are seeking only subcontracts that involve work arguably or possibly performed by Iron Workers.

At the hearing, Michael Couch (Mr. Couch), union business agent, testified that he noticed that "our guys, our bargaining unit employees in the shop, were sitting in the shop while nonunion people were out there doing the work they normally do, which, to me, is a violation of the agreement."

C. Positions of the Parties

The General Counsel contends the Union needs the requested subcontracting information to perform its contract administration duties. The request, which relates to bargaining unit employees, meets the Board's broad discovery-type relevance standard. Since the information sought concerns subcontractors who employ nonbargaining unit employees, Board law requires a special showing of relevance, which burden the General Counsel argues the Union has satisfied by showing a reasonable belief supported by objective evidence that a violation of the agreement may have occurred and that the requested information would be useful in determining whether grounds exist for filing a grievance or unfair labor practice charges.

The Union argues that Respondent has not shown the request for information is burdensome[8] that the Union has never waived its right to such information, and that the information is relevant to the following appropriate concerns: (1) as a basis to approach Respondent with reasons why they should not subcontract, (2) to determine whether the subcontracts comply with the subcontracting provisions of the agreement, (3) to determine whether the contract has been complied with, and (4) to explore potential grievances in such contractual areas as the parties' intent to promote harmony between employer and employees, the restriction of subcontracting for the purpose of evading the agreement, and the application of the new construc-

[8] Although Respondent's reply letters to the Union speak of the burdensome nature of the request, the evidence did not establish onerousness, and Respondent does not defend its refusal to give the information on that basis.

tion provisions of Section 31.[9] The Union also argues that it is entitled to the information as it has never "waived [its] rights to bargain over subcontracting, either the decision or the effects, during the life of the agreement."

Respondent's position is that where, as here, requested information is not presumptively relevant, a requesting union must make a "precise" showing of relevance. According to Respondent, the only acceptable showing of relevance must relate to the subcontracting's direct effect on unit employment. Relying on *The Detroit Edison Co.*, 314 NLRB 1273 (1994), Respondent argues that unless the Union can show or colorably claim that Respondent's subcontracting resulted in the contractually prohibited "termination or layoff, or failure to recall from layoff" of a bargaining-unit member, it has not established the necessary threshold relevance to justify its request for information.

D. Discussion

Under Section 8(a)(5) and 8(d) of the Act, an employer must furnish a union with requested relevant information to enable it to represent employees effectively in administering and policing an existing collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 4232, 435–436 (1967), *A-Plus Roofing, Inc.*, 295 NLRB 967, 970 (1989) enfd. *NLRB v. A-Plus Roofing, Inc.*, 39 F. 3d 1410 (9th Cir. 1994). Information that relates directly to the terms and conditions of employment of the employees represented by a union is presumptively relevant as is information necessary for processing grievances under a collective-bargaining agreement, including that necessary to decide whether to proceed with a grievance or arbitration.

As the General Counsel concedes, information about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, does not constitute presumptively relevant information. *Excel Rehabilitations & Health Center*, 336 NLRB No. 10, fn. 1 (2001) (not reported in Board volumes); *Richmond Health Care*, 332 NLRB 1304 (2000); *Detroit Auto Auction, Inc.*, 324 NLRB No. 143 (1997);(not reported in Board volumes); *Associated Ready Mixed Concrete, Inc.*, 318 NLRB 318 (1995). Therefore, "a union seeking such information must demonstrate its relevance." *Excel Rehabilitations and Health Center*, supra at fn. 1, and cases cited therein. This requirement is not unduly restrictive. A union need only meet a liberal "discovery-type standard," that is, a "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industries Co.*, supra at 437; *Pittston Coal Group, Inc.*, 334 NLRB 690, at slip op. 3 (2001) and cases cited therein. If the standard is met, the information must be produced. *Super Valu Stores*, 279 NLRB 22 (1986). In determining relevance, the Board recognizes that "a union's representation responsibilities. . . encompass, among other things, administration of the current contract and continual monitoring of any threatened incursions on the work being performed by bargaining unit members." *Detroit Edison Co.*, supra at 1275. A union must explicate the relevance of requested information with some precision,[10] and a generalized conclusionary explanation of relevance is "insufficient to trigger an obligation to supply information that is on its face not presumptively relevant." *Island Creek Coal Co.*, 292 NLRB 480, 490 fn. 19 (1989), enfd. 899 F.2d 1222 (6th Cir. 1990), citations omitted. However, a union need not demonstrate accuracy or reliability of facts relied on to support its request and must only show that it has a reasonable basis to suspect a breach of the collective-bargaining agreement. See *Crowley Marine Services, Inc.*, 329 NLRB 1054, 1060 (1999).

Respondent points out that the agreement's subcontracting provisions give Respondent a nearly unfettered right to subcontract work that could be performed by unit employees except where the subcontracting would result in the termination or layoff, or the failure to recall from layoff, any qualified unit employee.[11] Respondent is correct that the agreement clearly establishes the conditions under which it may subcontract. Despite the Union's argument that it has not waived its right to bargain over subcontracting during the life of the agreement, there is no midterm reopener provision in the agreement; therefore, the agreement forecloses renegotiation of subcontracting issues during its term. Further, there is no evidence that any of the subcontracting conditions were unmet. However, those facts do not dispose of the issue herein. Information requested to enable a union to assess whether an employer's subcontracting has violated a collective-bargaining agreement and to assist a union in deciding whether to pursue a grievance is relevant to a union's representative responsibilities. *AK Steel Corp.*, 324 NLRB 173, 184 (1997); *Island Creek Coal Co.*, supra. Here, the Union specified the relevance of the requested information in its April 9 letter to Respondent by expressing its concern that Respondent's subcontracting might be an impermissible attempt to reduce the unit work force.

In Section 23 of the agreement, Respondent "agrees it will not subcontract work for the purpose of evading its obligations under this Agreement." While the Union did not note that specific provision in its demands for information, the Union stated in its original, February 11, request that it was "concerned that [Respondent's] subcontracting may not comply with the terms of the agreement." The Union thereafter noted in its April 9 letter that one unit member had retired and had not been replaced and that no new steward had been hired at Disney's California Adventure. Essentially, the Union charged Respondent with reducing the unit work force through attrition or refusal to hire and supplanting unit employees with subcontract workers. The Union could reasonably view such conduct as an attempt by Respondent to erode unit work and, thereby, to evade its obligations under the agreement.[12] Whether the Un-

[9] Section 31 provides for new construction pay to unit employees involved in the "building or erecting of totally new rides or new buildings. . . "

[10] *Westinghouse Electric Corp.*, 239 NLRB 106, 107 (1978).

[11] As to Disney's California Adventure, Respondent may subcontract even if doing so results in the layoff of unit employees. Certain notification and permanent subcontracting provisions, as set forth in the agreement addendum, are not at issue herein.

[12] Although not communicated to Respondent, Mr. Couch believed that Respondent inexplicably under-utilized unit employees while subcontractors performed customary unit work and that the subcontractors were "nonunion." The Union apparently relied on Mr. Couch's per-

ion's view is accurate or persuasive is unimportant. *Crowley Marine Services, Inc.*, supra, 1062. Respondent's failure to replace a retired unit employee, to hire a new steward, or to utilize unit employees, while not proving or even red flagging any contract infraction, are factors that elevate the Union's concern above frivolous suspicion or a mere fishing expedition.[13] Therefore, the Union is entitled to explore more fully the question of whether Respondent seeks to evade its agreement obligations. Respondent's argument that the information request can only be relevant if unit employee layoff or recall denial exists ignores the Union's legitimate concern that Respondent may be attempting to evade the agreement by reducing the work force.

In light of the Board's liberal discovery-type standard for evaluating information relevancy, the Union has asserted an arguably valid reason for seeking, in the first part of its information request, the following information: a list of all subcontractors performing work within the Union's jurisdiction for the period of January 1, 1999, to present, the date of each subcontract, the nature of the work, when the work was performed, and the name of the subcontractor. *Detroit Edison,* supra, relied on by Respondent does not dictate a different result. The union in that case sought subcontracting cost data, which had no apparent connection to contractual provisions, and the union conceded that the data would not support any claim of a contract breach. While the reasoning of *Detroit Edison* applies to the second half of the Union's request, as set forth below, it does not apply to the first half. Information regarding subcontractors performing work within the Union's jurisdiction, along with subcontract dates, the nature of the work, when the work was performed, and the name of the subcontractor may reasonably be reviewed and analyzed to determine whether evidence exists of an attempt to evade contract obligations through erosion of unit work.[14] The Union need not show that the requested information will be dispositive of the unit work-erosion question but only that it is relevant. I conclude that the Union has demonstrated the requisite relevance and is entitled to the above information

The latter part of the Union's information request, i.e., the request to review Respondent's subcontracts and files regarding the bidding and the performance of the subcontract, requires further analysis. This latter information does not appear to be of "probable or potential relevance"[15] to the question of whether Respondent was evading its agreement obligations or to any of the other possible contract violations suggested by the Union. In its correspondence with Respondent, the Union explained, variously, that it needed the information because the subcontracting might not comply with the terms of the agreement, that the Union believed there had been an increase in subcontracts, and, as discussed above, that the Union suspected Respondent was reducing its work force. In his oral argument, Respondent's counsel specified potential contract violations the Union wished to consider such as the provision relating to the parties' intent to promote harmony between employer and employees and the application of the new-construction provisions of Section 31 of the agreement. Neither the Union's counsel nor counsel for the General Counsel explained how obtaining information concerning subcontract bidding and performance would assist the Union in determining if any agreement violation had occurred or in formulating a grievance. The Union's generalized and conclusionary explanations of its bases do not trigger an obligation to provide this information. *Island Creek Coal Co.*, supra.[16] In the circumstances, I conclude the Union has not demonstrated any logical foundation or factual basis for requesting information regarding subcontract bidding or performance.

Accordingly, I find the General Counsel met his burden of proving that Respondent violated Sections 8(a)(5) and (1) of the Act by failing to furnish the following information to the Union: a list of all subcontractors performing work within the Union's jurisdiction for the period of January 1, 1999, to present, the date of each subcontract, the nature of the work, when the work was performed, and the name of the subcontractor. I further find that the General Counsel failed to meet his burden of proving that Respondent violated Sections 8(a)(5) and (1) of the Act by failing to furnish the following information to the Union: review of subcontracts and any files which Respondent maintains regarding the bidding of said subcontracts and their performance. Therefore, I recommend the complaint be dismissed as to this latter request for information.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Employees employed in the classifications listed in Schedule A, subsection V of the agreement between Respondent and the Union constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been, and is now, the exclusive collective-bargaining representative of Respondent's employees in the above unit within the meaning of Section 9(b) of the Act.

5. By refusing to provide the following information to the Union on and after February 11, 2002, Respondent has engaged

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ceptions in formulating the information request, and his perceptions support the Union's position that it was concerned about Respondent's possible evasion of agreement obligations.

[13] Thus, cases such as *Detroit Edison Co.*, supra (reasons not logically or rationally related to the information requested), or *Uniontown County Market,* 326 NLRB 1069 (1998) (failure to meet burden of showing a reasonable objective basis for request), do not apply.

[14] The instant situation is different from that in *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266, 1268 (1995), where the Board rejected a union's argument it had a reasonable belief in and concern about "potential erosion of unit work," noting such a belief was unsupported by the evidence, which showed bargaining unit positions had substantially increased. Here, no evidence has been produced to refute the Union's asserted belief.

[15] *Detroit Edison Co.*, supra at 1274.

[16] The Union's argument that it has never waived its right to seek subcontracting information begs the question. Irrespective of waiver, the Union must demonstrate relevance.

in unfair labor practice conduct within the meaning of Section 8(a)(5) and (1) of the Act: a list of all subcontractors performing work within the Union's jurisdiction for the period of January 1, 1999, to present, the date of each subcontract, the nature of the work, when the work was performed, and the name of the subcontractor.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent has not otherwise violated 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[17]

ORDER

The Respondent, Disneyland Park and Disney's California Adventure, Divisions of Walt Disney World Co., Anaheim, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by refusing to furnish the Union with the following information: a list of all subcontractors performing work within the Union's jurisdiction for the period of January 1, 1999, to present, the date of each subcontract, the nature of the work, when the work was performed, and the name of the subcontractor.

(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) On request, bargain collectively with the Union by furnishing it with the following information: a list of all subcontractors performing work within the Union's jurisdiction for the period of January 1, 1999, to present, the date of each subcontract, the nature of the work, when the work was performed, and the name of the subcontractor.

(b) Within 14 days after service by the Region, post at its facility in Anaheim, California, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 21 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 February 11, 2002.

(c) 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, San Francisco, California, May 15, 2003

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 do anything that interferes with these rights. More particularly,

WE WILL NOT refuse to bargain collectively with the International Association of Bridge, Structural and Ornamental Iron Workers, Local 433, AFL–CIO (the Union) by refusing to furnish the Union with information necessary and relevant to the Union's performance of its responsibilities in representing employees.

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.

WE WILL, on request, bargain collectively with the Union by furnishing the Union with the first part of the information requested in its letter of February 11, 2002.

DISNEYLAND PARK AND DISNEY'S CALIFORNIA ADVENTURE, DIVISION OF WALT DISNEY WORLD CO.

[17] 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.

[18] 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."

Woodland Clinic, a Medical Practice Foundation *and* Engineers and Scientists of California, MEBA, AFL–CIO. Cases 20–CA–25680–3, 20–CA–26011, 20–CA–26987–1, and 20–CA–26987–2

July 12, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

Upon charges filed[1] by Engineers and Scientists of California, MEBA, AFL–CIO (the Union), the General Counsel of the National Labor Relations Board issued an amended consolidated complaint (complaint) on March 26, 1997, against Woodland Clinic, a Medical Practice Foundation (the Respondent) alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charges and complaint were served on the Respondent. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On July 10, 1997, the Union, the Respondent, and the General Counsel filed with the Board a Joint Motion to Transfer Proceedings to the Board and Stipulation of Facts. They agreed that the stipulation, with attached exhibits, constitutes the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties waived a hearing, the making of findings of fact and conclusions of law, and the issuance of a decision by an administrative law judge. On October 7, 1997, the Executive Secretary, by direction of the Board, issued an order approving the stipulation, and transferring the proceeding to the Board. The Respondent and the General Counsel thereafter filed briefs.

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

On the entire record in the case, the Board makes the following findings of fact and conclusions of law and issues the following remedy and Order.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Woodland, California is engaged in the operation of a medical clinic providing outpatient medical care. The Respondent, in the course and conduct of its business operations during the calendar year 1995, derived gross revenues in excess of $250,000, and purchased and received at its Woodland, California facility products, goods, and materials valued in excess of $5000, which originated from points located outside the State of California. The parties have stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act. The parties have further stipulated, and we find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issues presented are whether the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) failing to timely comply with the Union's request for the home telephone numbers of unit employees; (2) failing to bargain with the Union regarding the effects of the transfer of the bargaining unit work performed by the materials management department to a nonunion facility; (3) insisting to impasse on a dues-checkoff proposal that allegedly discriminated against bargaining unit members by charging a 4-percent service fee;[2] (4) insisting to impasse on a pay-for-performance wage system that allegedly provided for direct dealing between the Respondent and unit employees;[3] (5) in the absence of a lawful impasse, implementing the pay-for-performance wage system and discontinuing paying employees according to the wage step provisions of the expired collective-bargaining agreements; and (6) in the absence of a lawful impasse, discontinuing subsidies for Jazzercise classes attended by unit employees, discontinuing free coffee service for unit employees, reducing the cafeteria discount available to unit employees, and changing its health insurance carrier, thereby causing changes in the health insurance benefits to unit employees. For the reasons set forth below, we find that the Respondent violated the Act as alleged in numbers (1) and (2) listed above. We further find, as set forth below, that the remaining allegations must be dismissed.

A. Factual Background

Since about 1980, the Union has been recognized by the Respondent as the exclusive representative of the following two appropriate bargaining units of the Respondent's employees:

> All employees in the Respondent's Laboratory and X-Ray Departments in Woodland and Davis, California, and the Laboratory and X-Ray Departments at Woodland Memorial Hospital, which are operated by the Clinic; excluding Transcribers and the Receptionist in the X-Ray Department, the Histotechnicians and Cytotechnologists in the Laboratory, confidential employees, guards and supervisors as defined in the Act. [Unit I.]

[1] The charge and amended charge in Case 20–CA–25680–3 were filed, respectively, on October 18, 1993, and January 11, 1994. The charge and amended charge in Case 20–CA–26011 were filed, respectively, on April 4 and May 27, 1994. The charges in Case 20–CA–26987–1 and in Case 20–CA–26987–2 were filed on October 25, 1995.

[2] The complaint alleges that this proposed contract clause is prohibited by Sec. 8(a)(3) and (1) of the Act.

[3] The complaint alleges that this is a permissive subject of bargaining.

All registered nurses, medical assistants, receptionists, licensed vocational nurses, librarians and clerical employees in the Respondent's Clinic in Woodland and Davis, California, excluding X-Ray employees, optometrists, physicians, audiologists, guards and supervisors as defined in the Act [Unit II.]

This recognition has been embodied in successive collective-bargaining agreements for each unit. The most recent agreements for each unit were effective from August 9, 1991, to August 8, 1993. At all times since at least 1980, the Union, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the employees in each unit.

From about June 3 to October 18, 1993,[4] the Respondent and the Union engaged in negotiations for collective-bargaining agreements to succeed the agreements for both bargaining units set to expire on August 8. Between June 3 and October 18, the parties met and bargained on 14 dates, 9 of which occurred prior to the expiration of the agreements, and exchanged numerous written proposals. About October 8, the Respondent presented to the Union its last, best, and final contract offer (final offer) for units I and II, which included its proposals discussed, infra, regarding dues-checkoff and the pay-for-performance wage system. At the close of the October 8 bargaining session, the parties had in fact met and bargained concerning their contract proposals, had not reached agreement on the terms of successor collective-bargaining agreements for units I and II, and had concluded the prospect of reaching an agreement on that date. The Respondent, adhering to its final offer for each unit, declared impasse at the close of the October 8 bargaining session. By letter dated October 18, the Respondent's counsel notified the Union of its intent to implement, and in fact implemented, certain provisions of its final offers, as further discussed below. The General Counsel and the Union contend that the October 8 impasse was not a valid impasse, because it was tainted by the Respondent's allegedly unlawful bargaining conduct concerning its dues-checkoff and pay-for-performance proposals.

Subsequently, the parties engaged in additional bargaining on the following topics more fully discussed below: (1) discontinuation of subsidies for Jazzercise classes attended by unit employees; (2) reduction in the cafeteria discount available to unit employees; (3) discontinuation of free coffee service for unit employees; and (4) change of the Respondent's health insurance carrier and resulting modification of certain health benefits available to unit employees. All the complaint allegations arise from the course of the parties' negotiations for successor collective-bargaining agreements for units I and II, and the parties' subsequent bargaining on the latter four topics. We shall address each complaint allegation in turn.

[4] All dates hereafter are in 1993 unless otherwise noted.

B. Discussion

1. The Union requests information

Approximately midway through the course of the parties' negotiations, the Union requested by letter dated August 16 that the Respondent provide it with the home telephone number of every employee in units I and II. The Union explained in its letter that it desired this information in order to "fulfill its obligation to communicate" with unit employees. The Respondent did not respond to the Union's August 16 letter until September 7. By letter of that date, the Respondent informed the Union that "[w]e are reviewing your request and will provide you with information in the near future." The Respondent on that same date distributed a memorandum to all unit employees notifying them of the Union's information request, and stating in part that "the law requires us to comply with the Union's request . . . . We will be sending this information to [the Union] on September 24, 1993."

The Respondent failed to do so, however. Rather, at the parties' bargaining session held on September 30, the parties discussed the Union's information request, including the Respondent's asserted concerns about matters raised by several employees. The Union inquired as to the nature of the concerns. The Respondent declined to specify these concerns. The Respondent instead proposed that it would distribute the Union's literature directly to employees. The Union rejected this proposal. The Respondent then agreed to provide the Union with the requested information. The Respondent did not, however, furnish the requested information to the Union until about October 7. At the parties' bargaining session held the very next day, October 8, the Respondent presented its final contract offers for units I and II, and declared impasse.

The complaint alleges, and we find, that the Respondent violated Section 8(a)(5) and (1) by failing to timely comply with the Union's information request. It is axiomatic that an employer has an obligation to furnish to a union, on request, information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); and *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). An employer must respond to the information request in a timely manner. *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992). An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989).

The parties in this proceeding have stipulated that the information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of units I and II. An employer has a duty to timely furnish such information absent presentation of a valid defense. See, e.g., *Mary Thompson Hospital*, 296 NLRB 1245 fn. 1

(1989), enfd. 943 F.2d 741 (7th Cir. 1991); and *NLRB v. Illinois-American Water Co.*, 933 F.2d 1368, 1377–1378 (7th Cir. 1991), enfg. 296 NLRB 715 (1989). The Respondent appears to argue that it delayed in providing the information to protect the privacy interests of its employees. The burden is on the employer to demonstrate a "legitimate and substantial" confidentiality interest. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). The Respondent has failed to sustain that burden.

The Respondent declined to specify, when queried by the Union, the nature of any concerns regarding the requested information. Nor has the Respondent identified in its brief any evidence in the record that supports its asserted claim of confidentiality. A claim of confidentiality is an insufficient defense to a request for relevant information where, as here, there was no evidence presented to support such a claim. *Engineers Local 12*, 237 NLRB 1556, 1559 fn. 9 (1978); *Illinois-American Water Co.*, 296 NLRB at 724.

We further find without merit the Respondent's contention that its delay of approximately 7 weeks in providing the requested information was minimal, and is thus insufficient to support an unfair labor practice finding. Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation of Section 8(a)(5) inasmuch "[a]s the Union was entitled to the information at the time it made its initial request, [and] it was Respondent's duty to furnish it as promptly as possible." *Pennco, Inc.*, 212 NLRB 677, 678 (1974). The Respondent has presented no evidence justifying its delay in furnishing the requested information. The Respondent indeed acknowledged on September 7 that it was required by law to furnish the information. Yet it failed to do so until one additional month had elapsed, only 1 day before the Respondent declared impasse in bargaining. This sequence of events severely diminished the usefulness to the Union, at the time it was provided, of the requested information. The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). The Respondent's failure to do so is violative of Section 8(a)(5) and (1) of the Act.[5]

2. The Respondent closes its materials management department

Prior to about November 5, the Respondent maintained a materials management department, which provided minor maintenance and repairs to the Respondent's physical plant. Prior to October 18, two employees were working in that department, Burnie Row and Clyde Cook. Employees Row and Cook were covered by the unit II collective-bargaining agreement. About November 5, the Respondent closed the materials management department, and transferred the bargaining unit work of that department to the maintenance department at the adjacent hospital, which is a nonunion facility. The Respondent thereupon laid off and/or terminated employee Row, and laid off employee Cook. The Respondent caused Cook to be transferred to the hospital, resulting in the reduction of his pension benefits.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by failing to afford the Union an opportunity to bargain with respect to the effects of the transfer of unit II work outside the bargaining unit. We find, for the reasons set forth below, that the Respondent violated the Act as alleged.[6]

The Respondent notified the Union by letter dated October 18 that it intended to lay off employees Row and Cook as of November 5. By letter dated October 21, the Union asked the Respondent to bargain regarding the impact of the proposed layoffs. The Union further requested that the Respondent provide it with certain information concerning the proposed layoffs. The Respondent, by letter dated October 27, provided the Union with the requested information. The Respondent did not, however, make any response to the Union's request to bargain regarding the impact of the proposed layoffs. The Respondent indeed provided no response to the Union's request for effects bargaining, until a letter to the Union dated November 2, merely 3 days before the Respondent's stated November 5 deadline for the layoff of employees Row and Cook. The Respondent's November 2 letter inquired of the Union whether it desired to conduct the effects bargaining separately or as part of the parties' overall negotiations. The Respondent on November 5 closed the materials management department, laid off employee Cook, and laid off and/or terminated employee Row.

It is well established that an employer is obligated under Section 8(a)(5) to bargain in a meaningful manner and at a meaningful time over the effects on employees of a decision to close part of its operations. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981); and *Metropolitan Teletronics*, 279 NLRB 957, 959 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987). The Respondent's dilatory response to the Union's request for effects bargaining precluded such bargaining from occurring at a meaningful time: before the closure was implemented. The Respondent failed to respond to the Union's October 21 request to bargain until its letter dated November 2,

[5] See, e.g., *Bundy Corp.*, 292 NLRB 671 (1989) (2-1/2-month delay unlawful); *Engineers Local 12*, supra, 237 NLRB at 1559 (6-week delay unlawful).

The Respondent has filed a motion to strike portions of the brief by the General Counsel concerning the purported effect on the parties' contract negotiations of the Respondent's failure to timely provide the requested information. It is unnecessary to pass on the Respondent's motion to strike, because the General Counsel's reply to the motion withdraws the portions of his brief at issue.

[6] The General Counsel does not contend that the Respondent had an obligation to bargain about the decision to close the materials management department and transfer the unit work of that department to a nonunion facility.

even though the Respondent had notified the Union that it would implement the decision on November 5. The Union's right to discuss with the Respondent how the closure of the department impacts unit employees requires that bargaining occur sufficiently before actual implementation so that the Union is not confronted at the bargaining table with a fait accompli. *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990). The Respondent's belated November 2 offer to bargain was no substitute for a timely response to the Union's effects bargaining request, which would have permitted good-faith bargaining to occur before the actual closure of the department on November 5. *Metropolitan Teletronics*, supra, 279 NLRB at 959. The parties have indeed stipulated that the Respondent transferred the materials management department unit work "without affording the Union an opportunity to bargain with Respondent over such conduct, and/or the effects thereof, *in advance of such actions*." (Emphasis added.) We accordingly find that the Respondent violated Section 8(a)(5) and (1) by failing to bargain with the Union regarding the effects of the transfer of the bargaining unit work performed by the materials management department to a nonunion facility.[7]

3. The Respondent's dues-checkoff proposal

The parties' previous collective-bargaining agreements for units I and II contained provisions for dues checkoff. The parties during their negotiations exchanged various proposals to replace the expired provisions. The Union proposed, inter alia, maintaining the existing dues-checkoff system. The Respondent on October 6 proposed a new dues-checkoff system under which the Respondent would check off union dues and remit the dues to the Union, but would charge the Union a service fee of "8% of such monies collected in consideration of service rendered." The Respondent subsequently reduced its proposed service fee to 4 percent.

The parties have stipulated that they discussed their various proposals on dues checkoff at their bargaining sessions. No agreement was reached, however, and the 4-percent service fee proposal was included in the Respondent's final offers for units I and II, presented at the October 8 bargaining session. The Respondent, adhering to its final offers, declared impasse at the close of that session. By letter dated October 18, the Respondent notified the Union of its intent to implement, and in fact implemented, certain provisions of its final offer. The service fee proposals were not implemented by the Respondent, however, because it had ceased checking off union dues on expiration of the prior collective-bargaining agreements. On January 10, 1994, the service fee proposal for both units was withdrawn by the Respondent entirely.

The parties have stipulated that the Respondent has not charged any type of service fee for the payroll deductions it makes for employee contributions to the United Way charitable organization, health and pension trust funds, 401(k) plans, credit union, or wage garnishment. The General Counsel contends that the Respondent has violated the Act by insisting to impasse on a payroll deduction proposal that discriminates between union dues deductions and deductions for these other entities, by charging a service fee for the former but not the latter.

The complaint thus alleges that the Respondent's dues-checkoff proposal would have discriminated against unit employees because they were represented by the Union, which is prohibited by Section 8(a)(3) and (1) of the Act, and thus the Respondent violated Section 8(a)(5) and (1) by bargaining to impasse over the proposal.

We find that the General Counsel has not proven that Respondent insisted to impasse on a payroll deduction proposal which discriminated against union dues deductions. In order to prove discrimination it must be shown that the Respondent charges a service fee for union dues checkoff, while allowing payroll deductions without a service fee for similar, nonemployee entities, other than the Union. See *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996), enfg. 318 NLRB 433 (1995). In contrast, an employer does not discriminate against union activity by charging a service fee for union dues checkoff while making without charge payroll deductions that are related to an employer's fringe benefits package offered to its employees, such as health care insurance plans or tax sheltered annuity plans. Payroll deductions for such employee fringe benefits are integrally related to an employer's necessary business functions and are not deemed evidence of discrimination. See *Lucile Salter Packard Children's Hospital v. NLRB*, supra, 97 F.3d at 588–589; *Price Chopper v. NLRB*, 163 F.3d

[7] We find meritless the Respondent's assertion that substantial effects bargaining took place via correspondence between the parties. Much of that correspondence occurred after the closure of the department on November 5, which confirms our finding that the Respondent unlawfully failed to bargain at a meaningful time. We also reject the Respondent's contention that it was permitted to layoff or terminate Row and Cook by the terms of the management functions clause, and assignment of work clause, that it implemented on October 18. We have reviewed the terms of each of the clauses, and neither clause waives the Union's right to effects bargaining. *Challenge-Cook Bros.*, 282 NLRB 21, 27 (1986), enfd. 843 F.2d 230 (6th Cir. 1988); and *Borg Warner Corp.*, 245 NLRB 513, 518–519 (1979), enfd. 663 F.2d 666 (6th Cir. 1981), cert. denied 457 U.S. 1105 (1982).

Member Hurtgen notes that the contract expired on August 3. Thus, although he disagrees that a "waiver" analysis is appropriate, he concurs in the result.

Member Brame notes that the management-rights and assignment-of-work clauses on which the Respondent relies were not contained in the expired agreement but instead were unilaterally implemented by the Respondent on October 18. The Respondent does not contend that its failure to engage in effects bargaining was authorized by any provision of the expired agreement. In these circumstances, Member Brame agrees with his colleagues that the unilaterally implemented management-rights and assignment-of-work clauses do not justify the Respondent's failure to engage in effects bargaining. He finds it unnecessary to pass on whether the language in the disputed clauses could, under other circumstances, be read to "waive" the Union's right to effects bargaining, or on whether such clauses, if included in the expired agreement, could be found to survive that agreement's expiration.

1177, 1183 (10th Cir. 1998), enfg. 325 NLRB 186 (1997). The parties' stipulation shows that the payroll deductions for employee health and pension trust funds, and employee 401(k) plans are without dispute intimately related to the fringe benefits that the Respondent offers its employees, and thus do not constitute evidence of discrimination. With respect to the credit union, the Respondent argues that it is also an employee fringe benefit, not an "outside business." The General Counsel, who has the burden of proving discrimination, has failed to adduce any evidence to the contrary. Therefore, we find that the payroll deductions for the credit union similarly do not constitute evidence of discrimination.

The Respondent's payroll deduction for the United Way charitable organization also does not establish discrimination. The Board has long recognized that an employer does not discriminate against union-related solicitation by permitting a small number of isolated charitable or "beneficent" acts as a narrow exception to an absolute no-solicitation rule. See, e.g., *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982); *Emerson Electric Co.*, 187 NLRB 294 fn. 2 (1970). The Respondent by proposing a dues-checkoff service fee likewise has not discriminated against deductions for union dues, merely because it permits one single instance of charitable payroll deduction without a service fee. We further observe that the Respondent is required by law to carry out court-ordered wage garnishment, and the Respondent's fulfillment of that obligation does not constitute discrimination. In sum, the General Counsel has not shown that the Respondent has sought to charge a service fee for union dues checkoff, while at the same time permitting deductions without a service fee for similar entities. We accordingly find without merit the complaint allegation that the Respondent's dues-checkoff proposal is unlawfully discriminatory. The Respondent was thus privileged to bargain to impasse over its dues-checkoff proposal, a mandatory subject of bargaining,[8] and we shall dismiss the complaint allegation that it violated Section 8(a)(5) and (1) by doing so.[9]

4. The Respondent's pay-for-performance wage proposal

The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) by insisting to impasse on a pay-for-performance wage system which provided for direct dealing between the Respondent and the unit employees and, in the absence of a lawful impasse, implementing the pay-for-performance wage system, including the discontinuation of paying employees according to the wage step increase provisions of the expired collective-bargaining agreements. For the reasons set forth below, we shall dismiss these complaint allegations.

The parties' expired collective-bargaining agreements for units I and II provided employees, by job classification, with annual wage step increases during each of the first 4 years of their employment. The expired agreements did not provide for any pay-for-performance or merit pay increases. During the parties' negotiations for successor contracts, the Respondent advanced several different versions of a pay-for-performance wage proposal.

The Union was adamant in its objection to the Respondent having the freedom to implement any pay-for-performance wage system that did not provide the Union an opportunity to engage in collective bargaining concerning the criteria, procedures, timing, and amounts of wage increases under such system. In response, the Respondent proposed to set parameters which addressed the Union's concerns, and modified its proposal to state that any pay-for-performance system shall meet certain minimum conditions concerning the appeal and evaluation process.

The Union also complained during negotiations that the Respondent's proposed pay-for-performance plan was "undefined," because the Respondent did not have a final, detailed proposal to present. In response, the Respondent modified its pay-for-performance proposal to require that the Respondent bargain with the Union prior to implementation of any pay-for-performance system.

About October 8, the Respondent presented to the Union its final offer for units I and II, which included the following pay-for-performance wage proposal:

> (A) The wage rates set forth in Appendix A are minimums. The [Respondent] may pay any amount in excess of those minimums in its sole discretion. The [Respondent] shall have the right to develop and implement a pay-for-performance system of its own choosing . . . . Prior to implementing such pay-for-performance system the [Respondent] shall notify the Union of the proposed system and, upon request, meet and confer with the Union prior to implementation no later than three (3) weeks prior to the proposed implementation date.
>
> (B) Any pay-for-performance system implemented shall meet the following minimum conditions:
>
> . . . .
>
> 4. Any employee who disagrees with his performance evaluation may file an appeal in writing within 10 days of notification of the results of the evaluation. While the appeal process shall be determined by the [Respondent], it will provide for the right to be heard and the employee may be accompanied by an employee of his/her own choosing. The final decision regarding the performance review and the pay rate

[8] See, e.g., *CJC Holdings*, 320 NLRB 1041, 1046 (1996), affd. mem. 110 F.3d 794 (5th Cir. 1997).

[9] The General Counsel additionally argues in his brief that the Respondent's allegedly discriminatory dues-checkoff proposal is evidence of bad-faith bargaining. See *Alba-Waldensian, Inc.*, 167 NLRB 695, 716–717 (1967), enfd. 404 F.2d 1370 (4th Cir. 1968); and *Atlas Metal Parts Co.*, 252 NLRB 205, 220 (1980), enf. denied in pertinent part 660 F.2d 304 (7th Cir. 1981). In light of our finding that the General Counsel has not shown discrimination, however, we find no merit in the General Counsel's contention.

> shall be with the [Respondent], and shall not be subject to the grievance and arbitration procedures herein.
>
> (C) Scale—see attached minimum scales.
>
> During the term of this Agreement, no employee on the payroll as of October 8, 1993 shall have his/her rate of pay reduced below his/her October 8, 1993 level, so long as the employee remains in their [sic] same classification.

The Respondent insisted as a condition of reaching collective-bargaining agreements for units I and II, that the Union agree to the Respondent's final contract offer, which included the pay-for-performance proposal.

As set forth above, the Respondent declared impasse at the close of the October 8 bargaining session. The Respondent thereafter implemented those portions of its final offers for units I and II that do not depend on the existence of a collective-bargaining agreement to be enforceable, including the wage provisions set forth in the pay-for-performance proposal. The Respondent upon implementation thus abandoned the step increase system of the prior contracts, resulting in what the parties have termed a wage freeze. Employees hired after October 18 were compensated under the terms of the Respondent's proposal according to the wage schedule attached to the final offers as Appendix A. The General Counsel acknowledges that at no time did the Respondent ever grant merit pay increases pursuant to its pay-for-performance proposal.

The Board holds that a merit wage increase proposal that confers on an employer broad discretionary powers is a mandatory subject of bargaining on which parties may lawfully bargain to impasse. *McClatchy Newspapers*, 321 NLRB 1386, 1388 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998).[10] The pay-for-performance proposal here, which reserves substantial discretionary power to the Respondent, is similar to the merit pay increase proposal at issue in *McClatchy Newspapers*.

The General Counsel, however, contends that the Respondent's pay-for-performance proposal differs from that at issue in *McClatchy*, and constitutes a permissive subject of bargaining which the Respondent could not lawfully have pressed to impasse, because it permits the Respondent to deal directly with employees to the exclusion of the Union. The General Counsel argues that under the conditions set forth in the proposal, no role is provided for the Union with regard to the procedures for determining employee performance evaluations, or the merit pay consultation and appeal process. The General Counsel thus asserts that the Respondent's decision on merit pay increases would be based on direct consultation with employees, rather than with the Union as the employees' exclusive collective-bargaining representative.

Contrary to the General Counsel's contention, we find that the Respondent's proposal does not mandate direct dealing. Rather, it mandates that bargaining with the Union take place prior to implementation of any pay-for-performance system and prior to any employee being given a wage increase pursuant to such a plan. The Union at such negotiations would be free to propose that it be more directly involved with wage determinations than set forth in the Respondent's proposed *minimum* conditions, and to bargain for and achieve a more extensive role in merit pay determinations. The Union may indeed at negotiations veto the proposed minimum conditions, including the provision that the Respondent meet directly with employees concerning merit pay determinations. We thus find meritless the General Counsel's contention that the Respondent's proposal constitutes a permissive subject of bargaining because it excludes the Union from any role in the determination of merit wage increases.

Accordingly, for these reasons, we find that the Respondent's pay-for-performance proposal is a mandatory subject of bargaining, and we shall dismiss the complaint allegation that the Respondent unlawfully bargained to impasse over it.

We shall also dismiss the complaint allegation that the Respondent unlawfully *implemented* merit wage increases under its pay-for-performance system. The well-settled general rule is that an employer may, on bargaining to a valid impasse, unilaterally implement changes in mandatory subjects that are reasonably comprehended within its preimpasse proposals.[11] There are certain limited exceptions to the implementation-after-impasse doctrine, however, including a merit pay proposal which confers on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in employees' rates of pay. The Board has explained that such unlimited managerial discretion over future pay increases, without explicit standards or criteria, would leave the union unable to bargain knowledgeably on the determination of employee wage rates and unable to explain to unit employees how such rates were formulated. Because such a circumstance would serve to destroy rather than further the bargaining process, an employer is obligated, prior to the actual implementation of such merit wage increases, to negotiate to agreement or to impasse "definable objective procedures and criteria" governing raises under a merit pay proposal.[12] Here, the General Counsel concedes that the Respondent never actually implemented or granted

[10] Member Brame finds it unnecessary to pass on whether *McClatchy Newspapers* was correctly decided on its facts, as he agrees that it is distinguishable from the facts presented in this case.

[11] See, e.g., *Television & Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968), affg. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967); *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enfd. mem. 559 F.2d 1201 (1st Cir. 1977).

[12] See *McClatchy Newspapers*, supra, 321 NLRB 1391 ("[I]t is not the Respondent's [merit pay] bargaining proposal that [is] inimical to the policies of the Act, but its exclusion of the [union] *at the point of its implementation* of the merit pay plan from any meaningful bargaining as to the procedures and criteria governing the merit pay plan[.]") (Emphasis added.)

any merit pay increases pursuant to its proposal. Absent evidence that the Respondent actually granted merit wage increases to unit employees, there is no basis for finding a violation of the Act under *McClatchy*.[13]

We further find without merit the General Counsel's additional contention that the Respondent was not privileged upon impasse to implement the wage freeze proposal because it was "inextricably related" to the pay-for-performance proposal. We have explained above that an employer may not, even upon valid impasse, implement a merit pay proposal without definable objective procedures and criteria, because to do so would leave the employer with unlimited managerial discretion in the formulation of future pay increase about which the union would be unable to bargain knowledgeably in future negotiations. These vices are not implicated by the implementation of the wage freeze provision by the Respondent, however. There are no discretionary elements to the wage freeze provisions. Rather, the stipulated record shows that the amounts of the Respondent's implemented wage schedule under Appendix A are fixed for each job classification, and explicitly set forth in the Respondent's pre-impasse proposal. We shall accordingly dismiss the complaint allegation that the Respondent unlawfully implemented its wage freeze proposal.

5. The bargaining over health insurance benefits, subsidies for Jazzercize classes, free coffee service, and cafeteria discount

Subsequent to the parties having reached valid impasse as to collective-bargaining agreements as a whole for units I and II on October 18, 1993, the Union and the Respondent engaged in bargaining on certain additional topics. This bargaining included the following four proposals by the Respondent to: (1) change its health insurance carrier thereby causing changes in health insurance benefits for unit employees;[14] (2) discontinue subsidies for Jazzercise classes attended by unit employees; (3) discontinue free coffee service for unit employees; and (4) reduce the cafeteria discount for unit employees. The parties have stipulated that the Respondent provided the Union with advance notice of each of these proposals, that they met and bargained concerning each of the proposed changes as well as the effects of the changes, and that the parties had not reached agreement on these topics. The parties have further stipulated that they had exhausted the prospect of reaching an agreement concerning each of these subjects, and the Respondent declared that the parties were at impasse. The Respondent thereafter implemented its proposals on these four topics.

The parties have expressly stipulated that "the General Counsel and the Charging Party contend that the impasse on the [four topics] was not a valid impasse because it was tainted by Respondent's conduct" vis-a-vis dues-checkoff and pay-for performance. We have found above, however, that the Respondent's bargaining conduct with respect to these two topics was not unlawful. We accordingly must find that that conduct did not taint the parties' subsequent bargaining on the additional four topics. We further find that the General Counsel, by the plain meaning of the parties' stipulation, has asserted no other basis for finding the Respondent's conduct concerning the four topics to be unlawful. The Board has long held that a stipulation is conclusive on the party making it, and prohibits any further dispute as to the stipulated matters. See, e.g., *Kroger Co.*, 211 NLRB 363, 364 (1974). We shall accordingly dismiss the complaint allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) changing its health insurance carrier; (2) discontinuing subsidies for Jazzercise classes; (3) discontinuing free coffee service; and (4) reducing the cafeteria discount.

CONCLUSIONS OF LAW

1. The Respondent, Woodland Clinic, a Medical Practice Foundation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. Engineers and Scientists of California, MEBA, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act: (1) failing to timely comply with the Union's request for the home telephone numbers of unit employees; and (2) failing to bargain with the Union regarding the effects of the transfer of the bargaining unit work performed by the materials management department to a nonunion facility.

4. The Respondent has not otherwise violated the Act as alleged in the amended consolidated complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As a result of the Respondent's unlawful failure to bargain in good faith with the Union about the effects of its decision to close its materials management department and to transfer its work, the affected employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore,

[13] Id.

[14] This proposal was prompted by notification from the Respondent's health insurance carrier of an increase in premium rates, which the parties have stipulated would have increased costs to both employees and the Respondent.

cannot serve as an adequate remedy for the unfair labor practice committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects on unit employees of closing the materials management department and the transferring of its work, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the affected employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its employees employed in the materials management department at the time of its closure, backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects on unit employees of the closing of its materials management department and the transferring of its work; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union;[15] (4) the Union's subsequent failure to bargain in good faith, but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent closed its materials management department, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the affected employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, in view of the fact that the Respondent has closed its materials management department, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees of the materials management department as of November 5, 1993, in order to inform them of the outcome of this proceeding.[16]

[15] *Melody Toyota*, 325 NLRB 846 (1998).

ORDER

The National Labor Relations Board orders that the Respondent, Woodland Clinic, a Medical Practice Foundation, Woodland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to timely furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees.

(b) Failing to bargain with the Union regarding the effects of the transfer of the bargaining unit work performed by the materials management department to a nonunion facility.

(c) 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) On request, bargain with the Union concerning the effects on unit employees of its decision to close its materials management department and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Pay its former employees employed in the materials management department at the time of its closure their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects on unit employees of the closing of its materials management department and the transferring of its work; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith, but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from November 5, 1993, the date on which the Respondent closed its materials management department, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ, with interest, as set forth in the remedy portion of this decision.

[16] No affirmative remedy is necessary for the Respondent's unlawful failure to timely provide the Union with the requested information, because the stipulated record establishes that the Respondent ultimately supplied the information.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its place of business in Woodland, California, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 insure 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 August 16, 1993.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, signed and dated copies of the attached notice marked "Appendix" to the Union and to all former unit employees of the materials management department as of November 5, 1993.

(f) 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.

[17] If this Order is enforced by a judgment of a 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."

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to timely furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees.

WE WILL NOT fail to bargain with the Union regarding the effects of our transfer of the bargaining unit work performed by the materials management department to a nonunion facility.

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.

WE WILL bargain, on request, with the Union concerning the effects on unit employees of our decision to close our materials management department and to transfer its work, and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL pay our former employees in the materials management department who were employed at the time we closed the department their normal wages for the period of time set forth in the decision underlying this notice to employees, with interest.

WOODLAND CLINIC, A MEDICAL PRACTICE FOUNDATION

Detroit Newspaper Agency and The Detroit Free Press, Inc. *and* Newspaper Guild of Detroit, Local 22, of the Newspaper Guild, AFL–CIO–CLC. Case 7–CA–35452

June 30, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On October 26, 1994, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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 for the following reasons, and to adopt the recommended Order.

We agree with the judge that the Respondent[1] violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with a complete copy of Ernest King's 1992 environmental audit. The material facts are undisputed. In 1992, Ernest King, manager of environmental affairs for Knight-Ridder, Inc., and Lynn Straughn, environmental director for Gannett Co., Inc., conducted an environmental audit of the Respondent's workplaces covering such matters as safety records, hearing conservation records, bloodborne pathogen procedures, and emergency response records. The Union (the Charging Party) requested in writing on October 11, November 18, and December 30, 1993, that the Respondent provide it with a copy of the audit. On January 13, 1994, the Respondent denied the request, stating, "Unfortunately, the Ernest King report is not available. According to the September 27, 1993 Business Monday article, Mr. King would not release his report." The Respondent did not offer to accommodate the Union's request through other means. Shortly before the hearing, the Respondent did furnish the Union with a highly redacted copy of the audit.

I. RELEVANCY

An employer has a statutory obligation to supply information that is potentially relevant and will be of use to the union in fulfilling its responsibilities as exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). The judge found, and the Respondent does not dispute, that health and safety matters regarding the unit employees' workplaces are of vital interest to the employees and are, thus, generally relevant and necessary for the Union to carry out its bargaining obligations. We agree. Indeed, "[f]ew matters can be of greater legitimate concern." *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29 (1982), enfd. sub nom. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). Furthermore, the Respondent has contractually recognized the relevancy of health and safety matters. In a side letter, included in the printed version of the 1992–1995 bargaining agreement between the Detroit Free Press and the Union, the parties agreed:

> This letter will confirm the parties' intent to meet as often as possible to consider, discuss and attempt to resolve all issues relating to the employer-employee relationship, *including health and safety issues*, between the Publisher and employees represented for the purpose of bargaining by the Union. [Emphasis added.]

Accordingly, we conclude that the requested audit is relevant.

Once it is established that an employer has failed to timely furnish potentially relevant information requested by a union, the employer will be found in violation of Section 8(a)(5) and (1) of the Act unless it establishes a valid reason why it did not timely furnish the information. In its exceptions, the Respondent attempts to supply several reasons: it contends that the Union had the information available to it but in a different form, that the assessments, conclusions, and recommendations redacted from the audit are confidential, and that its confidentiality interests outweigh the Union's need for the information. For the following reasons, we reject the Respondent's contentions and agree with the judge that the Respondent was and is obligated to furnish the Union with an unredacted copy of the requested audit.

II. AVAILABILITY IN DIFFERENT FORM

Shortly before the hearing began, the Respondent did furnish the Union with a redacted copy of the King audit. The redacted copy, however, omitted all assessments, conclusions, and recommendations. Beyond identifying areas covered, the redacted audit contained little information of value to the Union. It is apparent that the assessments, conclusions, and recommendations are what gives the audit useful meaning. The redacted audit did not contain raw data from which the Union could reach its own conclusions. Rather, it is what was blacked out, i.e., redacted, that contains the essential information. As one of many possible examples, at page 18 the audit states, "The environmental

[1] The Detroit Newspaper Agency is a partnership that handles selling, advertising, printing, and distribution of two otherwise independent newspapers: The Detroit Free Press (a Knight-Ridder, Inc. newspaper) and The Detroit News (a Gannett Co., Inc. newspaper). The Detroit Newspaper Agency and The Detroit Free Press, Inc. are collectively the Respondent here.

assessment indicated that The Detroit Newspaper Agency toxic chemicals emissions were [a blacked out word] the reporting requirement of section 313." It is obvious that essential information, whether the Respondent was above or below toxic emission standards, was withheld from the Union.[2] Furthermore, the Respondent did not even furnish the Union with the redacted copy until some 7 months after its refusal. Once a union has made a good-faith request for information, an employer must provide relevant information reasonably promptly in useful form. *General Electric Co.*, 290 NLRB 1138, 1147 (1988). We find that the redacted copy of the audit is both too little and too late to meet the Respondent's statutory obligation.

The Respondent also contends that the wide variety of information about environmental, health, and safety matters it has shared with the Union over the past few years satisfies its obligation to furnish the requested audit. The Respondent, however, has failed to show that this other information duplicates the information in the requested audit. From all we can tell, the audit may well have touched on new matters or may have contradicted other reports. Even if the information were cumulative, it would remain relevant. Cumulative information on such vital matters as health and safety would serve to identify the most pressing problems, to demonstrate any continuing problems, and to aid the Union in formulating a rational response. An employer is obligated to furnish a union with information that would help the union make an informed judgment about the problem the information addresses. *General Motors Corp. v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983), enfg. 257 NLRB 1068 (1981). Accordingly, even assuming that the Respondent has previously provided the Union with similar information, we find that the Respondent has failed to show that the other information satisfies its obligation to furnish the requested audit.

The Respondent further contends that the Union is free to make its own safety inspection using the other information and the redacted audit as a basis for that investigation. The Respondent, however, did not offer this opportunity to the Union when it refused to furnish the requested audit. Furthermore, this is not the form in which the Union requested the information, and the requested audit is readily available to the Respondent. An employer's obligation to furnish relevant information is not excused merely because a union may have alternative sources for the information. *New York Times Co.*, 265 NLRB 353 (1982); *Colgate-Palmolive Co.*, 261 NLRB 90, 92 fn. 13 (1982), enfd. sub nom. *Oil Workers Local 5-114 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983); and *Kroger Co.*, 226 NLRB 512, 513 (1976) (a "union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form"). See also *ASARCO, Inc. v. NLRB*, 805 F.2d 194, 198 (6th Cir. 1986) ("availability of the requested information from another source does not alter the employer's duty to provide readily available relevant information to the bargaining representative").

[2] This one word was imperfectly blacked out and on careful examination reads "below." This was one of the few instances in which the blacking-out of the text was ineffective.

III. CONFIDENTIALITY

A. *Timeliness*

The Respondent asserts that the information requested is confidential. We reject this contention. The Board has found that substantial claims of confidentiality may justify refusals to furnish otherwise relevant information. See, e.g., *Postal Service*, 306 NLRB 474 (1992) (names of witnesses to drug transactions); *General Dynamics Corp.*, 268 NLRB 1432 (1984) (study made in preparing for pending litigation); *Minnesota Mining & Mfg. Co.*, supra at 27 (trade secrets); and *Johns-Manville Sales Corp.*, 252 NLRB 368 (1980) (individual medical records and disorders).[3] Blanket claims of confidentiality, however, will not be upheld. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). Also, confidentiality claims must be timely raised. *Gas Spring Co.*, 296 NLRB 84, 99 (1989) (claim belatedly raised and brought up as an afterthought not upheld). The reason a confidentiality claim must be timely raised is so that the parties can attempt to seek an accommodation of the employer's asserted confidentiality concerns. *Tritac Corp.*, 286 NLRB 522 (1987) (employer "cannot simply raise its confidentiality concerns, but must also come forward with some offer to accommodate both its concerns and its bargaining obligation"); *Pennsylvania Power Co.*, supra at 1105 ("party refusing to supply information on confidentiality grounds has a duty to seek an accommodation"). Here, the Respondent did not raise its confidentiality claim when it initially refused to furnish the requested audit but apparently first made the claim during or shortly before the August 30, 1994 hearing. Furthermore, the Respondent failed to timely seek an accommodation with the Union of its confidentiality claim. Accordingly, we find that the Respondent failed to timely raise its claim that the requested information was confidential.

B. *Prepared for Litigation*

The Respondent contends that the audit is confidential because it was prepared in anticipation of litigation. We disagree. The Board has found that information gathered in response to specific legal actions is

[3] See also *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) (individual psychological aptitude test scores).

privileged from disclosure. *General Dynamics*, supra, 1432. The mere potential for litigation does not constitute a legitimate claim of confidentiality. *New England Telephone Co.*, 309 NLRB 196 (1992). Furthermore, as the Board has held, "The Party asserting the claim of confidentiality has the burden of proof." *Washington Gas Light Co.*, 273 NLRB 116 (1984).

The Respondent's sole witness, Ernest King, testified that the audit was part of the annual audit of safety matters undertaken in all Knight-Ridder facilities. Thus, the testimony shows that the audit was prepared in the ordinary course of the Respondent's business, rather than in anticipation of litigation. The Respondent's suggestion that the Union might pursue matters arising from the requested audit through litigation or complaints to Federal or state safety agencies has no solid foundation. There is evidence that the Union has brought certain ergonomic matters relating to alleged repetitive motion stress problems to the attention of the Michigan health and safety agency. The audit, however, does not concern such matters. King testified "no" when asked on direct examination whether the audit related to anything in the area of ergonomics. Thus, we find that the Respondent has failed to establish its asserted claim of confidentiality of the requested audit. At best, the claim is based on mere speculation.[4] Accordingly, we reject the Respondent's claim that the requested audit should be considered as a confidential matter in preparation for litigation.

C. *Self-Critical Report*

The Respondent additionally contends that the audit is confidential because it is an internal, self-critical report. We disagree. To establish a legitimate confidentiality claim, the Board requires more than what the Respondent has shown. Confidential information is limited to a few general categories: that which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits. See cases cited in sections III,A and B, above. The requested audit falls outside these general categories.

The Respondent draws a distinction between internal and external reports. It states that it did not claim confidentiality for reports from outsiders, such as insurance companies and environmental consultants.[5] The Respondent argues that findings of outsiders, in contrast to the findings of officials from parent companies, are not likely to be viewed as admissions of error. The Respondent contends that internal reports are confidential because they must be able "to recommend, criticize, warn, threaten or use any other means at their disposal to cause Respondent's managers to achieve the highest possible levels of health and safety for Respondent's employees."

The Respondent's argument is too sweeping. Much, if not most, of the relevant information an employer is required to furnish to a union is internally generated. Furthermore, the Respondent's argument is inconsistent with the whole theory of the Act. Because employee health and safety are mandatory subjects of bargaining,[6] Section 8(a)(5) requires the Respondent to confer and negotiate with the Union on these matters. Thus, the Act contemplates that achieving the "highest possible levels of health and safety" is to be accomplished jointly with the Union, not unilaterally by the Respondent.

In addition, the Respondent's confidentiality contentions are not supported by the record. Ernest King, who was involved in preparing the requested audit, did not testify that the audit criticized, warned, or threatened anyone. Rather, King testified more generally that he would alter the way he put the reports together if he were aware they would be given to the Union:

> Because I write these reports in the manner that I try to get action. If I write them in a very strong manner there are a lot of opinions in these reports based on my opinion of things and I would have to drastically alter the way I put these reports together.

King did not, however, testify that he would alter the substance, as opposed to the tone, of the audit. To this extent, we agree with the judge's finding, with which the Respondent disagrees, that King "never explained how the report would be different if directed to management alone or directed to management with disclosure to the Union."

The Respondent also relies on *ASARCO, Inc. v. NLRB*, supra, denying enf. in pertinent part to 276 NLRB 1367 (1985), and argues that the requested audit is confidential because its disclosure, if anticipated, would result in the report's being watered down or not written. Although we continue to adhere to the principles expressed in the Board's decision in *ASARCO*, we also find that the Respondent's reliance on the court's decision in that case is misplaced. The court found (id. at 199) that ASARCO's self-critical

[4] The Union, as well as the Respondent, was contractually obligated to pursue any safety and health matters through negotiations pursuant to the parties' side agreement on the negotiability of health and safety matters, and, even regarding matters that the Union eventually brought to the attention of the state health and safety agency, the Union first attempted to resolve the matters through direct negotiations with the Respondent.

[5] The Union has received such reports.

[6] *Oil Workers*, supra at 360.

reports, which were prepared after a serious accident,[7] "contain speculative material and opinions, criticisms of persons, events, and equipment, and recommendations for future practices." In this case, there is no contention that the requested audit was prepared as the result of any particular incident. Rather, as previously found, the audit is part of Knight-Ridder's annual audits of all its facilities. Furthermore, although the audit made recommendations, there is no evidence that it contained speculative material or criticisms of persons or events. King did not so testify.

Because the Respondent's contentions are unsupported by the record, we find that the Respondent has merely made a speculative or blanket confidentiality claim. Blanket claims of confidentiality will not be upheld. *Pennsylvania Power Co.*, supra at 1105; *Washington Gas Light Co.*, supra at 117. Accordingly, we find that the Respondent has failed to meet its burden and conclude that the requested audit has not been shown to contain confidential information.[8]

D. *Balancing Test*

The Respondent contends that the judge erroneously failed to balance the Union's interest in disclosure of the requested audit with the Employer's interest in confidentiality. We disagree. A union's interest in arguably relevant information does not always predominate over other legitimate interests. In determining whether an employer must comply with a union's request for relevant but assertedly confidential information, the Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interests. *Detroit Edison Co. v. NLRB*, supra at 301; *Washington Gas Light Co.*, supra at 116. To invoke a balancing test, however, an employer must first prove its confidentiality claim. *Resorts International Hotel*, 307 NLRB 1437, 1438 (1992). Because the Respondent, as found above, has failed to establish its confidentiality claim, a balancing test is neither necessary nor proper.

Even assuming that the Respondent had raised a legitimate confidentiality claim that would require a balancing test, we would strike the balance in favor of the Union and order the Respondent to furnish the Union with an unredacted copy of the requested audit. In support of its contention that the balance should be struck in its favor, the Respondent relies on the court's decision in *ASARCO*, supra at 194. We find that *ASARCO* is also distinguishable on this issue. The relevant issue in that case concerned the union's request for an extensive self-critical report the employer made after a serious accident and for the purpose of improving safety and preventing future similar mishaps. The court, in its final analysis, held (id. at 200) that "access to ASARCO's internal report and self-critical thinking is not relevant or reasonably necessary to the Union's representative duties." Thus, the ultimate holding of the court goes to whether the information was relevant and does not depend on making a balancing determination.

The court additionally found (id. at 199) that the report contains speculative material and opinions, criticisms of persons, events, and equipment, and recommendations for future practices. The court referred (id. at 199) to testimony that "if ASARCO were required to divulge these reports to the Union, much of their contents would have been omitted, adversely affecting, if not nullifying, the report's value." The court further referred (id. at 199) to testimony that the report was made in anticipation of litigation that frequently arises after serious accidents. The court found (id. at 200), "The practice of uninhibited self-critical analysis, which benefits both the union's and employer's substantial interest in increased worker safety and accident prevention, would undoubtedly be chilled by disclosure." In addition, the court found (id. at 200) that the union had all the factual information regarding the accident available to it by the union's participation in the investigation of the accident and the court's requiring the employer to give the union access to the mine and the photographs relating to the accident.

In contrast, this case involves an annual health and safety audit routinely made by the parent corporation in all Knight-Ridder facilities, rather than a report in response to a specific health and safety problem, let alone an accident causing an employee's death. Although the audit's recommendations were undoubtedly made to improve safety, there is no evidence that the audit contained speculative materials or criticisms of persons, events, and equipment. And there is no testimony, as in *ASARCO*, that the substance, as opposed to the tone, of the audit would be changed or that it was prepared in anticipation of litigation. In addition, the record here fails to support a finding that the Union had available to it all the factual information in the audit. The Union was not invited to, and did not, participate in the audit or accompany King and Straughn when they made the audit, and the Respondent has not offered or made available to the Union the records that King and Straughn reviewed. These differences from *ASARCO* are significant and call for a result different from *ASARCO*.

[7] An employee died after apparently driving his tractor over a 30-foot dropoff at a mine site.

[8] Contrary to our colleague's partial dissent, we would not give the Respondent yet another opportunity to bargain over its asserted confidentiality claims. We have found above that, unlike the situation in *Minnesota Mining*, the case relied on by the dissent, the Respondent's confidentiality claims are unsupported by the record and are at best speculative. In these circumstances, we do not believe that it would be appropriate to force the Union to go back to the bargaining table to obtain the information to which it is entitled.

As previously stated, we find that the balance between the interests of the Respondent's confidentiality assertions and the Union's right to relevant information should be struck in favor of disclosure to the Union. Although we recognize that a union's interest in information about an accident leading to the death of an employee is powerful, we also recognize that the Union's interest here in the requested audit is substantial.[9] Furthermore, disclosure of the audit to the Union would not undermine the purpose of the audit. King testified that his purpose is to "get action"; local union access to the information would also serve to "get action." Although King's "strong" words might, if revealed to the Union, embarrass the Respondent's management, preventing such embarrassment has little claim to confidentiality. Clearly it is outweighed by the Union's substantial interest in health and safety matters. Accordingly, we find in all the circumstances that the balance between the Respondent's assertion of confidentiality and the Union's right to potentially relevant information should be struck in favor of the Union.

Conclusion

For the foregoing reasons, we find that the Respondent should be ordered to furnish the Union with a complete and unredacted copy of the requested audit. Accordingly, we shall adopt the judge's recommended Order to this effect.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Detroit Newspaper Agency and The Detroit Free Press, Inc., Detroit, Michigan, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER STEPHENS, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(5) and (1) of the Act by withholding the King report in its entirety until after complaint issued in this case, more than 7 months after the Union requested it. I further agree, for the reasons stated by the majority, that the withholding of factual material concerning workplace conditions is not immunized by a showing that facts it contains can also be gleaned from various other sources.[1] I would not, however, order the Respondent to turn over the complete unredacted report. Rather, I would order the Respondent to turn over to the Union all portions of the report relating to the conditions of the workplace except for judgments on the performance of the Respondent's managers or other purely judgmental statements and recommendations; and following the approach of the Board in *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 32 (1982), enfd. sub nom. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983), I would require the Respondent to bargain with the Union over a procedure for protecting the confidentiality of any such matters in the disclosure of the report.

[9] *Minnesota Mining & Mfg. Co.*, supra at 29.

[1] *Service Employees Local 144 (Jamaica Hospital)*, 297 NLRB 1001 fn. 2 (1990).

Cynthia L. Beauchamp, Esq., for the General Counsel.
John B. Jaske, Esq., of Arlington, Virginia, and *John Taylor, Esq.*, of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On January 20, 1994, the charge in Case 7–CA–35452 was filed by the Newspaper Guild of Detroit, Local 22, of the Newspaper Guild, AFL–CIO–CLC (Union), against the Detroit Newspaper Agency (Respondent DNA), and the Detroit Free Press, Inc. (Respondent Free Press).

On March 25, 1994, the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint which alleges that Respondents violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) when they failed and refused to comply with an information request from the Union for a copy of a report of an environmental audit conducted by Ernest King.

Respondents filed an answer in which they denied violating the Act in any way.

A hearing was held before me in Detroit, Michigan, on August 30, 1994.

On the entire record in this case, including posthearing briefs submitted by the General Counsel and Respondents, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent DNA is organized as a general partnership under Michigan law. Respondent Free Press and The Detroit News, Inc. are, and have been at all times material, copartners doing business under the trade name and style of Detroit Newspaper Agency.

At all material times, Respondent DNA has maintained an office and place of business at 615 West Lafayette, Detroit, Michigan, and has been engaged in the publishing operations of all nonnews and noneditorial departments of Respondent Free Press and The Detroit News as a unified integrated business, as agent for, and for the benefit of both newspapers and is responsible for selling, advertising, printing, and distribution of the two newspapers.

At all material times Respondent Free Press, a Michigan corporation with an office and place of business at 321 West Lafayette, Detroit, Michigan, has been engaged in the operation of the news and editorial departments of a daily newspaper.

During 1993, Respondent DNA, in the course and conduct of its business operations described above, had gross revenues in excess of $500,000, and purchased and received

newspaper print valued in excess of $50,000, which was shipped to its Michigan facilities directly from points located outside the State of Michigan.

During 1993, Respondent Free Press, in the course and conduct of its business operations described above, derived gross revenues in excess of $200,000 and held membership in/or subscribed to various interstate news services and published various nationally syndicated features and advertised various nationally sold products.

Respondents admit, and I find, that each of the Respondents has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondents admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Overview*

The Detroit News Agency (DNA) was formed under the Newspaper Preservation Act and handles all noneditorial functions for two Detroit newspapers, i.e., the Detroit Free Press and the Detroit News, e.g., business advertising, circulation, etc.

The Union represents certain employees of both the Detroit Newspaper Agency (DNA) and the Detroit Free Press. More specifically the Union represents:

> 1. All full-time and regular part-time janitors employed by Respondent DNA, including working supervisors and Respondent DNA employees formerly classified as machinist helpers, heavy cleaners, and cleaners; but excluding managerial employees, confidential employees, guards and supervisors as defined in the Act, and
>
> 2. All full-time and regular part-time employees in the editorial and business office departments of Respondent Detroit Free Press; but excluding the classifications listed in a document entitled "Exemptions," as updated February 7, 1994; but excluding guards and supervisors as defined in the Act.

Since about 1990, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the DNA unit and has been recognized as such representative by Respondent DNA. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from date of ratification through April 30, 1995.

Since about 1930, and at all material times, the Union (Charging Party) has been the designated exclusive collective-bargaining representative of the Detroit Free Press unit and has been recognized as such representative by Respondent Free Press. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from May 1, 1992, to April 30, 1995.

At all times since 1990, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the DNA unit.

At all times since 1930, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Free Press unit.

It is undisputed that on October 11 and December 30, 1993, the Union requested in writing that the Respondents provide to it a copy of a report prepared by Ernest King following an environmental audit he conducted in the fall of 1992 at the Detroit Newspaper Agency and the Detroit Free Press.

Respondents failed and refused to turn over the report in its entirety, claiming that it is the kind of internal self-critical report that they should be permitted to keep confidential, citing the case of *ASARCO, Inc. v. NLRB*, 805 F.2d 194 (6th Cir. 1986). At the hearing before me, Respondents introduced into evidence as Respondent's Exhibit 1 a redacted version of the King report. The report consists of 26 pages and a cover sheet. All or part of 19 pages are blacked out and unreadable. According to Respondents, the blacked out areas of the report cover the conclusions and recommendations of Ernest King.

All parties concede that the Union has an interest in health and safety, but the Union insists, contrary to Respondents, that it needs to be able to review the King report in its entirety because the contents of the report are necessary and relevant to the performance of its functions as a collective-bargaining representative, especially considering that bargaining for new contracts for the employees it represents at both the Detroit Newspaper Agency (DNA) and the Detroit Free Press will begin in late 1994 or early 1995 as both contracts expire on April 30, 1995. A purpose of King's report was "to reduce liability overall for accident and injury."

The sole issue in the case is whether Respondents violated Section 8(a)(1) and (5) of the Act when it refused to turn over King's report.

B. *Discussion and Analysis*

Luther Jackson Jr., an official of the Union, testified for the General Counsel. He was a very impressive witness and I credit his testimony in its entirety.

His testimony reflects that since at least 1985 the Union has been very concerned about health and safety issues for the employees it represents at the DNA and the Detroit Free Press. Jackson testified, for example, that in 1990 the Union conducted a survey among the employees it represents and ascertained that many were suffering from repetitive strain injuries apparently caused by working in front of video display terminals (VDTs). The Union also received complaints about the configuration of the VDTs and the furniture used by the employees working at the VDTs. The Union was also concerned about ventilation, and asbestos detection, removal, and encapsulation, VDT screen radiation, repetitive strain injury hazards for maintenance employees, photographic chemical hazards, and the Union also wanted a nurse assigned back into the Detroit Free Press building.

The Union also expressed its concern to management about new furniture and work stations at the Detroit Free Press, which had undergone some renovation in 1992. A number of employees complained to the Union about the lack of easily adjustable furniture at their work stations. The Union was interested in the field of ergonomics, i.e., the science of adapting furniture, equipment, and machinery to people, and the Union let management know this. In an

ergonomic survey conducted by the Union some employees complained about back problems, wrist problems, etc., caused by the furniture provided to them at their work stations.

In September 1993, certain maintenance employees complained to the Union about asbestos exposure on the job. Another incident which concerned the Union involved a graphics intern cutting himself on the job with a knife and the issue and concerns that incident caused.

The Union learned that Liberty Mutual, the workers' compensation carrier for the Free Press, had visited work stations and done work station analyses. The Union requested and received a copy of the report prepared by Liberty Mutual. On another occasion the Union requested and received permission from Respondents to inspect OSHA forms the Respondents maintained pursuant to Federal law. With respect to the Liberty Mutual report and the OSHA records Respondents fully cooperated with the Union.

In the fall of 1993, the Union became aware from a newspaper article in the Detroit Free Press on September 27, 1993, that two environmental audits had been conducted at the Detroit Newspaper Agency and or Detroit Free Press. One had been conducted by Donald A. Hensel of the Newspaper Association of America (NAA), a trade organization, and the other had been conducted by Ernest King.

Ernest King is an employee of Knight-Ridder, Inc., the parent company of the Detroit Free Press, and apparently its top health and safety person. Knight-Ridder, Inc. owns approximately 29 newspapers, one of which is the Detroit Free Press.

The Union requested a copy of Donald Hensel's 67-page report prepared for the NAA, management's response to Hensel's report, and a copy of Ernest King's environmental audit. The Union received a copy of Hensel's report and management's response to it, but Respondents would not release a copy of King's report to the Union.

As noted above, a redacted copy of King's report was received in evidence as Respondent's Exhibit 1. The table of contents of King's 26-page report reflects that the following subject areas, inter alia, were covered: hearing conservation program records, safety program and records, waste management program and records, bloodborne pathogens, and emergency response program and records.

According to Luther Jackson, the Union wanted a copy of Ernest King's report because it was very interested in getting as much information as possible regarding the health and safety of its members, because of the prominence of Ernest King, and to prepare for negotiations for a new collective-bargaining agreement. All are extremely valid reasons.

Respondents would not voluntarily turn over all of King's report. The Respondents claim that because it is a internal self-critical report it would have a chilling effect on Respondents' inclination to do similar internal self-critical reports in the future if forced to disclose the contents of this report to the Union. Because the Hensel audit done for the NAA and the report of Liberty Mutual were not internal self-critical reports, Respondents readily disclosed those reports to the Union on its request.

Ernest King was, like Jackson, a very impressive witness. He testified for the Respondents. The only problem I had with King's testimony was his assertion that his report to his superiors would be different if disclosable to the Union. He struck me as the kind of professional who would tell it like it is regardless of who the reader of the report might be. Interestingly enough he never explained how the report would be different if directed to management alone or directed to management with disclosure to the Union on its request. King stated, by the way, that he did not cover the area of repetitive strain injuries associated with VDT use in his report.

It is well settled that "[t]he duty to bargain collectively, imposed upon an employer by Section 8(a)(5) of the National Labor Relations Act, includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). In evaluating an employer's obligation to fulfill the union's information requests, the Board and courts apply a "discovery type standard," under which the requested information need only be relevant and useful to the union in fulfilling its statutory obligations in order to be subject to disclosure. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Some information in the hands of management is presumptively relevant, e.g., health and safety information. As the Board stated "Few matters can be of greater legitimate concern to individuals in the workplace, and thus to the bargaining agent representing them, than exposure to conditions potentially threatening their health, well-being, or their very lives." *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29 (1982).

Respondents, as noted above, rely on the Sixth Circuit decision in *ASARCO, Inc. v. NLRB*, supra, in claiming that its internal self-critical report should not be required to be turned over as the Sixth Circuit found that the report in the *ASARCO* case need not be turned over. The critical difference, however, is that in the *ASARCO* case the court found that the Union had available to it *all* relevant factual information and did not need to see ASARCO's internal self-critical investigative report. In the instant case there is no evidence that the Union has available to it *all* relevant factual information contained in the King report. Because this is so and because health and safety are so critical, I find that disclosure of the King report to the Union was necessary to and relevant for the Union to perform its duty as collective-bargaining representative.

The Sixth Circuit in *ASARCO* reversed the Board which had found the employer violated the Act in not turning over the internal self-critical report in question. What could be more important to the Union than the health and safety of its members. Turning the King report over to the Union is not the functional equivalent of the United States turning over to the German high command the details of Operation Overlord prior to June 6, 1944. The fact is that when it comes to the health and safety of the employees the Respondents and the Union are on the same side.

Accordingly, Respondents violated Section 8(a)(1) and (5) of the Act when it failed and refused to turn over to the Union in its entirety the Ernest King report on the environmental audit he conducted at the Detroit News Agency and the Detroit Free Press in the fall of 1992.

CONCLUSIONS OF LAW

1. Respondents Detroit Newspaper Agency and the Detroit Free Press are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to provide to the Union an unredacted copy of the report prepared by Ernest King following the environmental audit he conducted in the fall of 1992 Respondents unlawfully refused, and are refusing, to bargain in violation of Section 8(a)(5) and (1) of the Act.

4. The above-unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

Having found Respondents engaged in an unfair labor practice, I find it necessary to order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The order will require Respondents to furnish the Union with an unredacted copy of the King report.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondents, Detroit Newspaper Agency and the Detroit Free Press, Inc., their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with the Union by refusing to provide the Union a complete and unredacted copy of a report prepared by Ernest King following an environmental audit he conducted in the fall of 1992.

(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) On request of the Union, furnish to it within a reasonable time the report referred to in paragraph 1(a), above.

(b) Post at its facilities in Detroit, Michigan, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 7, 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.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] 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.

[2] If this Order is enforced by a judgment of a 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."

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with the Union by refusing to supply it with a complete and unredacted copy of a report prepared by Ernest King following an environmental audit he conducted in the fall of 1992.

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.

WE WILL, on request of the Union, furnish to it the aforementioned report by Ernest King

DETROIT NEWSPAPER AGENCY AND THE DETROIT FREE PRESS, INC.

REVISED (Changes in Bold in Memo and in Attachments 1 and 3)

OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM OM-03-18 **January 13, 2003**

TO: All Regional Directors, Officers-in-Charge, And Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Procedures for Handling Postal Service Cases Involving Refusal to Supply Information and Procedures for Addressing Conduct Covered by Outstanding Court Judgments

This memorandum advises the Regions of (A) certain initiatives being implemented by the United States Postal Service concerning union information requests and new procedures and revised guidelines for Regions to deal with refusal-to-provide-information charges.[1] It also reminds Regions of (B) the procedures for addressing conduct covered by outstanding court judgments.

A. Initiatives Implemented by the USPS and New Procedures and Guidelines for the Regions

The formulation of the initiatives, procedures and guidelines concerning USPS refusal-to-provide-information cases follows a review and analysis by Region 6 and the Division of Operations-Management of such pending cases and discussions with both the USPS and the American Postal Workers Union. We found that the volume of these refusal-to-provide-information charges differs from Region to Region. Some Regions have an inordinate, recurring intake of these charges, despite efforts under the now-terminated 1997 Memorandum of Understanding between the parties. In virtually all these recurring cases, while the information sought is ultimately supplied, the delays in providing it have been substantial. These delays diminish the utility of the information provided, given the short grievance handling times in the collective bargaining agreement. On the other hand, some Regions report few cases, prompt resolutions of these cases, and very little indication of recidivism at the individual facilities or districts.

We have met with the USPS General Counsel, her chief counsel for labor law, and the USPS outside counsel on these cases, regarding recurring charges alleging the USPS' refusal to provide information. They correctly noted that the USPS with

[1] This memorandum does not address the refusal-to-provide-information cases covered by the outstanding complaint in United States Postal Service, Case 5-CA-27954(P), et al.

900,000 employees is the largest employer under our jurisdiction and it annually responds to tens of thousands of information requests. However, they share our concerns that, in the future, all information requests should receive prompt and responsive replies, without the necessity of unfair labor practice charges being filed, and that any charges filed should be promptly and satisfactorily resolved. In this regard, the USPS has committed to undertake a number of initiatives to improve its response to information requests and to unfair labor practice charges. In turn, we have agreed to modify certain Regional Office procedures to facilitate the processing of such charges.

USPS Initiatives

The USPS has made a commitment to enhance its training program for managers and supervisors with respect to the duty to expeditiously supply information that is relevant and necessary for collective bargaining, and to underscore that unprivileged refusals to supply information will not be tolerated. The USPS has committed that once its labor law offices receive a faxed unfair labor practice charge, they will accord the matter much higher priority than in the past. If the charge appears to have merit, the USPS will endeavor to resolve it within 14 calendar days or less, without any further communication from a Board agent. The USPS has also agreed that even after an unfair labor practice charge is filed, representatives of the Local USPS office will continue to consider the request for information, particularly where they recognize that the information should have previously been provided. Accordingly, under these procedures, obvious violations should be promptly resolved and no longer result in substantial delay before the information sought is actually provided.

Regional Office Procedures and Guidelines

In an effort to facilitate compliance with the Act, new pre-filing assistance and new procedures and guidelines for processing USPS refusal-to-provide-information cases should immediately be implemented in all Regional Offices. These new procedures and guidelines are set forth below.

Procedures

When a Region provides pre-filing assistance, it should insure that the unfair labor practice charge contains specific information concerning: 1) the identity of the requester; 2) the person to whom the request was directed; 3) whether the request was oral or in writing; 4) a description of the requested information sought that has not been provided; and 5) the general proffered reason for the request (e.g., contract administration, grievance processing or collective bargaining). If the request is in writing and available to the Region, it should also be faxed to the USPS along with the charge. If unfair labor practice charges are filed without the Region's pre-filing assistance, it will promptly seek an amendment of the charges to add the information listed above, unless the charge is already reasonably clear or the additional

information can easily be provided by telephone. The Region will also fax the unfair labor practice charges to the appropriate USPS labor law office. A list of the fax numbers and areas served by each USPS labor law office is attached to this memorandum as Attachment 1.

Guidelines

We are hopeful that the USPS' renewed promise to both comply with its statutory obligation in this area and to promptly resolve those charges that are filed will succeed where previous efforts have failed. In the meantime, we must handle, in a consistent and effective manner, the cases that are currently on file and those that are yet to come.

In light of our past experience with the USPS, we have determined to modify the procedures outlined in OM 01-91, issued September 25, 2001, for handling these cases filed by APWU. Further, we have concluded that charges alleging refusal-to-provide-information filed by other postal unions should be treated the same since they involve the same employer. Accordingly, the Regions are to process all pending and future refusal-to-provide-information cases filed against the USPS as follows:

(1) Regional Offices should follow the usual policy of increasing the formality required for the resolution of cases with successive unfair labor practice charges involving the same issue with the same employer, even if different facilities are involved.[2] This policy does not apply where the Region in its discretion concludes that the USPS has satisfactorily complied with the 14-calendar day commitment to resolve the information dispute and has extended any time limits on the filing or processing of grievances as appropriate. In such cases, the Regions should accept adjusted withdrawals unless the Region sees a pattern of postponing compliance with the Act until unfair labor practice charges are filed.[3]

(2) As to charges that are not voluntarily resolved by the USPS within 14 days after filing, it is inappropriate, absent special circumstances, to continue to accept adjusted withdrawals in recurring meritorious cases involving refusal-to-provide-information conduct. Several Regions have already crossed this threshold with the USPS and the remaining Regions when faced with such recurring

[2] In making this determination, Regions should note whether the recurring violations are in the same USPS administrative district. A list of USPS administrative districts is attached as Attachment 2. If the violations recur in the same district, a smaller number of violations may trigger the next step of formality than if they recurred in different districts.

[3] Regions should not accept adjusted withdrawals in cases involving conduct potentially violating provisions of outstanding court judgments against the USPS, see Attachment 3, without first contacting Acting Assistant General Counsel Stanley Zirkin or Deputy Assistant General Counsel Ken Shapiro of the Contempt Litigation and Compliance Branch. That Branch may want to consider pursuing contempt action on the conduct.

meritorious charges should now decline to accept any further withdrawals or informal adjustments.

(3) Where the USPS has resolved by adjusted withdrawals recurring meritorious refusal-to-provide-information charges filed with the same Region, particularly involving the same USPS administrative district, Regions should resolve subsequent cases only by informal settlements, first with, and then without, non-admission clauses. Continued violations should be resolved by formal settlements, even if litigation is the only other alternative.

(4) In all settlement agreements, whether informal or formal, Regions should include language stating, "the Respondent agrees that this settlement stipulation may be used in any proceeding before the Board or an appropriate court to show proclivity to violate the Act for purposes of determining an appropriate remedy."

If a Region concludes that departure from the above guidelines is warranted because of special circumstances, it should first consult with Director Gerald Kobell of Region 6, prior to taking any action.[4]

Region 6 will continue to coordinate and monitor processing of USPS refusal-to-provide-information cases. Region 6 will also consider whether consolidation or clustering of cases for trial or seeking remedial relief on a wider basis is appropriate. In order to maintain oversight of these cases, each Region should send Region 6 copies of dispositions (withdrawal approval letters, settlement agreements, draft complaints, and ALJDs) in all refusal-to-provide-information cases filed against the USPS.

In addition, please be careful to input all data regarding these cases, timely and accurately, into the CATS system. Such data will help us monitor the volume of activity as to these refusal-to-provide-information charges. The naming convention for all cases involving the USPS should be United States Postal Service. Be sure to specify that the case includes a refusal-to-provide-information allegation.

As with all charges that are transferred pursuant to the Interregional Assistance Program (IRAP), refusal-to-provide-information cases filed against the USPS should not be transferred if it appears that the charge is meritorious. We understand that it is difficult to determine simply from the face of a charge whether a charge will have merit, but past case activity may be helpful in making a preliminary determination. In any event, if a refusal-to-provide-information case is transferred pursuant to IRAP and is found to have merit, the case should be returned to the sending Region for further processing, including approval of an adjusted withdrawal or settlement.

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[4] Special circumstances could be, for example, that the recurring charges arose in facilities a great distance from each other, although still in the same NLRB Region.

(B) Procedures for Addressing Conduct Covered by Outstanding Court Judgments

Standard procedure in all cases involving conduct violating negative or affirmative provisions of outstanding court judgments requires that the investigating Region refer such cases to the Contempt Litigation and Compliance Branch, prior to taking any final action.[5] See Casehandling Manual – Compliance, Section 10592. We have learned that some Regions have taken action in cases against the USPS, without following these procedures.

In order to assist Regions in complying with these requirements, attached to this memorandum are lists of outstanding court judgments against the USPS (Attachments 3 and 4). Attachment 3 lists court judgments involving refusal-to-provide-information violations. **Prior to taking any final action on cases involving the violation of any provision(s) of these court judgments involving refusal-to-provide-information violations, Regions should contact the Contempt Litigation and Compliance Branch.**[6]

Attachment 4 lists court judgments against the USPS involving violations of Sections 8(a)(1), (3) and (4) other than refusal-to-provide-information.[7] **For any cases involving conduct, which may be violative of court judgments against the USPS in other than refusal-to-provide-information cases, Regions should investigate such cases and if a Region determines that the charge has merit, the Region should submit the case to the Contempt Litigation and Compliance Branch to determine whether contempt proceedings are appropriate. When submitting the case to Contempt Litigation and Compliance Branch, the Region should include a memorandum summarizing the results of the investigation and the Region's analysis of the merits and including a recommendation as to whether the initiation of contempt proceedings would be appropriate.**

If you have any questions concerning this memorandum, please contact Regional Director Gerald Kobell or Deputy Assistant General Counsel Jane Schnabel. Questions concerning possible contempt action should be directed to Acting Assistant

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[5] "Final action" includes dismissal, issuance of complaint, solicitation or approval of any type of settlement including "non-Board adjustments," or Collyer or any other type of deferral.

[6] Regions are reminded that any refusal to furnish information would potentially violate the judgments listed in Attachment 3; that is, the information requested need not be identical or even similar to that which underlay the judgment.

[7] Except for court judgment (4) on Attachment 4, each of the court judgments listed on both attachments relates only to the specific USPS location noted under the respective court judgment. However, as indicated, court judgment (4) on Attachment 4 contains nationwide cease and desist orders and notice provisions relating to Weingarten violations.

General Counsel Stanley Zirkin or Deputy Assistant General Counsel Ken Shapiro of the Contempt Litigation and Compliance Branch.

/s/
R. A. S.

cc: NLRBU
Attachment

Release to Public

MEMORANDUM OM 03-18