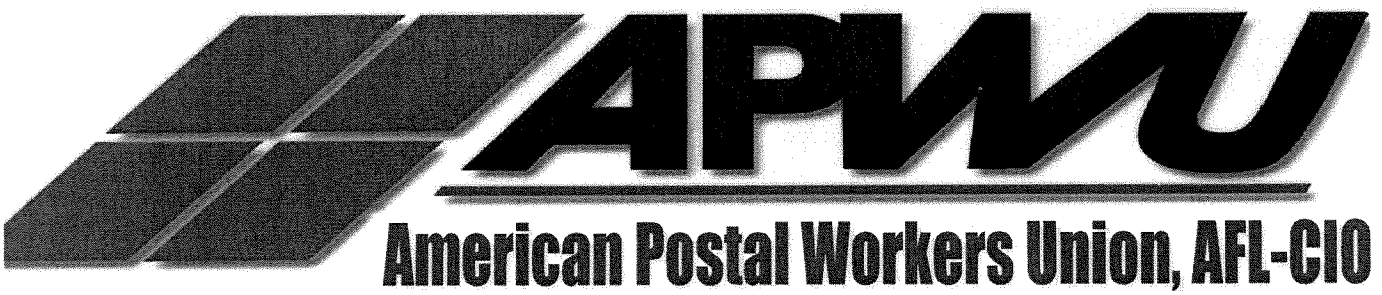

ALL-CRAFT CONFERENCE

Las Vegas, NV

November 5-8, 2007

LEGAL RIGHTS & RESPONSIBILITIES

Instructors:
Lee W. Jackson and Jennifer E. Ku
O'Donnell, Schwartz & Anderson, P.C.

wj/opeiu #2/afl-cio

AMERICAN POSTAL WORKERS UNION, AFL-CIO

William Burrus, President

2007 ALL-CRAFT CONFERENCE
Las Vegas, NV
November 2007

Legal Rights and Responsibilities

Presented by:

Lee W. Jackson
Jennifer E. Ku

O'Donnell, Schwartz & Anderson, P.C.
Washington, DC

Legal Rights and Responsibilities

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WEINGARTEN RIGHTS

Chapter 5:
Weingarten Rights

(UNION REPRESENTATION DURING INVESTIGATORY INTERVIEWS)

A VITAL FUNCTION of a steward is to prevent management from coercing employees into confessions of misconduct. This is especially important when a worker is questioned by a supervisor experienced in interrogation techniques.

The NLRA's protection of concerted activity includes the **right to request assistance from union representatives during investigatory interviews**. This was declared by the Supreme Court in 1975 in *NLRB v. J. Weingarten, Inc.*[1] The rights announced by the Court have become known as *Weingarten* rights.

Unions should educate their members about the advantages of having a steward present at an investigatory interview. These include the ability of the steward to:

- serve as a witness to prevent a supervisor from giving a false account of the conversation;
- object to intimidation tactics or confusing questions;
- help an employee to avoid making fatal admissions;
- advise an employee, when appropriate, against denying everything, thereby giving the appearance of dishonesty and guilt;
- warn an employee against losing his or her temper;
- discourage an employee from informing on others; and
- raise extenuating factors.

[1] NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

WHAT IS AN INVESTIGATORY INTERVIEW?

Weingarten rights apply only during investigatory interviews. An investigatory interview occurs when: **(1) management questions an employee** to obtain information; and **(2)** the employee **has a reasonable belief that discipline or other adverse consequences may result.** For example, an employee questioned about an accident would be justified in fearing that she might be blamed for it. An employee questioned about poor work would have a reasonable fear of disciplinary action if he should admit to making errors.

Shop-floor conversation. Not every discussion with management is an investigatory interview. For instance, a supervisor may speak with an employee about the proper way to do a job. The supervisor may even ask questions. But because the likelihood of discipline is remote, the conversation is not an investigatory interview.

A shop-floor conversation can change its character, however. If the supervisor's attitude becomes hostile and the meeting turns into an investigatory interview the employee is entitled to representation.

Disciplinary announcement. When a supervisor calls an employee to the office to announce a warning or other discipline, is this an investigatory interview? The NLRB says no, because the supervisor is merely informing the employee of an already-made decision.[2] Unless the supervisor asks questions about the employee's conduct, the meeting is not investigatory.

What is the Meeting About?

One factor used to determine whether or not the employee had a reasonable belief in potential disciplinary action is the substantive content of the meeting itself. If the purpose of a meeting or interview was to ***investigate alleged misconduct*** on the part of an employee which involves theft, fraud, or other acts of dishonesty, that may create a reasonable belief that discipline may be administered. Weingarten itself involved a case of suspected theft. Weingarten 420 US 251. The Board has also found a reasonable fear where employees were being investigated for installing unauthorized telephone equipment, Pacific Tel. & Tel. Co., 711 F2d 134 (1983), and where the purpose of the interview was to secure a statement from the employee regarding the employee's allegedly fraudulent reimbursement claim. Detroit Edison Co., 217 NLRB 622 (1975).

If the purpose of a meeting or interview was to ***investigate an employee's work performance***, that may create a reasonable belief that discipline may be administered. The Board found that where an employee was going to be investigated for poor performance at a hog plant, he had a reasonable belief in potential disciplinary action. Kahns and Company, 253 NLRB 25 (1980). enfd. in relevant part. One court has found, however, that:

> a supervisory interview in which the employee is questioned or instructed about work performance inevitably carries with it the threat that if the employee cannot or will not

[2] Baton Rouge Water Works Co., 246 NLRB 995, 103 LRRM 1056 (U.S. Sup. Ct. 1979).

> comply with a directive, discharge or discipline may follow; but that latent threat, without more, does not invoke the right to the assistance of a union representative. Alfred M. Lewis, Inc. v NLRB, 598 F2d 478 (9th Cir. 1978).

In that case, the court ultimately affirmed the Board's judgment that the employee possessed a reasonable fear, because the system of "counseling" established by the employer was actually an "integral part" of the disciplinary system. In other words, these meetings or "counseling sessions" were the first step in a disciplinary investigation.

Another court has refused to enforce a Board finding that a postal employee possessed a reasonable fear of disciplinary action in a meeting concerning work performance. NLRB v. USPS, 689 F.2d 835 (9th Cir. 1982). In that case, the employee was told specifically that the meeting was only a "discussion" and that no disciplinary action would come out of it. The court said that the employee "could not reasonably fear that he would be disciplined" because he had been told that he would not be. Id., at 838-839.

The fact that ***the meeting took place in a place where discipline is normally meted out*** can support a reasonable fear. NLRB v. Potter Electric Signal Co. (8th Cir. 1979)(interviews took place in company cafeteria and employees were aware that cafeteria was customarily used as the place to investigate and to administer discipline). However, a court has refused to enforce a Board finding of "reasonable fear" where the manager's office was the convenient, logical location for a meeting. NLRB v. Certified Grocers of California, Ltd., 587 F2d 449 (9th Cir. 1978).

EMPLOYEE RIGHTS

Under the Supreme Court's Weingarten decision, the following rules apply to investigatory interviews:

- The **employee can request union representation before or at any time during the interview**.

- When an employee asks for representation, the employer must choose from among three options:

    1. Grant the request and delay questioning until the union representative arrives;

    2. Deny the request and end the interview immediately; or

    3. Give the employee a choice of: (a) having the interview without representation or (b) ending the interview.

EDUCATING MEMBERS

Employees sometime confuse Weingarten rights with Miranda rights. Under the Supreme Court's Miranda decision, police who question criminal suspects in custody must notify them of their right to have a lawyer present. The Supreme Court did not impose a similar requirement in Weingarten. An ***employer does not have to inform*** an employee that he or she has a right to union representation. In other words, **ASK for a union representative.**

Unions should explain Weingarten rights to members in newsletters and at union meetings. Consider distributing wallet-sized cards such as the following:

WEINGARTEN CARD

(If called to a meeting with management, read the following or present this card to management when the meeting begins.)

If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I respectfully request that my union representative, officer, or steward be present at this meeting.

Until my representative arrives, I choose not to participate in this discussion.

NLRB CHARGES

An employer's failure to comply with a worker's request for union representation, or a violation of any other Weingarten right, is an unfair labor practice. Unless a grievance is pending on the matter, the NLRB does not defer Weingarten charges.[3]

QUESTIONS AND ANSWERS

COERCION

Q. An employee, summoned to a meeting with her supervisor, asked for her steward. The supervisor said, "You can request your steward, but if you do, I will have to bring in the plant manager and you know how temperamental she is. If we can keep it at this level, things will be better for you." Is this a Weingarten violation?

A. Yes. The supervisor is raising the specter of increased discipline to coerce an employee into abandoning her Weingarten rights.[4]

CAN EMPLOYEE REFUSE TO GO TO MEETING?

Q. A supervisor told an employee to report to the personnel office for a "talk" about his attendance. The employee asked to see his steward but the supervisor said no. Can the employee refuse to go to the office without seeing his steward first?

A. No. Weingarten rights do not arise until an investigatory interview actually begins. The employee must make a request for representation to the person conducting the interview.[5]

MEDICAL EXAMINATION

Q. Our employer requires medical examinations when workers return from medical leaves. Can an employee insist on a steward during the examination?

A. No. A run-of-the-mill medical examination is not an investigatory interview.[6]

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[3] See Amoco Oil Co., 278 NLRB 1, 2-3, 121 LRRM 1308 (1986).
[4] Southwestern Bell Telephone Co., 227 NLRB 1223, 94 LRRM 1305 (1977).
[5] Joseph F. Whelan Co., 273 NLRB 340, 118 LRRM 1040 (1984); Roadway Express, 246 NLRB 1127, 103 LRRM 1050 (1979).
[6] U.S. Postal Service, 252 NLRB 61, 105 LRRM 1200 (1980).

LIE DETECTOR TEST

Q. Do Weingarten rights apply to polygraph tests?

A. Yes. An employee has a right to union assistance during the pre-examination interview and the test itself.[7]

SOBRIETY TEST

Q. If management asks an employee if he will submit to a test for alcohol, does Weingarten apply?

A. Yes. The employee must be allowed to consult with a union representative to decide whether or not to take the test.[8]

LOCKER SEARCH

Q. If a guard orders an employee to open a locker, can the employee insist on a steward being present?

A. No. A locker search is not an investigatory interview.[9]

COUNSELING SESSION

Q. An employee was given a written warning for poor attendance and told she must participate in counseling with the human relations department. Does she have a right to a union steward at the counseling sessions?

A. This depends. If notes from the sessions are kept in the employee's permanent record, or if other employees have been disciplined for what they said at counseling sessions, an employee's request for a steward would come under Weingarten.[10] But if management gives a firm assurance that the meetings will not be used for discipline, and promises that the conversations will remain confidential, Weingarten rights would probably not apply.[11]

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[7] Consolidated Casinos Corp., 266 NLRB 988, 1008-10, 113 LRRM 1081 (1983).
[8] System 99, 289 NLRB 723, 131 LRRM 1226 (1988).
[9] See E.I. du Pont de Nemours & Co., 100 LRRM 1633 (Advice Memorandum 1981) (car search); Chrysler Corp. (Advice Memorandum 1981) (cited in Walnut Hill Convalescent Home, 114 LRRM 1255 (Advice Memorandum 1983) (handbag search)).
[10] Good Hope Refineries, Inc., 245 NLRB 380, 382-84, 102 LRRM 1302 (1979).
[11] Amoco Chemicals Corp., 237 NLRB 394, 396-98, 99 LRRM 1017 (1978).

PRIVATE ATTORNEY

Q. Can a worker insist on a private attorney before answering questions at an investigatory interview?

A. No. Weingarten only guarantees the presence of a union representative.[12]

STEWARD OUT SICK

Q. If a worker's steward is out sick, can the worker insist that a Weingarten interview be delayed until the steward returns?

A. Usually, no. Management does not have to delay an investigation if another union representative is available to assist the employee.[13]

INTERROGATION OF A STEWARD

Q. If a steward is called in by supervision to discuss her work, can she insist on the presence of another steward?

A. Yes. Stewards have the same rights to assistance as other employees.[14]

SHOP MEETING

Q. When management calls a meeting to go over work rules, do employees have a right to demand a union representative?

A. No. Weingarten rights do not arise unless management asks questions of an investigatory nature.[15]

REMEDIES

Q. If management rejects a worker's request for union assistance at an investigatory interview, induces him to confess to wrongdoing, and fires him, will the NLRB order the worker reinstated because of the Weingarten violation?

A. No. The NLRB considers reinstatement to be an unwarranted "windfall" for an employee who confesses to serious misconduct.[16] The usual Weingarten remedy is a bulletin-board posting in

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[12] TCC Center Companies, 275 NLRB 604, 119 LRRM (1985).
[13] Coca-Cola Bottling Co. 227 NLRB 1276, 94 LRRM 1200 (1977).
[14] Keystone Consolidated Industries, Inc., 217 NLRB 995, 89 LRRM 1192 (1975).
[15] Northwest Engineering Co., 265 NLRB 190, 111 LRRM 148 (1982).

which the employer acknowledges that it violated the Weingarten rules and promises to obey them in the future.

NOTE: The remedy is different when an employee is discharged for requesting a steward. In such cases, the NLRB orders reinstatement with back pay.[17] A make-whole remedy is also imposed if an employee is demoted, transferred, or loses privileges because of a request for union representation.

RECORDING THE INTERVIEW

Q. Can a supervisor tape record an investigatory interview?

A. This depends. The Weingarten decision itself does not forbid an employer from tape recording an investigatory interview. But, if this represents a new policy on the part of the employer, the steward can object on the grounds that the union did not receive prior notice and an opportunity to bargain.[18]

PARTICULAR REPRESENTATIVE

Q. If an employee asks to be represented by her chief steward instead of her departmental steward, must management comply?

A. Usually, yes. If two representatives are equally available, an employee's request for a particular representative must be honored.[19]

QUESTIONS ABOUT OTHERS

Q. If a worker is summoned to a meeting and asked about the role of other employees in illegal activities, can he insist on assistance from a union representative?

A. Yes. Although the employee may not be involved in wrongdoing himself, he risks discipline if he refuses to inform on others or admits that he was aware of illegal activities. Because what he says at the meeting could get him into trouble, he is entitled to union representation.

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[16] Taracorp, Inc. 273 NLRB 221, 117 LRRM 1497 (1984).
[17] Safeway Stores, 303 NLRB 989, 138 LRRM 1007 (1991).
[18] Cf. Pennsylvania Telephone Guild, 277 NLRB 501, 120 LRRM 1257 (1985), enforced, 799 F.2d 84, 123 LRRM 2214 (3d Cir. 1986).
[19] Consolidated Coal Co., 307 NLRB 976, 977-78, 140 LRRM 1248 (1992).

CHIEF POSTAL INSPECTOR
Washington, DC 20260

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,

K. H. Fletcher

settlement by an Act of Congress . . . approved July first, eighteen hundred and ninety-two, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act approved June twenty-first nineteen hundred and six, ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one, three hundred thousand dollars . . . ." 34 Stat. 1050–1051.

Thus the Court rests its decision in this case on two legislative pronouncements. The first is the 1906 Act authorizing payment of money to the Colvilles and reciting that the authorization was made to "carry into effect" the 1891 Agreement. The second is the series of Acts appropriating funds to cover the 1906 authorization and referring to the authorization as "ratifying the agreement ceding said land." On the basis of these Acts, both of which are part of the mechanism by which Congress expends public funds, the Court has concluded that provisions of the 1891 Agreement utterly unrelated to the payment of money became the supreme law of the land, even though there is no indication that the Colvilles sought any relief other than with respect to the Government's failure to pay compensation, or that Congress intended any relief affecting the *use* of land it quite plainly had determined should be returned to the public domain.

A far more reasoned interpretation of these legislative materials would begin by placing them in the context of the Executive/Legislative dispute over Indian policy and authority. A year after the signing of the 1891 Agreement, Congress clearly indicated its doubt as to whether President Grant was justified in setting aside three million acres for the Colvilles, and as to whether his Executive Order actually conveyed title. In the Act of July 1, 1892, Congress chose to take what the Indians had expressed a willingness to surrender, but to give only part of what the Commissioners had agreed the Government should give in return. The Colvilles, after a 14-year battle in and around the legislative halls of Congress, obtained the monetary relief which they sought. Sympathy with their plight should not lead us now to distort what is on its face no more than congressional response to demands for payment into congressional enactment of the entire 1891 Agreement.

I would affirm the judgment of the Supreme Court of Washington.

420 U.S. 251, 43 L.Ed.2d 171

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

J. WEINGARTEN, INC.

No. 73–1363.

Argued Nov. 18, 1974.

Decided Feb. 19, 1975.

National Labor Relations Board sought enforcement of an order determining that employer had committed an unfair labor practice. The Court of Appeals for the Fifth Circuit, 485 F.2d 1135, denied enforcement and certiorari was granted. The Supreme Court, Mr. Justice Brennan, held that employer's denial of employee's request that union representative be present at investigatory interview which employee reasonably believed might result in disciplinary action interfered with, restrained and coerced employee's right to engage in concerted activities for mutual aid or

protection and constituted an unfair labor practice.

Reversed and remanded with direction.

Mr. Justice Powell, with whom Mr. Justice Stewart joined, dissented and filed opinion.

For separate dissenting opinion by Mr. Chief Justice Burger see 95 S.Ct. 976.

1. Labor Relations ⇐366

Employer's denial of employee's request that union representative be present at investigatory interview which employee reasonably believed might result in disciplinary action interfered with, restrained and coerced employee's right to engage in concerted activities for mutual aid or protection and constituted an unfair labor practice. National Labor Relations Act, §§ 7, 8(a)(1) as amended 29 U.S.C.A. §§ 157, 158(a)(1).

2. Labor Relations ⇐623

Determination of National Labor Relations Board that employer's denial of employee's request that union representative be present at investigatory interview which employee reasonably believed might result in disciplinary action constituted an unfair labor practice was not foreclosed by prior decisions of the Board which could be read as reaching a contrary conclusion. National Labor Relations Act, §§ 7, 8(a)(1) as amended 29 U.S.C.A. §§ 157, 158(a)(1).

3. Labor Relations ⇐505

National Labor Relations Board has responsibility to adapt National Labor Relations Act to changing patterns of industrial life. National Labor Relations Act, § 1 as amended 29 U.S.C.A. § 151.

4. Labor Relations ⇐671

It is province of National Labor Relations Board, not the courts, to determine whether need for union assistance at an investigatory interview which employee reasonably believes might result in disciplinary action exists in light of changed industrial practices and Board's cumulative experience in dealing with labor-management relations. National Labor Relations Act, §§ 1, 7 as amended 29 U.S.C.A. §§ 151, 157.

5. Labor Relations ⇐505

National Labor Relations Board has special function of applying general provisions of National Labor Relations Act to the complexities of industrial life. National Labor Relations Act, § 1 as amended 29 U.S.C.A. § 151.

6. Labor Relations ⇐679

Special competence of National Labor Relations Board in applying provisions of National Labor Relations Act to complexities of industrial life was justification for according deference to its determination that employer's denial of employee's request that union representative be present at an investigatory interview which employee reasonably believed might result in disciplinary action constituted an unfair labor practice. National Labor Relations Act, §§ 7, 8(a)(1) as amended 29 U.S.C.A. §§ 157, 158(a)(1).

Syllabus *

During the course of an investigatory interview at which an employee of respondent was being interrogated by a representative of respondent about reported thefts at respondent's store, the employee asked for but was denied the presence at the interview of her union representative. The union thereupon filed an unfair labor practice charge with the National Labor Relations Board (NLRB). In accordance with its construction in Mobil Oil Corp., 196 N.L.R.B. 1052, enforcement denied, 7 Cir., 482 F.2d 842, and Quality Mfg. Co., 195 N.L.R.B. 197, enforcement denied, 4 Cir., 481 F.2d 1018,

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

rev'd, 420 U.S. 276, 95 S.Ct. 972, 43 L.Ed.2d 189, the NLRB held that the employer had committed an unfair labor practice and issued a cease-and-desist order, which, however, the Court of Appeals subsequently refused to enforce, concluding that an employee has no "need" for union assistance at an investigatory interview. *Held:* The employer violated § 8(a)(1) of the National Labor Relations Act because it interfered with, restrained, and coerced the individual right of an employee, protected by § 7, "to engage in . . . concerted activities for . . . mutual aid or protection . . . ," when it denied the employee's request for the presence of her union representative at the investigatory interview that the employee reasonably believed would result in disciplinary action. Pp. 963–969.

(a) The NLRB's holding is a permissible construction of "concerted activities for . . . mutual aid or protection" by the agency charged by Congress with enforcement of the Act. Pp. 965–967.

(b) The NLRB has the "special function of applying the general provisions of the Act to the complexities of industrial life," NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 83 S.Ct. 1139, 1149, 10 L.Ed.2d 308, and its special competence in this field is the justification for the deference accorded its determination. Pp. 967–969.

485 F.2d 1135, reversed and remanded.

Patrick H. Hardin, Washington, D. C., for petitioner.

Neil Martin, Houston, Tex., for respondent.

Mr. Justice BRENNAN delivered the opinion of the Court. [252]

The National Labor Relations Board held in this case that respondent employer's denial of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of § 8(a)(1) of the National Labor Relations Act,[1] as amended, 61 Stat. 140, because it interfered with, restrained, and coerced the individual right of the employee, protected by § 7 of the Act, "to engage in . . . concerted activities for . . . mutual aid or protection . . . ."[2] 202 N.L.R.B. 446 (1973). The Court of Appeals for [253] the Fifth Circuit held that this was an impermissible construction of § 7 and refused to enforce the Board's order that directed respondent to cease and desist from requiring any employee to take part in an investigatory interview without union representation if the employee requests representation and reasonably fears disciplinary action. 485 F.2d 1135 (1973).[3] We granted certiorari and set

1. Section 8(a)(1), 29 U.S.C. § 158(a)(1); provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

2. Section 7, 29 U.S.C. § 157, provides:
"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

3. Accord: NLRB v. Quality Mfg. Co., 481 F.2d 1018 (CA4 1973), rev'd, Garment Workers v. Quality Mfg. Co., 420 U.S. 276, 95 S.Ct. 972, 43 L.Ed.2d 189; Mobil Oil Corp. v. NLRB, 482 F.2d 842 (CA7 1973). The issue is a recurring one. In addition to this case and Garment Workers v. Quality Mfg. Co., 420 U.S. 276, 95 S.Ct. 972, 43 L.Ed.2d 189, see Western Electric Co., 205 N.L.R.B. 46 (1973); New York Telephone Co., 203 N.L.R.B. 180 (1973); National Can Corp., 200 N.L.R.B. 1116 (1972); Western Electric Co., 198 N.L.R.B. 82 (1972); Mobil Oil Corp., 196 N.L.R.B. 1052 (1972), enforcement denied, 482 F.2d 842 (CA7 1973);

the case for oral argument with No. 73-765, Garment Workers v. Quality Mfg. Co., 420 U.S. 276, 95 S.Ct. 972, 43 L.Ed. 2d 189; 416 U.S. 969, 94 S.Ct. 1990, 40 L.Ed.2d 557 (1974). We reverse.

[254] I

Respondent operates a chain of some 100 retail stores with lunch counters at some, and so-called lobby food operations at others, dispensing food to take out or eat on the premises. Respondent's sales personnel are represented for collective-bargaining purposes by Retail Clerks Union, Local 455. Leura Collins, one of the sales personnel, worked at the lunch counter at Store No. 2 from 1961 to 1970 when she was transferred to the lobby operation at Store No. 98. Respondent maintains a companywide security department staffed by "Loss Prevention Specialists" who work undercover in all stores to guard against loss from shoplifting and employee dishonesty. In June 1972, "Specialist" Hardy, without the knowledge of the store manager, spent two days observing the lobby operation at Store No. 98 investigating a report that Collins was taking money from a cash register. When Hardy's surveillance of Collins at work turned up no evidence to support the report, Hardy disclosed his presence to the store manager and reported that he could find nothing wrong. The store manager then told him that a fellow lobby employee of Collins had just reported that Collins had purchased a box of chicken that sold for $2.98, but had placed only $1 in the cash register. Collins was summoned to an interview with Specialist Hardy and the store manager, and Hardy questioned her. The Board found that several times during the questioning she asked the store manager to call the union shop steward or some other union representative to the interview, and that her requests were denied. Collins admitted that she had purchased some chicken, a loaf of bread, and some cake which she said she paid for and donated to her church for a church dinner. She explained that she purchased four pieces of chicken for which the price was $1, but that because the lobby department was out of [255] the small-size boxes in which such purchases were usually packaged she put the chicken into the larger box normally used for packaging larger quantities. Specialist Hardy left the interview to check Collins' explanation with the fellow employee who had reported Collins. This employee confirmed that the lobby department had run out of small boxes and also said that she did not know how many pieces of chicken Collins had put in the larger box. Specialist Hardy returned to the interview, told Collins that her explanation had checked out, that he was sorry if he had inconvenienced her, and that the matter was closed.

Collins thereupon burst into tears and blurted out that the only thing she had ever gotton from the store without paying for it was her free lunch. This revelation surprised the store manager and Hardy because, although free lunches had been provided at Store No. 2 when Collins worked at the lunch counter there, company policy was not to provide free lunches at stores operating lobby departments. In consequence, the store manager and Specialist Hardy closely

Lafayette Radio Electronics, 194 N.L.R.B. 491 (1971); Illinois Bell Telephone Co., 192 N.L.R.B. 834 (1971); United Aircraft Corp., 179 N.L.R.B. 935 (1969), aff'd on another ground, 440 F.2d 85 (CA2 1971); Texaco, Inc., Los Angeles Terminal, 179 N.L.R.B. 976 (1969); Wald Mfg. Co., 176 N.L.R.B. 839 (1969), aff'd on other grounds, 426 F.2d 1328 (CA6 1970); Dayton Typographic Service, Inc., 176 N.L.RB 357 (1969); Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968); Chevron Oil Co., 168 N.L.R.B. 574 (1967); Texaco, Inc., Houston Producing Division, 168 N.L.R.B. 361 (1967), enforcement denied, 408 F.2d 142 (CA5 1969); Electric Motors & Specialties, Inc., 149 N.L.R.B. 1432 (1964); Dobbs Houses, Inc., 145 N.L.R.B. 1565 (1964); Ross Gear & Tool Co., 63 N.L.R.B. 1012 (1945), enforcement denied, 158 F.2d 607 (CA7 1947). See generally Brodie, Union Representation and the Disciplinary Interview, 15 B.C.Ind. & Com.L. (1973); Comment, Union Presence in Disciplinary Meetings, 41 U.Chi.L.Rev. 329 (1974).

interrogated Collins about violations of the policy in the lobby department at Store No. 98. Collins again asked that a shop steward be called to the interview, but the store manager denied her request. Based on her answers to his questions, Specialist Hardy prepared a written statement which included a computation that Collins owed the store approximately $160 for lunches. Collins refused to sign the statement. The Board found that Collins, as well as most, if not all, employees in the lobby department of Store No. 98, including the manager of that department, took lunch from the lobby without paying for it, apparently because no contrary policy was ever made known to them. Indeed, when company headquarters advised Specialist Hardy by telephone during
|256 the interview that |headquarters itself was uncertain whether the policy against providing free lunches at lobby departments was in effect at Store No. 98, he terminated his interrogation of Collins. The store manager asked Collins not to discuss the matter with anyone because he considered it a private matter between her and the company, of no concern to others. Collins, however, reported the details of the interview fully to her shop steward and other union representatives, and this unfair labor practice proceeding resulted.[4]

II

The Board's construction that § 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 was announced in its decision and order of January 28, 1972, in Quality Mfg. Co., 195 N.L.R.B. 197, considered in Garment Workers v. Quality Mfg. Co., 420 U.S. 276, 95 S.Ct. 972, 43 L.Ed. 2d 189. In its opinions in that case and in Mobil Oil Corp., 196 N.L.R.B. 1052, decided May 12, 1972, three months later, the Board shaped the contours and limits of the statutory right.

First, the right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection. In *Mobil Oil*, the Board stated:

> "An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for |'mutual aid and protection.' |257 The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action." *Ibid.*

Second, the right arises only in situations where the employee requests representation. In other words, the employee may forgo 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

4. The charges also alleged that respondent had violated § 8(a)(5) by unilaterally changing a condition of employment when, the day after the interview, respondent ordered discontinuance of the free lunch practice. Because respondent's action was an arbitrable grievance under the collective-bargaining agreement, the Board, pursuant to the deferral-to-arbitration policy adopted in Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), "dismissed" the § 8(a)(5) allegation. No issue involving that action is before us.

believes the investigation will result in disciplinary action.[5] Thus the Board stated in *Quality:*

"We would not apply the rule to such
[258] run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative." 195 N.L.R.B., at 199.

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 forgoing any benefits that might be derived from one. As stated in *Mobil Oil:*

"The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview
[259] unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources.' 196 N.L.R.B., at 1052.

The Board explained in *Quality:*

"This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview." 195 N.L.R.B., at 198–199.

5. The Board stated in *Quality*: " 'Reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case." 195 N.L.R.B. 197, 198 n. 3. In NLRB v. Gissel Packing Co., 395 U.S. 575, 608, 89 S.Ct. 1918, 1937, 23 L.Ed.2d 547 (1969), the Court announced that it would "reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry," and we reaffirm that view today as applicable also in the context of this case. Reasonableness, as a standard, is prescribed in several places in the Act itself. For example, an employer is not relieved of reponsibility for discrimination against an employee "if he has reasonable grounds for believing" that certain facts exist, §§ 8(a)(3)(A), (B), 29 U.S.C. §§ 158(a)(3)(A), (B); also, preliminary injunctive relief against certain conduct must be sought if "the officer or regional attorney to whom the matter may be referred has reasonable cause to believe" such charge is true, § 10(*l*), 29 U.S.C. § 160(*l*). See also Congoleum Industries, Inc., 197 N.L.R.B. 534 (1972); Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963), enforced, 351 F.2d 917 (CA6 1965).

The key objective fact in this case is that the only exception to the requirement in the collective-bargaining agreement that the employer give a warning notice prior to discharge is "if the cause of such discharge is dishonesty." Accordingly, had respondent been satisfied, based on its investigatory interview, that Collins was guilty of dishonesty, Collins could have been discharged without further notice. That she might reasonably believe that the interview might result in disciplinary action is thus clear.

Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. The Board said in *Mobil*, "we are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations." 196 N.L.R.B., at 1052 n. 3. The Board thus adhered to its decisions distinguishing
260 between disciplinary and investigatory interviews, imposing a mandatory affirmative obligation to meet with the union representative only in the case of the disciplinary interview. Texaco, Inc., Houston Producing Division, 168 N.L.R.B. 361 (1967); Chevron Oil Co., 168 N.L.R.B. 574 (1967); Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968). The employer has no duty to bargain with the union representative at an investigatory interview. "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." Brief for Petitioner, at 22.

III

[1] The Board's holding is a permissible construction of "concerted activities for . . . mutual aid or protection" by the agency charged by Congress with enforcement of the Act, and should have been sustained.

The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." Mobil Oil Corp. v. NLRB, 482 F.2d 842, 847 (CA7 1973). This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding 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 261 unjustly.[6] 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. Concerted activity for mutual aid or protection is therefore as present here as it was held to be in NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505–506 (CA2 1942), cited with approval by this Court in Houston Contractors Assn. v. NLRB, 386 U.S. 664, 668–669, 87 S.Ct. 1278, 1280–1281, 18 L.Ed.2d 389 (1967):

> "'When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.'"

6. "The quantum of proof that the employer considers sufficient to support disciplinary action is of concern to the entire bargaining unit. A slow accretion of custom and practice may come to control the handling of disciplinary disputes. If, for example, the employer adopts a practice of considering [a] foreman's unsubstantiated statements sufficient to support disciplinary action, employee protection against unwarranted punishment is affected. The presence of a union steward allows protection of this interest by the bargaining representative." Comment, Union Presence in Disciplinary Meetings, 41 U. Chi.L.Rev. 329, 338 (1974).

The Board's construction plainly effectuates the most fundamental purposes of the Act. In § 1, 29 U.S.C. § 151, the Act declares that it is a goal of national labor policy to protect "the exercise by
[262] workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection." To that end the Act is designed to eliminate the "inequality of bargaining power between employees . . . and employers." *Ibid.* Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." American Ship Building Co. v. NLRB, 380 U.S. 300, 316, 85 S.Ct. 955, 966, 13 L.Ed.2d 855 (1965). Viewed in this light, the Board's recognition that § 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section " 'read in the light of the mischief to be corrected and the end to be attained.' " NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124, 64 S.Ct. 851, 857, 88 L.Ed. 1170 (1944).

The Board's construction also gives recognition to the right when it is most useful to both employee and employer.[7] A single employee confronted by an employer investigating whether certain [263] conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or other-

7. See, *e. g.*, Independent Lock Co., 30 Lab. Arb. 744, 746 (1958):
"[Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising . . . . [It] can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to bear on the problem."

See also Caterpillar Tractor Co., 44 Lab.Arb. 647, 651 (1965):
"The procedure . . . contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. Similarly, there exists the responsibility upon management to withhold disciplinary action, or other decisions affecting the employees, where it can be demonstrated at the outset that such action is unwarranted. The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and presuasion conducted at the threshold of an impending grievance. It is entirely logical that the steward will employ his office in appropriate cases so as to limit formal grievances to those which involve differences of substantial merit. Whether this objective is accomplished will depend on the good faith of the parties, and whether they are amenable to reason and persuasion."

wise disciplined.[8] At that point, however, it becomes increasingly difficult for the employee to vindicate himself, 264 and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.

IV

The Court of Appeals rejected the Board's construction as foreclosed by that court's decision four years earlier in Texaco, Inc., Houston Producing Division v. NLRB, 408 F.2d 142 (5 Cir. 1969), and by "a long line of Board decisions, each of which indicates—either directly or indirectly—that no union representative need be present" at an investigatory interview. 485 F.2d, at 1137.

The Board distinguishes *Texaco* as presenting not the question whether the refusal to allow the employee to have his union representative present constituted a violation of § 8(a)(1) but rather the question whether § 8(a)(5) precluded the employer from refusing to deal with the union. We need not determine whether *Texaco* is distinguishable. Insofar as the Court of Appeals there held that an employer does not violate § 8(a)(1) if he denies an employee's request for union representation at an investigatory interview, and requires him to attend the interview alone, our decision today reversing the Court of Appeals' judgment based upon *Texaco* supersedes that holding.

In respect of its own precedents, the Board asserts that even though some "may be read as reaching a contrary conclusion," they should not be treated as impairing the validity of the Board's construction, because "[t]hese decisions do not reflect a considered analysis of the issue." Brief for Petitioner 25.[9] In that circumstance, and in the light of 265 significant developments in industrial life believed by the Board to have warranted a reappraisal of the question,[10] the Board argues that the case is one where "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed its standards on the basis of accumulating experience." Electrical Workers v. NLRB, 366 U.S. 667, 674, 81 S.Ct. 1285, 1290, 6 L.Ed.2d 592 (1961).

[2] We agree that its earlier precedents do not impair the validity of the Board's construction. That construction in no wise exceeds the reach of § 7, but falls well within the scope of the rights created by that section. The

8. 1 CCH Lab.L.Rep., Union Contracts, Arbitration ¶ 59,520, pp. 84,988–84,989.

9. The precedents cited by the Court of Appeals are: Illinois Bell Telephone Co., 192 N.L.R.B. 834 (1971); Texaco, Inc., Los Angeles Terminal, 179 N.L.R.B. 976 (1969); Wald Mfg. Co., 176 N.L.R.B. 839 (1969), aff'd, 426 F.2d 1328 (CA6 1970); Dayton Typographic Service, Inc., 176 N.L.R.B. 357 (1969); Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968); Chevron Oil Co., 168 N.L.R.B. 574 (1967); Dobbs Houses, Inc., 145 N.L.R.B. 1565 (1964). See also NLRB v. Ross Gear & Tool Co., 158 F.2d 607 (CA7 1947).

10. "There has been a recent growth in the use of sophisticated techniques—such as closed circuit television, undercover security agents, and lie detectors—to monitor and investigate the employees' conduct at their place of work. See, *e. g.*, Warwick Electronics, Inc., 46 Lab. Arb. 95, 97–98 (1966); Bowman Transportation, Inc., 56 Lab.Arb. 283, 286–292 (1972); FMC Corp., 46 Lab.Arb. 335, 336–338 (1966). These techniques increase not only the employees' feelings of apprehension, but also their need for experienced assistance in dealing with them. Thus, often, as here and in *Mobil*, *supra*, an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques. These developments in industrial life warrant a concomitant reappraisal by the Board of their impact on statutory rights. Cf. Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235, 250 [90 S.Ct. 1583, 1592, 26 L.Ed.2d 199]" Brief for Petitioner 27 n. 22.

use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this
266 important aspect of the national labor law would misconceive the nature of administrative decisionmaking. " 'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." NLRB v. Seven-Up Co., 344 U.S. 344, 349, 73 S.Ct. 287, 290, 97 L.Ed. 377 (1953).

[3–6] The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no "need" for union assistance at an investigatory interview. "While a basic purpose of section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview." 485 F.2d, at 1138. It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. For the Board has the "special function of applying the general provisions of the Act to the complexities of industrial life," NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 83 S.Ct. 1139, 1150, 10 L.Ed.2d 308 (1963); see Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798, 65 S.Ct. 982, 985, 89 L.Ed. 1372 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 196–197, 61 S.Ct. 845, 853–854, 85 L.Ed. 1271 (1941), and its special competence in this field is the justification for the deference accorded its determination. American Ship Building Co. v. NLRB, 380 U.S., at 316, 85 S.Ct., at 966. Reviewing courts are of course not "to stand aside and rubber stamp" Board determinations that run contrary to the language or tenor of the Act, NLRB v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965). But the Board's construction here, while it may not be required by the Act, is at least permissible under it, and insofar as the 267
Board's application of that meaning engages in the "difficult and delicate responsibility" of reconciling conflicting interests of labor and management, the balance struck by the Board is "subject to limited judicial review." NLRB v. Truck Drivers, 353 U.S. 87, 96, 77 S.Ct. 643, 648, 1 L.Ed.2d 676 (1957). See also NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956); NLRB v. Brown, *supra*; Republic Aviation Corp. v. NLRB, *supra*. In sum, the Board has reached a fair and reasoned balance upon a question within its special competence, its newly arrived at construction of § 7 does not exceed the reach of that section, and the Board has adequately explicated the basis of its interpretation.

The statutory right confirmed today is in full harmony with actual industrial practice. Many important collective-bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews.[11] Even where such a right is not explicitly provided in the agree-

11. 1 BNA Collective Bargaining Negotiations and Contracts 21:22 (General Motors Corp. and Auto Workers, ¶ 76a); 27:6 (Goodyear Tire & Rubber Co. and Rubber Workers, Art. V(5)); 29:15–29:16 (United States Steel Corp. and United Steelworkers, §§ 8B [8.4] and 8.7]). See, *e. g.*, the Bethelem Steel Corp. and United Steelworkers Agreement of 1971, Art. XI, § 4(d), which provided:

"Any Employee who is summoned to meet in an enclosed office with a supervisor for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by the Assistant Grievance Committeeman designated for the area if he requests such representation, provided such representative is available during the shift."

ment a "well-established current of arbitral authority" sustains the right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him. Chevron Chemical Co., 60 Lab.Arb. 1066, 1071 (1973).[12]

[268] The judgment is reversed and the case is remanded with direction to enter a judgment enforcing the Board's order.

It is so ordered.

Judgment of Court of Appeals reversed and case remanded.

Mr. Justice POWELL, with whom Mr. Justice STEWART joins, dissenting.

Section 7 of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 157, guarantees to employees [269] the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Court today construes that right to include union representation or the presence of another employee[1] at any interview the employee reasonably fears might result in disciplinary action. In my view, such an interview is not *concerted activity* within the intendment of the Act. An employee's right to have a union representative or another employee present at an investigatory interview is a matter that Congress left to the free and flexible exchange of the bargaining process.

The majority opinion acknowledges that the NLRB has only recently discovered the right to union representation in employer interviews. In fact, as late as 1964—after almost 30 years of experience with § 7—the Board flatly rejected an employee's claim that she was entitled to union representation in a "discharge conversation" with the general manager, who later admitted that he had already decided to fire her. The Board adopted the Trial Examiner's analysis:

> "I fail to perceive anything in the Act which obliges an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or to otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity. An employer undoubtedly has the right to maintain day-to-day discipline in the plant or on the working premises and it seems to me that only [271] exceptional circumstances should warrant any interference with this right." Dobbs Houses, Inc., 145 N.L.R.B. 1565, 1571 (1964).[2]

12. See also Universal Oil Products Co., 60 Lab.Arb. 832, 834 (1973): "[A]n employee is entitled to the presence of a Committeeman at an investigatory interview if he requests one and if the employee has reasonable grounds to fear that the interview may be used to support disciplinary action against him." Allied Paper Co., 53 Lab.Arb. 226 (1969); Thrifty Drug Stores Co., Inc., 50 Lab. Arb. 1253, 1262 (1968); Waste King Universal Products Co., 46 Lab.Arb. 283, 286 (1966); Dallas Morning News, 40 Lab.Arb. 619, 623–624 (1963); The Arcrods Co., 39 Lab.Arb. 784, 788–789 (1962); Valley Iron Works, 33 Lab.Arb. 769, 771 (1960); Schlitz Brewing Co., 33 Lab.Arb. 57, 60 (1959); Singer Mfg Co., 28 Lab.Arb. 570 (1957); Braniff Airways, Inc., 27 Lab.Arb. 892 (1957); John Lucas & Co., 19 Lab.Arb. 344, 346–347 (1952). Contra, *e. g.*, E. I. du Pont de Nemours & Co., 29 Lab.Arb. 646, 652 (1957); United Air Lines, Inc., 28 Lab.Arb. 179, 180 (1956).

1. While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the § 7 right today recognized, affording employees the right to act "in concert" in employer interviews, also exists in the absence of a recognized union. Cf. NLRB v. Washington Aluminum Co., 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962).

2. In one earlier case the Board had found a § 8(a)(1) violation in the employer's refusal to admit a union representative to an interview. Ross Gear & Tool Co., 63 N.L.R.B. 1012, 1033–1034 (1945), enforcement denied, 158 F.2d 607, 611–614 (CA7 1947). In that case, however, the Board found that the employee, a union committee member, was called in to discuss a pending union issue. The Board found that discharging her for insisting on the presence of the entire committee was a discriminatory discharge under § 8(a)(1). The opinion in *Dobbs Houses* distinguished *Ross Gear* on the ground that the matter under investigation was protected union activity. 145 N.L.R.B., at 1571.

The convoluted course of litigation from *Dobbs Houses* to *Quality Mfg.* hardly suggests that the Board's change of heart resulted from a logical "evolutional approach." *Ante,* at 967. The Board initially retreated from *Dobbs Houses,* deciding that it only applied to "investigatory" interviews and holding that if the employer already had decided on discipline the union had a § 8(a)(5) right to attend the interview. Texaco, Inc., Houston Producing Division, 168 N.L.R.B. 361 (1967), enforcement denied, 408 F.2d 142 (CA5 1969). It reasoned that employee discipline sufficiently affects a "term or condition of employment" to implicate the employer's obligation to consult with the employee's bargaining representative, and that direct dealing with an employee on an issue of discipline violated § 8(a)(5).[3] For several years, the Board adhered to its distinction between "investigative" and "disciplinary" interviews, dismissing claims under both § 8(a)(1) and § 8(a)(5) in the absence of evidence that the employer had decided to discipline the employee.[4]

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Quality Mfg. Co. was the first case in which the Board perceived any greater content in § 7. It did so, not by relying on "significant developments in industrial life," *ante,* at 967, but by stating simply that in none of the earlier cases had a worker been fired for insisting on union representation. The Board also asserted, for the first time, that its earlier decisions had disposed of only the union's right to bargain with the employer over the discipline to be imposed, and had not dealt with the employee's right under § 7 to insist on union presence at meetings that he reasonably fears would lead to disciplinary action. 195 N.L.R.B. 197, 198. Even this distinction was abandoned some four months later in Mobil Oil Corp., 196 N.L.R.B. 1052 (1972), enforcement denied, 482 F.2d 842 (CA7 1973). There the Board followed *Quality Mfg.,* even though the employees in *Mobil Oil* had not been fired for insisting on union representation and their only claim was that the employer had excluded the union from an investigatory interview. Thus, the Board has turned its back on *Dobbs Houses* and now finds a § 7 right to insist on union presence in the absence of any evidence that the employer has decided to embark on a course of discipline.

Congress' goal in enacting federal labor legislation was to create a framework within which labor and management can establish the mutual rights and obligations that govern the employment relationship. "The theory of the act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, 57 S.Ct. 615, 628, 81 L. Ed. 893 (1937). The National Labor Relations Act only creates the structure for the parties' exercise of their respective economic strengths; it leaves definition of the precise contours of the em-

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3. The Board has not been called upon to pursue its § 8(a)(5) theory to its logical conclusion. Its determination that all disciplinary decisions are matters that invoke the employer's mandatory duty to bargain would seem to suggest that, absent some qualification of the duty contained in the collective-bargaining agreement, federal law will now be read to require that the employer bargain to impasse before initiating unilateral action on disciplinary matters. It is difficult to believe that Congress intended such a radical restriction of the employer's power to discipline employees. See Fibreboard Corp. v. NLRB, 379 U.S. 203, 217, 218, 223, 85 S.Ct. 398, 406, 407, 409, 13 L.Ed.2d 233 (1964) (Stewart, J., concurring).

4. Lafayette Radio Electronics, 194 N.L.R.B. 491 (1971); Illinois Bell Telephone Co., 192 N.L.R.B. 834 (1971); Texaco, Inc., Los Angeles Terminal, 179 N.L.R.B. 976 (1969); Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968); Chevron Oil Co., 168 N.L.R.B. 574 (1967).

ployment relationship to the collective-bargaining process. See Porter Co. v. NLRB, 397 U.S. 99, 108, 90 S.Ct. 821, 826, 25 L.Ed.2d 146 (1970); NLRB v. American National Insurance Co., 343 U.S. 395, 402, 72 S.Ct. 824, 828, 96 L.Ed. 1027 (1952).

As the Court noted in Emporium Capwell Co. v. Western Addition Community Organization, § 7 guarantees employees' basic rights of industrial self-organization, rights which are for the most part "collective rights . . . to act in concert with one's fellow employees, [which] are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" 420 U.S. 50, at 62, 95 S.Ct. 977, at 984, 43 L.Ed.2d 12 (1975). Section 7 protects those rights that are essential to employee self-organization and to the exercise of economic weapons to exact concessions from management and demand a voice in defining the terms of the employment relationship.[5] It does not define those terms itself.

The power to discipline or discharge employees has been recognized uniformly as one of the elemental prerogatives of management. Absent specific limitations imposed by statute[6] or through 274
the process of collective bargaining,[7] management remains free to discharge employees at will. See Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 583, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960). An employer's need to consider and undertake disciplinary action will arise in a wide variety of unpredictable situations. The appropriate disciplinary response also will vary significantly, depending on the nature and severity of the employee's conduct. Likewise, the nature and amount of information required for determining the appropriateness of disciplinary action may vary with the severity of the possible sanction and the complexity of the problem. And in some instances, the employer's legitimate need to maintain discipline and security may require an immediate response.

This variety and complexity necessarily call for flexible and creative adjustment. As the Court recognizes, *ante*, at 968, the question of union participation in investigatory interviews is a standard 275
topic of collective bargaining.[8] Many

5. By contrast, the employee's § 7 right announced today may prove to be of limited value to the employee or to the stabilization of labor relations generally. The Court appears to adopt the Board's view that investigatory interviews are not bargaining sessions and that the employer legitimately can insist on hearing only the employee's version of the facts. Absent employer invitation, it would appear that the employee's § 7 right does not encompass the right to insist on the participation of the person he brings with him to the investigatory meeting. The new right thus appears restricted to the privilege to insist on the mute and inactive presence of a fellow employee or a union representative; a witness to the interview, perhaps.

6. Section 8(a)(1) forbids employers to take disciplinary actions that "interfere with, restrain, or coerce" the employee's exercise of § 7 rights. Other federal statutes also limit in certain respects the employer's basic power to discipline and discharge employees. See, *e. g.*, § 706 of the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. § 2000e–5; Age Discrimination in Employment Act, of 1967, 81 Stat. 602, 29 U.S.C. § 623.

7. The Board and the courts have recognized that union demands for provisions limiting the employer's power to discharge can be the subject of mandatory bargaining. See Fibreboard Corp. v. NLRB, 379 U.S., at 217, 221–223, 85 S.Ct. 398, 406, 408–409, 13 L.Ed.2d 233 (Stewart, J., concurring).

8. The history of a similar case, Mobil Oil, 196 N.L.R.B. 1052 (1972), enforcement denied, 482 F.2d 842 (CA7 1973), illustrates how the Board has substituted its judgment for that of the collective-bargaining process. During negotiations leading to the establishment of a collective-bargaining agreement in that case, the union advanced a demand that existing provisions governing suspension and discharge be amended to provide for company-union discussions prior to disciplinary action. The employer refused to accede to that demand and ultimately prevailed, only

agreements incorporate provisions that grant and define such rights, and arbitration decisions increasingly have begun to recognize them as well. Rather than vindicate the Board's interpretation of § 7, however, these developments suggest to me that union representation at investigatory interviews is a matter that Congress left to the bargaining process. Even after affording appropriate deference to the Board's meandering interpretation of the Act, I conclude that the right announced today is not among those that Congress intended to protect in § 7. The type of personalized interview with which we are here concerned is simply not "concerted activity" within the meaning of the Act.

420 U.S. 276, 43 L.Ed.2d 189

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, Petitioner,

v.

QUALITY MANUFACTURING COMPANY et al.

No. 73-765.

Argued Nov. 18, 1974.

Decided Feb. 19, 1975.

National Labor Relations Board sought enforcement of order determining that employer had committed an unfair labor practice. The Court of Appeals for the Fourth Circuit, 481 F.2d 1018, denied enforcement in part and certiorari was granted. The Supreme Court, Mr. Justice Brennan, held that employer's denial of employee's request that union representative be present at investigative interview which employee reasonably believed might result in disciplinary action interfered with, restrained and coerced employee's right to engage in concerted activities for mutual aid or protection and constituted an unfair labor practice.

Reversed and remanded with direction.

Mr. Justice Powell dissented and filed opinion in which Mr. Justice Stewart joined.

For separate dissenting opinion by Mr. Chief Justice Burger see 95 S.Ct. 976.

Labor Relations ⇐366

Employer's denial of employee's request that union representative be present at investigative interview which employee reasonably believed might result in disciplinary action interfered with, restrained and coerced employee's right to engage in concerted activities for mutual aid or protection and constituted an unfair labor practice. National Labor Relations Act, §§ 7, 8(a)(1) as amended 29 U.S.C.A. §§ 157, 158(a)(1).

Syllabus *

Respondent employer's denial of employee's request that her union repre-

to find his efforts at the bargaining table voided by the Board's interpretation of the statute.

Chairman Miller subsequently suggested that the union can waive the employee's § 7 right to the presence of a union representative. See Western Electric Co., 198 N.L.R.B. 82 (1972). The Court today provides no indication whether such waivers in the collective-bargaining process are permissible. Cf. NLRB v. Magnavox Co., 415 U.S. 322, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974).

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Summary of Weingarten Cases

1. In United States Postal Service v. NLRB, (American Postal Workers Union, AFL-CIO and East Area Local, APWU, Intervenors), D. C. Circuit, Decided June 30, 1992, the Board determined that the ***Postal Service committed an unfair labor practice*** 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. This decision was enforced by the D.C. Circuit.

2. In United States Postal Service and American Postal Workers Union AFL-CIO, 252 NLRB 4 (1980), the Board concluded that the ***"fitness for duty" examinations*** at issue were not part of a disciplinary procedure and ***do not fall within the purview of Weingarten***. Although the examinations were prompted by personnel problems such as excessive absenteeism because of alleged illness or injury, and the examinations might lead to recommendations regarding the employees' future work assignments, there was 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. The Board determined that it was noteworthy that there was an absence of evidence that questions of an investigatory nature were asked at these examinations.

3. National Labor Relations Board v. Southwestern Bell Telephone Co. 730 F.2d 166 (5th Cir. 1984), involved three separate potential Weingarten violations. The most relevant issue discussed regarding the purpose of Weingarten revolves around whether or not union representatives have a right to simply "be present" or whether an employee has a right to "representation" in the meeting. The Ninth Circuit had decided that Weingarten is violated by an employee who allows a union steward to attend an investigatory interview but requires that the steward remain silent. NLRB v. Texaco, Inc., 659 F.2d 124 (9th Cir.1981). The court notes that Weingarten itself was "quite clear" that ***union representatives be able to participate in an investigatory interview***, and this passage describes the fear an employee may be feeling:

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Weingarten, 420 U.S. at 262-263.

Or, "put simply, the union representative is there to help the employee is his effort to vindicate himself." NLRB v. Southwestern, 730 F.2d at 172. The court found that the employer's blanket refusal to allow union representatives to talk during an investigatory hearing was a Weingarten violation.

4. In National Labor Relations Board v. New Jersey, 936 F.2d 144, 148 (3d Cir. 1991), the Third Circuit confirmed the Board's finding of a Weingarten violation where an employee had not directly requested the presence of a union representative. The principal issue was whether or not the employee had given notice to the employer that she desired the presence of a union rep where she asked aloud, ***"Should I have a union rep present?"*** Id., at 149. In this case, the fact that the ***employer ignored the question and kept going constituted a violation of Weingarten*** because "the Respondent's reply was preemptive and effectively prohibited [the employee] from making a further request for representation. Id., at 149.

5. In Anheuser-Busch, Inc. v. NLRB, 338 F.3d 267 (4th Cir. 2003), the Fourth Circuit discussed whether or not employees are ***entitled to exactly the union representative they wish to be present,*** or whether the employer can make a choice based on convenience and availability. The court upheld the Board's decision in favor of the employee, stating that "the choice of a representative plainly furthers the ability of workers to seek" mutual aid and protection, "the most fundamental purpose of the Act." Id., at 275. The Court stated that where an employee is being investigated, she or he is "generally at some disadvantage, and the recognition of his right to choose his representative serves...to mitigate this inequality." Id., 275.

If You're Called In...

REMAIN CALM.

REQUEST a union representative.

When a supervisor or other management official asks to interview you about any matter which you reasonably believe can result in discipline, you have the right under the law to the presence of a shop steward or other APWU representative to accompany you to the interview.

Tell the management official: "I request the presence of my APWU representative before I answer any questions or make any statement"

The right to a steward is NOT AUTOMATIC; you MUST REQUEST a steward.

The **employee can request union representation before the interview or at any time during the interview**.

You CANNOT REFUSE TO GO to the meeting.

Weingarten rights do not arise until an investigatory interview actually begins. The employee must make a request for representation to the person conducting the interview.

When an employee asks for representation, the employer must choose from among three options:

1. Grant the request and delay questioning until the union representative arrives;
2. Deny the request and end the interview immediately; or
3. Give the employee a choice of: (a) having the interview without representation or (b) ending the interview.

You also have the **right to a private meeting with the steward prior to your being questioned** by management.

However, for **CRIMINAL INVESTIGATIONS**, employees **MUST COOPERATE** in any postal investigation, including Office of Inspector General investigations. ELM Section 665.3.

SHOP STEWARDS' RIGHTS AND PRIVILEGES

Some of the following excerpts are from *The Legal Rights of Union Stewards by Robert M. Schwartz*, (c) 1999, is reprinted with permission from the publisher. *The Legal Rights of Union Stewards* may be purchased by contacting Work Rights Press at 800-576-4552, or online at *www.workrightspress.com*.

STEWARD RIGHTS

Employers sometimes assert that the only function of a steward at an investigatory interview is to observe the discussion; in other words, to be a silent witness. This is incorrect. The steward must be allowed to advise and assist the employee in presenting the facts. When the steward arrives at the meeting:

- The supervisor or manager must inform the steward of the subject matter of the interview: in other words, the type of misconduct being investigated.[1]

- The steward must be allowed to have a private meeting with the employee before questioning begins.[2]

- The steward can speak during the interview, but cannot insist that the interview be ended.[3]

- The steward can object to a confusing question and can request that the question be clarified so that the employee understands what is being asked.[4]

- The steward can advise the employee not to answer questions that are abusive, misleading, badgering, or harassing.[5]

- When the questioning ends, the steward can provide information to justify the employee's conduct.[6]

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[1] Pacific Telephone and Telegraph Co., 262 NLRB 1048, 110 LRRM 1411 (1982), *enforced in part*, 711 F.2nd 134, 113 LRRM 3529 (9th Cir. 1983).
[2] U.S. Postal Service, 303 NLRB 463, 138 LRRM 1339 (1991).
[3] See Southwestern Bell Telephone Co., 251 NLRB 612, 105 LRRM 1246 (1980); New Jersey Bell Telephone Co., 308 NLRB 277, 141 LRRM 1017 (1992); Yellow Freight System, Inc., 317 NLRB 115; 149 LRRM 1327 (1995) (steward may be issued a warning letter for repeatedly interrupting interview, profanity, and pounding on manager's desk).
[4] U.S. Postal Service, 288 NLRB 864, 130 LRRM 1184 (1998); NLRB v. J. Weingarten, Inc. 420 U.S. 251, 260, 88 LRRM 2689 (U.S. Sup. Ct. 1975).
[5] New Jersey Bell Telephone Co., 308 NLRB 277, 141 LRRM 1017 (1992).
[6] NLRB v. J. Weingarten, Inc. 420 U.S. 251, 88 LRRM 2689 (U.S. Sup. Ct. 1975).

QUESTIONS AND ANSWERS

STEWARD'S REQUEST

Q. If I see a worker being questioned in a supervisor's office, can I ask to be admitted?

A. Yes. A steward has a right to insist on admission to a meeting that appears to be a *Weingarten* interview.[7] If the interview is investigatory, the employee must be allowed to indicate whether he or she desires the steward's presence.[8]

OBSTRUCTION

Q. The company is interviewing employees about drug use in the plant. If I tell my people not to answer questions, could management go after me?

A. Yes. A union representative may not obstruct a legitimate investigation into employee misconduct.[9] If management learns of such orders, you could be disciplined.

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[7] ILGWU v. Quality Mfg. Co., 420 U.S. 276, 88 LRRM 2698 (U.S. Sup. Ct. 1975).

[8] Appalachian Power Co., 253 NLRB 931, 106 LRRM 1041 (1980). An employee's silence, after a steward asks to be present, may be considered agreement with the request. See Colgate Palmolive Co., 257 NLRB 130, 107 LRRM 1486 (1981).

[9] See Manville Forest Products Corp., 269 NLRB 390, 115 LRRM 1266 (1984); Cook Paint & Varnish Co., 246 NLRB 646, 102 LRRM 1680 (1979). See also Service Technology Corp., 196 NLRB 845, 80 LRRM 1187 (1972) (employee has no right to refuse to answer questions about misconduct he has been involved in or witnessed).

Role of a Steward in Employee Interrogations

Article 17.3 of the National Agreement, "Rights of Stewards," requires that "[i]f 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. All polygraph tests will continue to be on a voluntary basis." The Postal Service has acknowledged that this requirement applies equally to the Office of Inspector General ("OIG").

Thus, it is important for a union steward or representative to recognize his or her role in an interrogation by the Inspection Service and/or the OIG.

The **steward should not allow the inspectors or agents to limit his or her participation to that of a passive observer**.

Although a steward should not turn the interrogation into an adversarial proceeding and prevent the inspectors and/or agents from questioning the employee, the steward should nonetheless advise and actively assist the employee.

He or she should **attempt to clarify the facts, assist the employee in articulating an explanation, and advise the employee appropriately of the employee's right to remain silent and to consult with an attorney.**

The steward may ascertain whether the employee is under arrest and/or whether the employee is the subject of a criminal investigation or is a suspect in a crime.

The steward may also advise the employee on whether to sign any forms or statements, particularly before the employee has consulted with a lawyer.

The steward may advise the employee on whether to voluntarily submit to a polygraph examination.

Finally, the steward may advise the employee about the consequences of giving a statement or not answering questions. All of this advice may be given in front of the inspectors or agents, or alone in private, and a steward may interrupt the interrogation in order to speak with the employee.

If the inspectors or agents fail to respect the role of the steward, both the Local Union and the individual employee who is the subject of the interrogation can file an unfair labor practice charge with the NLRB.

For an individual employee to make such a claim, it is important that the employee articulate, both during the interrogation and again to the NLRB, that he or she requested the assistance of a union representative.

This factor will also bolster an allegation by the Local Union. The Local Union should claim a violation of Section 8(a)(1) and (5) of the National Labor Relations Act, while the employee can claim a violation of Section 8(a)(1).

The body of such a charge filed by an employee should allege that:

> On or about _____, the U.S. Postal Service interfered with, restrained and coerced an employee in the exercise of his or her Section 7 rights, by, among other things, failing and refusing to permit the participation of a union representative during the interrogation of the employee by the Employer.

A similar charge can be filed by the Local Union alleging the Postal Service's failure and refusal to permit the Union stewards participation in the interrogation of an employee in violation of the Postal Service's legal and contractual obligation. Both charges can cite NLRB v. Weingarten, 420 U.S. 251 (1975) as supporting authority. A recent NLRB decision supporting this type of charge is Barnard College, 340 NLRB 934 (2003).

Garrity Rights:
Legal Rights of Postal Service Employees When Interrogated about Potentially Criminal Matters

As with all people in America, Postal Service employees have rights under the Fifth Amendment of the United States Constitution.

> The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."
>
> This means that a person may not be required or coerced to disclose any information that he or she reasonably believes may be used (or lead to other evidence that may be used) in a criminal prosecution against him or her.
>
> If a person is coerced into disclosing information, that information is not admissible in court against him or her.

In addition to the basic Fifth Amendment rights, Postal Service employees have additional rights under the Fifth Amendment as public sector employees.

> These workplace rights arise because in the public sector the government acts as both law enforcement agency *and* employer.

Developed through a series of United States Supreme Court cases beginning in 1966, these rights are generally known as "Garrity rights," after the Supreme Court's decision in Garrity v. New Jersey.[10]

> In that case, several New Jersey police officers were targeted during an internal investigation of ticket fixing.
>
> The officers were told that they must respond to questions during the investigation or face discharge for insubordination.
>
> In order to keep their jobs, the officers complied and answered the questions.
>
> The statements made by the officers were then used in criminal prosecutions against them.

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[10] Garrity v. New Jersey, 385 U.S. 493 (1967).

In overturning the convictions, the Supreme Court held that threatening the police officers with discharge was coercive in violation of the Fifth Amendment.

This case now stands for the principle that using the threat of discharge or other substantial economic penalty against public sector employees is coercive – that any consequent disclosures is inadmissible in a criminal trial.

Although the principles behind Garrity rights continue to be refined by the courts, the available cases do provide some guidance for Postal Service employees now:

- First, a Postal Service employee's disclosures may not be used against him or her in a criminal proceeding if they were made during a Postal Service investigation in which the employee was told he or she must answer or face discharge (or other substantial discipline).

- Second, an employee may be discharged (or otherwise disciplined) if he or she refuses to respond to an investigation after being granted immunity from his or her statements being used in a criminal proceeding against him or her.

- Finally, an employee who discloses information after being granted prosecutorial immunity may still be disciplined (and even discharged) based upon that information.

KALKINES WARNING

The Garrity decision does not, however, mean that the government may never threaten an employee with discipline for refusing to give a statement about potentially criminal acts.

> In Gardner v. Broderick (1968),[11] the U.S. Supreme Court noted that the government could discipline an employee if it does not force the employee to give up his Fifth Amendment rights, such as by giving the employee prosecutorial immunity (a guarantee that the information disclosed will not be used against the employee in a criminal prosecution).

In Kalkines v. United States (1973),[12] the U.S. Court of Claims elaborated on the Supreme Court's holdings, finding that an employee can be asked to "answer pertinent questions about the performance of an employee's duties...when that employee is duly advised of his options to answer under the immunity granted or remain silent and face dismissal."

> **In other words, if an employee is given immunity, but nonetheless decides not to answer questions, the government may discipline or discharge the employee for not answering the questions.**
>
> In the Postal Service, any such discipline is, of course, subject to the grievance procedure.
>
> The Kalkines ruling is an attempt to balance the Fifth Amendment's right against self-incrimination with the Supreme Court's holding that the government has the right to have its employees answer questions about the performance of their official duties.
>
> In getting this information from employees, according to Kalkines, the Fifth Amendment is not violated so long as the government also grants the employee immunity from prosecution based upon that information.

[11] Gardner v. Broderick, 392 U.S. 273 (1968).
[12] Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973).

385 U.S. 493

Edward J. GARRITY et al., Appellants,

v.

STATE OF NEW JERSEY.

No. 13.

Argued Nov. 10, 1966.

Decided Jan. 16, 1967.

Police officers were convicted in state court of conspiracy to obstruct justice. The New Jersey Supreme Court, 44 N.J. 209, 207 A.2d 689, affirmed the judgment. The United States Supreme Court treated the papers of the officers as a petition for certiorari. The Supreme Court, Mr. Justice Douglas, held that where police officers being investigated were given choice either to incriminate themselves or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, confessions were not voluntary but were coerced, and Fourteenth Amendment prohibited their use in subsequent criminal prosecution in state court.

Judgment reversed.

Mr. Justice Harlan, Mr. Justice Clark, Mr. Justice Stewart, and Mr. Justice White, dissented.

For dissenting opinion of Mr. Justice White, see 87 S.Ct. 636.

1. Courts ⇐397½

Where New Jersey Supreme Court refused to reach question whether New Jersey forfeiture of office statute was valid and deemed voluntariness of statements of defendant police officers as only issue presented, statute was too tangentially involved to satisfy appeal provision of federal statute, and United States Supreme Court would dismiss appeal, treat papers of appealing defendants as petition for certiorari, grant the petition, and proceed to merits. 28 U.S.C.A. §§ 1257(2), 2103; N.J.S. 2A:81–17.1, N.J.S.A.

2. Criminal Law ⇐522(1)

"Coercion" that vitiates confession can be mental as well as physical, and question is whether accused was deprived of his free choice to admit, deny, or refuse to answer. U.S.C.A.Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law ⇐266

Where police officers being investigated were given choice either to incriminate themselves or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment, tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, confessions were not voluntary but were coerced, and Fourteenth Amendment prohibited their use in subsequent criminal prosecution of officers in state court. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

4. Courts ⇐394(3)

Where police officers being investigated were given choice either to incriminate themselves or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment, tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, question whether officers waived protection under Fourteenth Amendment against coerced confessions was a federal question for United States Supreme Court to decide. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

5. Constitutional Law ⇐43(1)

Where police officers were given choice either to incriminate themselves

or to forfeit their jobs under New Jersey statute dealing with forfeiture of office or employment, tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, there was no waiver by officers of protection under Fourteenth Amendment against coerced confessions. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

6. Constitutional Law ⇐82

There are rights of constitutional stature whose exercise a State may not condition by exaction of a price.

7. Constitutional Law ⇐266

Protection of individual under Fourteenth Amendment against coerced confessions prohibits use in subsequent criminal proceedings of confessions obtained under threat of removal from office, and protection extends to all, whether they are policemen or other members of body politic. U.S.C.A.Const. Amends. 5, 14; N.J.S. 2A:81–17.1, N.J.S.A.

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Daniel L. O'Connor, Washington, D. C., for appellants.

Alan B. Handler, Newark, N. J., for appellee.

Mr. Justice DOUGLAS delivered the opinion of the Court.

Appellants were police officers in certain New Jersey boroughs. The Supreme Court of New Jersey ordered that alleged irregularities in handling cases in the municipal courts of those boroughs be investigated by the Attorney General, invested him with broad powers of inquiry and investigation, and directed him to make a report to the court. The matters investigated concerned alleged fixing of traffic tickets.

Before being questioned, each appellant was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office.[1]

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Appellants answered the questions. No immunity was granted, as there is no immunity statute applicable in these circumstances. Over their objections, some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws. Appellants were convicted and their convictions were sustained over their protests that their statements were coerced,[2] by reason of the fact that, if

1. "Any person holding or who has held any elective or appointive public office, position or employment (whether State, county or municipal), who refuses to testify upon matters relating to the office, position or employment in any criminal proceeding wherein he is a defendant or is called as a witness on behalf of the prosecution, upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself or refuses to waive immunity when called by a grand jury to testify thereon or who willfully refuses or fails to appear before any court, commission or body of this state which has the right to inquire under oath upon matters relating to the office, position or employment of such person or who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself, shall, if holding elective or public office, position or employment, be removed therefrom or shall thereby forfeit his office, position or employment and any vested or future right of tenure or pension granted to him by any law of this State provided the inquiry relates to a matter which occurred or arose within the preceding five years. Any person so forfeiting his office, position or employment shall not thereafter be eligible for election or appointment to any public office, position or employment in this State." N.J.Rev.Stat. § 2A:81–17.1 (Supp.1965), N.J.S.A.

2. At the trial the court excused the jury and conducted a hearing to determine

they refused to answer, they could lose their positions with the police department. See State v. Naglee, 44 N.J. 209, 207 A.2d 689; 44 N.J. 259, 208 A.2d 146.

[1] We postponed the question of jurisdiction to a hearing on the merits. 383 U.S. 941, 86 S.Ct. 941, 16 L.Ed.2d 205. The statute whose validity was sought to be "drawn in question," 28 U.S.C. § 1257(2), was the forfeiture statute.[3] But the New

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Jersey Supreme Court refused to reach that question (44 N.J., at 223, 207 A.2d, at 697), deeming the voluntariness of the statements as the only issue presented. Id., at 220–222, 207 A.2d at 695–696. The statute is therefore too tangentially involved to satisfy 28 U.S.C. § 1257(2), for the only bearing it had was whether, valid or not, the fear of being discharged under it for refusal to answer on the one hand and the fear of self-incrimination on the other was " 'a choice between the rock and the whirlpool' " [4] which made the statements products of coercion in violation of the Fourteenth Amendment. We therefore dismiss the appeal, treat the papers as a petition for certiorari (28 U.S.C. § 2103), grant the petition and proceed to the merits.

We agree with the New Jersey Supreme Court that the forfeiture-of-office statute is relevant here only for the bearing it has on the voluntary character of the statements used to convict petitioners in their criminal prosecutions.

[2] The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, and related cases can be "mental as well as physical"; "the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. State of Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242. Subtle pressures (Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948; Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his "free choice to admit, to deny, or to refuse to answer." Lisenba v. People of State of California, 314 U.S. 219, 241, 62 S.Ct. 280, 292, 86 L.Ed. 166.

We adhere to Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, a civil forfeiture action against property. A statute offered

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the owner an election between producing a document or forfeiture of the goods at issue in the proceeding. This was held to be a form of compulsion in violation of both the Fifth Amendment and the Fourth Amendment. Id., at 634–635, 6 S.Ct. It is that principle that we adhere to and apply in Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574.

[3] The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in Miranda v. State of Arizona, 384 U.S. 436, 464–465, 86 S.Ct. 1602, 1623, 16 L.Ed.2d 694, is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by

whether, *inter alia*, the statements were voluntary. The State offered witnesses who testified as to the manner in which the statements were taken; the appellants did not testify at that hearing. The court held the statements to be voluntary.

3. N. 1, supra.

4. Stevens v. Marks, 383 U.S. 234, 243, 86 S.Ct. 788, 793, 15 L.Ed.2d 724, quoting from Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593, 46 S.Ct. 605, 607, 70 L.Ed. 1101.

the coercion [5] inherent in this scheme of questioning

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and cannot be sustained as voluntary under our prior decisions.

[4, 5] It is said that there was a "waiver." That, however, is a federal question for us to decide. Union Pac. R. R. Co. v. Public Service Comm., 248 U.S. 67, 69–70, 39 S.Ct. 24, 25, 63 L.Ed. 131. Stevens v. Marks, supra, 383 U.S. 234, 243–244, 86 S.Ct. 788, 793. The Court in Union Pac. R. R. Co. v. Public Service Comm., supra, in speaking of a certificate exacted under protest and in violation of the Commerce Clause, said:

"Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary * * *." Id., 248 U.S., at 70, 39 S.Ct. at 25.

Where the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other.

"It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." Ibid.

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In that case appellant paid under protest. In these cases also, though petitioners succumbed to compulsion, they preserved their objections, raising them at the earliest possible point. Cf. Abie State Bank v. Bryan, 282 U.S. 765, 776, 51 S.Ct. 252, 256, 75 L.Ed. 690. The cases are therefore quite different from the situation where one who is anxious to make a clean breast of the whole affair volunteers the information.

Mr. Justice Holmes in McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517, stated a dictum on which New Jersey heavily relies:

"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a police-

5. Cf. Lamm, The 5th Amendment and Its Equivalent in Jewish Law, 17 Decalogue Jour. 1 (Jan.–Feb.1967):

"It should be pointed out, at the very outset, that the Halakhah does not distinguish between voluntary and forced confessions, for reasons which will be discussed later. And it is here that one of the basic differences between Constitutional and Talmudic Law arises. According to the Constitution, a man cannot be compelled to testify against himself. The provision against self-incrimination is a privilege of which a citizen may or may not avail himself, as he wishes. The Halakhah, however, does not permit self-incriminating testimony. It is inadmissible, even if voluntarily offered. Confession, in other than a religious context, or financial cases completely free from any traces of criminality, is simply not an instrument of the Law. The issue, then, is not compulsion, but the whole idea of legal confession.

* * * * *

"The Halakhah, then, is obviously concerned with protecting the confessant from his own aberrations which manifest themselves, either as completely fabricated confessions, or as exaggerations of the real facts. * * * While certainly not all, or even most criminal confessions are directly attributable, in whole or part, to the Death Instinct, the Halakhah is sufficiently concerned with the minority of instances, where such is the case, to disqualify all criminal confessions and to discard confession as a legal instrument. Its function is to ensure the total victory of the Life Instinct over its omnipresent antagonist. Such are the conclusions to be drawn from Maimonides' interpretation of the Halakhah's equivalent of the Fifth Amendment.

"In summary, therefore, the Constitutional ruling on self-incrimination concerns only forced confessions, and its restricted character is a result of its historical evolution as a civilized protest against the use of torture in extorting confessions. The Halakhic ruling, however, is much broader and discards confessions in toto, and this because of its psychological insight and its concern for saving man from his own destructive inclinations." Id., at 10, 12.

man. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control." Id., at 220, 29 N.E., at 517–518.

The question in this case, however, is not cognizable in those terms. Our question is whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee.

We held in Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee:

"The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of
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guilt or a conclusive presumption of perjury. * * * The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." Id., at 557–558, 76 S.Ct. at 641.

We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.

[6–7] There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. Western Union Tel. Co. v. State of Kansas, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355. Resort to the federal courts in diversity of citizenship cases is another. Terral v. Burke Constr. Co., 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352 Assertion of a First Amendment right is still another. Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; Lamont v. Postmaster General, 381 U.S. 301, 305–306, 85 S.Ct. 1493, 1495–1496, 14 L.Ed.2d 398. The imposition of a burden on the exercise of a Twenty-fourth Amendment right is also banned. Harman v. Forssenius, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50. We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Reversed.

Mr. Justice HARLAN, whom Mr. Justice CLARK and Mr. Justice STEWART join, dissenting.

The majority opinion here and the plurality opinion in Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574, stem from fundamental misconceptions about the logic and necessities of the constitutional
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privilege against self-incrimination. I fear that these opinions will seriously and quite needlessly hinder the protection of other important public values. I must dissent here, as I do in *Spevack*.

The majority employs a curious mixture of doctrines to invalidate these convictions, and I confess to difficulty in perceiving the intended relationships among the various segments of its opinion. I gather that the majority believes that the possibility that these policemen might have been discharged had they refused to provide information pertinent to their public responsibilities is an impermissible "condition" imposed by New Jersey upon petitioners' privilege against self-incrimination. From this premise the majority draws the conclusion that

the statements obtained from petitioners after a warning that discharge was possible were inadmissible. Evidently recognizing the weakness of its conclusion, the majority attempts to bring to its support illustrations from the lengthy series of cases in which this Court, in light of all the relevant circumstances, has adjudged the voluntariness *in fact* of statements obtained from accused persons.

The majority is apparently engaged in the delicate task of riding two unruly horses at once: it is presumably arguing simultaneously that the statements were involuntary as a matter of fact, in the same fashion that the statements in Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, and Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513, were thought to be involuntary, and that the statements were inadmissible as a matter of law, on the premise that they were products of an impermissible condition imposed on the constitutional privilege. These are very different contentions and require separate replies, but in my opinion both contentions are plainly mistaken, for reasons that follow.

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I.

I turn first to the suggestion that these statements were involuntary in fact. An assessment of the voluntariness of the various statements in issue here requires a more comprehensive examination of the pertinent circumstances than the majority has undertaken.

The petitioners were at all material times policemen in the boroughs of Bellmawr and Barrington, New Jersey. Garrity was Bellmawr's chief of police and Virtue one of its police officers; Holroyd, Elwell, and Murray were police officers in Barrington. Another defendant below, Mrs. Naglee, the clerk of Bellmawr's municipal court, has since died. In June 1961 the New Jersey Supreme Court *sua sponte* directed the State's Attorney General to investigate reports of traffic ticket fixing in Bellmawr and Barrington. Subsequent investigations produced evidence that the petitioners, in separate conspiracies, had falsified municipal court records, altered traffic tickets, and diverted moneys produced from bail and fines to unauthorized purposes. In the course of these investigations the State obtained two sworn statements from each of the petitioners; portions of those statements were admitted at trial. The petitioners were convicted in two separate trials of conspiracy to obstruct the proper administration of the state motor traffic laws, the cases being now consolidated for purposes of our review. The Supreme Court of New Jersey affirmed all the convictions.

The first statements were taken from the petitioners by the State's Deputy Attorney General in August and November 1961. All of the usual indicia of duress are wholly absent. As the state court noted, there was "no physical coercion, no overbearing tactics of psychological persuasion, no lengthy incommunicado detention, or efforts to humiliate or ridicule the defendants." 44 N.J.

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209, 220, 207 A.2d 689, 695. The state court found no evidence that any of the petitioners were reluctant to offer statements, and concluded that the interrogations were conducted with a "high degree of civility and restraint." Ibid.

These conclusions are fully substantiated by the record. The statements of the Bellmawr petitioners were taken in a room in the local firehouse, for which Chief Garrity himself had made arrangements. None of the petitioners were in custody before or after the depositions were taken; each apparently continued to pursue his ordinary duties as a public official of the community. The statements were recorded by a court stenographer, who testified that he witnessed no indications of unwillingness or even significant hesitation on the part of any of the petitioners. The Bellmawr petitioners did not have counsel present, but the Deputy Attorney

General testified without contradiction that Garrity had informed him as they strolled between Garrity's office and the firehouse that he had arranged for counsel, but thought that none would be required at that stage. The interrogations were not excessively lengthy, and reasonable efforts were made to assure the physical comfort of the witnesses. Mrs. Naglee, the clerk of the Bellmawr municipal court, who was known to suffer from a heart ailment, was assured that questioning would cease if she felt any discomfort.

The circumstances in which the depositions of the Barrington petitioners were taken are less certain, for the New Jersey Supreme Court found that there was an informal agreement at the Barrington trial that the defendants would argue simply that the possibility of dismissal made the statements "involuntary as a matter of law." The defense did not contend that the statements were the result of physical or mental coercion, or that the wills of the Barrington petitioners were overborne. Accordingly, the State was never obliged to offer evidence

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of the voluntariness in fact of the statements. We are, however, informed that the three Barrington petitioners had counsel present as their depositions were taken. Insofar as the majority suggests that the Barrington statements are involuntary in fact, in the fashion of *Chambers* or *Haynes*, it has introduced a factual contention never urged by the Barrington petitioners and never considered by the courts of New Jersey.

As interrogation commenced, each of the petitioners was sworn, carefully informed that he need not give any information, reminded that any information given might be used in a subsequent criminal prosecution, and warned that as a police officer he was subject to a proceeding to discharge him if he failed to provide information relevant to his public responsibilities. The cautionary statements varied slightly, but all, except that given to Mrs. Naglee, included each of the three warnings.[1] Mrs. Naglee was

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not told that she could be removed from her position at the court if she failed to give information pertinent to the discharge of her duties. All of the petitioners consented to give statements, none displayed any significant hesitation, and none suggested that the decision to offer information was motivated by the possibility of discharge.

A second statement was obtained from each of the petitioners in September and December 1962. These statements were not materially different in content or circumstances from the first. The only significant distinction was that the interrogator did not advert even obliquely to any possibility of dismissal. All the petitioners were cautioned that they

1. The warning given to Chief Garrity is typical. "I want to advise you that anything you say must be said of your own free will and accord without any threats or promises or coercion, and anything you say may be, of course, used against you or any other person in any subsequent criminal proceedings in the courts of our state.

"You do have, under our law, as you probably know, a privilege to refuse to make any disclosure which may tend to incriminate you. If you make a disclosure with knowledge of this right or privilege, voluntarily, you thereby waive that right or privilege in relation to any other questions which I might put to you relevant to such disclosure in this investigation.

"This right or privilege which you have is somewhat limited to the extent that you as a police officer under the laws of our state, may be subjected to a proceeding to have you removed from office if you refuse to answer a question put to you under oath pertaining to your office or your function within that office. It doesn't mean, however, you can't exercise the right. You do have the right."

A. "No, I will cooperate."

Q. "Understanding this, are you willing to proceed at this time and answer any questions?"

A. "Yes."

were entitled to remain silent, and there was no evidence whatever of physical or mental coercion.

All of the petitioners testified at trial, and gave evidence essentially consistent with the statements taken from them. At a preliminary hearing conducted at the Bellmawr trial to determine the voluntariness of the statements, the Bellmawr petitioners offered no evidence beyond proof of the warning given them.

The standards employed by the Court to assess the voluntariness of an accused's statements have reflected a number of values, and thus have emphasized a variety of factual criteria. The criteria employed have included threats of imminent danger, Payne v. State of Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975, physical deprivations, Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948, repeated or extended interrogation, Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, limits on access to counsel or friends, Crooker v. State of California, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448, length and illegality of detention under state law, Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513, individual weakness or incapacity, Lynumn v. State of Illinois, 372 U.S. 528, and the adequacy of warnings of constitutional rights, Davis v. State of North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895. Whatever the criteria employed, the duty of the Court has been "to examine the entire

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record,"

and thereby to determine whether the accused's will "was overborne by the sustained pressures upon him." Davis v. State of North Carolina, 384 U.S. 737, 741, 739, 86 S.Ct. 1761, 1764, 1763.

It would be difficult to imagine interrogations to which these criteria of duress were more completely inapplicable, or in which the requirements which have subsequently been imposed by this Court on police questioning were more thoroughly satisfied. Each of the petitioners received a complete and explicit reminder of his constitutional privilege. Three of the petitioners had counsel present; at least a fourth had consulted counsel but freely determined that his presence was unnecessary. These petitioners were not in any fashion "swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion * * *." Miranda v. State of Arizona, 384 U.S. 436, 461, 86 S.Ct. 1602, 1621. I think it manifest that, under the standards developed by this Court to assess voluntariness, there is no basis for saying that any of these statements were made involuntarily.

II.

The issue remaining is whether the statements were inadmissible because they were "involuntary as a matter of law," in that they were given after a warning that New Jersey policemen may be discharged for failure to provide information pertinent to their public responsibilities. What is really involved on this score, however, is not in truth a question of "voluntariness" at all, but rather whether the condition imposed by the State on the exercise of the privilege against self-incrimination, namely dismissal from office, in this instance serves in itself to render the statements inadmissible. Absent evidence of involuntariness in fact, the admissibility of these statements thus hinges on the validity of the consequence which the State acknowledged might have resulted if the statements had not been given. If the consequence is

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constitutionally permissible, there can surely be no objection if the State cautions the witness that it may follow if he remains silent. If both the consequence and the warning are constitutionally permissible, a witness is obliged, in order to prevent the use of his statements against him in a criminal prosecution, to prove under the standards established since Brown v. State of Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80

L.Ed. 682, that as a matter of fact the statements were involuntarily made. The central issues here are therefore identical to those presented in Spevack v. Klein, supra: whether consequences may properly be permitted to result to a claimant after his invocation of the constitutional privilege, and if so, whether the consequence in question is permissible. For reasons which I have stated in Spevack v. Klein, in my view nothing in the logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged. The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect.

It can hardly be denied that New Jersey is permitted by the Constitution to establish reasonable qualifications and standards of conduct for its public employees. Nor can it be said that it is arbitrary or unreasonable for New Jersey to insist that its employees furnish the appropriate authorities with information pertinent to their employment. Cf. Beilan v. Board of Public Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414; Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692. Finally, it is surely plain that New Jersey may in particular require its employees to assist in the prevention and detection of unlawful activities by officers of the state government. The urgency of these requirements is the more obvious here, where the conduct in question is that of officials directly entrusted with the administration of justice. The importance for our systems of justice

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of the integrity of local police forces can scarcely be exaggerated. Thus, it need only be recalled that this Court itself has often intervened in state criminal prosecutions precisely on the ground that this might encourage high standards of police behavior. See, e. g., Ashcraft v. State of Tennessee, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192; Miranda v. State of Arizona, supra. It must be concluded, therefore, that the sanction at issue here is reasonably calculated to serve the most basic interests of the citizens of New Jersey.

The final question is the hazard, if any, which this sanction presents to the constitutional privilege. The purposes for which, and the circumstances in which, an officer's discharge might be ordered under New Jersey law plainly may vary. It is of course possible that discharge might in a given case be predicated on an imputation of guilt drawn from the use of the privilege, as was thought by this Court to have occurred in Slochower v. Board of Higher Education, supra. But from our vantage point, it would be quite improper to assume that New Jersey will employ these procedures for purposes other than to assess in good faith an employee's continued fitness for public employment. This Court, when a state procedure for investigating the loyalty and fitness of public employees might result either in the *Slochower* situation or in an assessment in good faith of an employee, has until today consistently paused to examine the actual circumstances of each case. Beilan v. Board of Public Education, supra; Nelson v. Los Angeles County, 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed.2d 494. I am unable to see any justification for the majority's abandonment of that process; it is well calculated both to protect the essential purposes of the privilege and to guarantee the most generous opportunities for the pursuit of other public values. The majority's broad prohibition, on the other hand, extends the scope of the privilege beyond its essential purposes, and seriously hampers the protection of other important values. Despite the majority's

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disclaimer, it is quite plain that the logic of its prohibiting rule would in this situation prevent the discharge of these policemen. It would therefore entirely forbid a sanction which presents, at least on its face, no hazard to the

purposes of the constitutional privilege, and which may reasonably be expected to serve important public interests. We are not entitled to assume that discharges will be used either to vindicate impermissible inferences of guilt or to penalize privileged silence, but must instead presume that this procedure is only intended and will only be used to establish and enforce standards of conduct for public employees.[2] As such, it does not minimize or endanger the petitioners' constitutional privilege against self-incrimination.[3]

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I would therefore conclude that the sanction provided by the State is constitutionally permissible. From this, it surely follows that the warning given of the possibility of discharge is constitutionally unobjectionable. Given the constitutionality both of the sanction and of the warning of its application, the petitioners would be constitutionally entitled to exclude the use of their statements as evidence in a criminal prosecution against them only if it is found that the statements were, when given, involuntary in fact. For the reasons stated above, I cannot agree that these statements were involuntary in fact.

I would affirm the judgments of the Supreme Court of New Jersey.

2. The legislative history of N.J.Rev.Stat. 2A:81–17.1, N.J.S.A. provides nothing which clearly indicates the purposes of the statute, beyond what is to be inferred from its face. In any event, the New Jersey Supreme Court noted below that the State would be entitled, even without the statutory authorization, to discharge state employees who declined to provide information relevant to their official responsibilities. There is therefore nothing to which this Court could properly now look to forecast the purposes for which or circumstances in which New Jersey might discharge those who have invoked the constitutional privilege.

3. The late Judge Jerome Frank thus once noted, in the course of a spirited defense of the privilege, that it would be entirely permissible to discharge police officers who decline, on grounds of the privilege, to disclose information pertinent to their public responsibilities. Judge Frank quoted the following with approval:

"'*Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers.* They claim that they had a constitutional right to refuse to answer under the circumstances, but * * * *they had no constitutional right to remain police officers* in the face of their clear violation of the duty imposed upon them.' Christal v. Police Commission of San Francisco". Citing 33 Cal.App.2d 564, 92 P.2d 416. (Emphasis added by Judge Frank.) United States v. Field, 2 Cir., 193 F.2d 92, 106 (separate opinion).

385 U.S. 511

Samuel SPEVACK, Petitioner,

v.

Solomon A. KLEIN.

No. 62.

Argued Nov. 7, 1966.

Decided Jan. 16, 1967.

Disciplinary proceeding against attorney. The New York Supreme Court, Appellate Division, Second Department, entered order confirming report of referee and directing that attorney be disbarred and attorney appealed and moved for stay of operation of order of disbarment. The Court of Appeals, 16 N.Y.2d 1048, 266 N.Y.S.2d 126, 213 N.E.2d 457, denied motion for stay and affirmed order of disbarment. A motion was made to amend the remittitur. The Court of Appeals, 17 N.Y.2d 490, 267 N.Y.S.2d 210, 214 N.E.2d 373, granted the motion to amend remittitur and certiorari was granted. The Supreme Court, Mr. Justice Douglas, held that refusal of attorney to produce demanded financial records or to testify at judicial inquiry on basis that production of records and his

George KALKINES

v.

The UNITED STATES.

No. 534-71.

United States Court of Claims.

Feb. 16, 1973.

As Amended on Rehearing June 1, 1973.

Action by customs bureau employee challenging his discharge. The Court of Claims, Davis, J., held that employee could not be discharged for failure to answer questions concerning his finances and payments from importers, where, although there was pending criminal investigation, he was not advised that his answers or their fruits could not be used in criminal case.

Judgment for plaintiff.

1. Officers ⇐66

Public employee cannot be discharged simply because he invoked Fifth Amendment privilege against self-incrimination in refusing to respond to questions but he can be removed for not replying if he is adequately informed both that he is subject to discharge for not answering and that his replies and their fruits cannot be employed against him in criminal case. U.S.C.A.Const. Amend. 5.

2. Criminal Law ⇐412.1(1)

Later prosecution of public employee cannot constitutionally use statements or their fruits coerced from employee in earlier disciplinary investigation or proceeding by threat of removal from office should he fail to answer question. U.S.C.A.Const. Amend. 5.

3. United States ⇐36

Bureau of customs employee could not be discharged for failure to answer questions concerning his finances and payments from importers, where, although there was pending criminal investigation, employee was not advised that his answers or their fruits could not be used in criminal case. U.S.C.A. Const. Amend. 5.

4. Officers ⇐110

Public employee cannot be held to have violated his duty to account to employer where interrogator acquiesces in request that questioning be deferred.

5. United States ⇐36

Treasury agent's statement to customs bureau employee, prior to questioning, that answers given cannot and would not be used against him in any criminal action, was insufficient warning to permit discharge for failure to answer, where statement did not refer to fruits of answers and remainder of colloquy showed that, although employee remained concerned about prospective criminal prosecution, agent never brought home that he would have immunity with respect to his answers. U.S. C.A.Const. Amend. 5.

Arthur Goldstein, Huntington, N.Y., attorney of record, for plaintiff. Goldstein & Hirschfeld, Huntington, N.Y., and David Serko, New York City, of counsel.

Judith A. Yannello, Washington, D. C., with whom was Asst. Atty. Gen. Harlington Wood, Jr., for defendant.

Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, Judges.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, Judge:

Plaintiff George Kalkines worked for the Bureau of Customs of the Treasury Department from November 1960 until his suspension in June 1968, rising from an initial rating of GS-7 to the position of import specialist, GS-13. His suspension and subsequent discharge came about because of his alleged failure, in violation of the Customs Manual, the Customs Personnel Manual, and the

Treasury Personnel Manual,[1] to answer questions put to him by the Bureau of Customs relating to the performance of his duties. According to management, this failure occurred at four separate interviews, three in New York and one in Washington, each listed as an individual specification of the charge. The agency sustained his removal on this charge, upholding each of the four specifications.[2] The Civil Service Commission affirmed. The validity of this determination is brought before us by the parties' cross-motions for summary judgment, both of which invoke the administrative record on which we rest for our decision.[3]

In November 1967 the Bureau of Customs began an investigation sparked by information saying that plaintiff had accepted a $200 payment from an importer's representative in return for favorable treatment on valuation of a customs entry. The inquiry initially disclosed that plaintiff had had lunch with the representative on November 16th and had made a $400 deposit in his personal bank account on November 17th. He was then visited or summoned by customs agents (acting as investigatory arms of the Bureau) on several occasions, at four of which (November 28, 1967, May 2, 1968, May 8, 1968, all in New York, and June 5, 1968, in Washington) he did not answer, or indicated that he would not answer, certain questions relating to the $400 deposit, his finances, and some aspects of the performance of his customs duties. At other interviews he did answer the queries then put to him. Plaintiff's defense is that his failure to reply at the four specified times was excusable and justifiable in each instance, and therefore not contrary to the directives cited in footnote 1, *supra*.

The most important fact bearing on the propriety of Mr. Kalkines' conduct at the interviews is that, for all or most of the time, a criminal investigation was being carried on concurrently with the civil inquiry connected with possible disciplinary proceedings against him. The United States Attorney's Office had been informed about the possible bribery before the customs agents' first interview with plaintiff, and it became active in investigating the matter in December 1967; witnesses were subpoenaed to, and did, testify before the grand jury. This criminal inquest continued until well into the spring of 1968, and perhaps even longer. Plaintiff was never indicted, the United States Attorney ultimately declining prosecution, but Mr. Kalkines saw the Damoclean sword poised overhead during the entire period with which we are concerned.

[1, 2] In recent years the courts have given more precise content to the obligations of a public employee to answer his employer's work-related ques-

1. The Customs Manual provided (§ 27.39 (j)): "Customs employees shall disclose any information in their possession pertaining to customs matters when requested to do so by a customs agent, and shall answer any proper questions put to them by customs agents."

   The Customs Personnel Manual stated (ch. 735, § 3, ¶ 3f): "Every customs employee is required to disclose any information he has concerning customs matters when requested to do so by a customs agent. Every customs employee is required to answer any proper questions posed by a customs agent. Every customs employee, when requested to do so by a customs agent, shall furnish to such agent, or authorize him in writing to obtain, information of the employee's financial affairs which bears a reasonable relationship to customs matters."

   The Treasury Personnel Manual declared (ch. 735, § 0.735–48): "When directed to do so by competent Treasury authority, employees must testify or respond to questions (under oath when required) concerning matters of official interest. See further 31 CFR 1.10."

2. The original notice contained three other charges which were not sustained by the agency and are not before us.

3. There was a full-scale hearing within the Treasury Department (the "agency hearing"), which the record sets forth in question-and-answer form, as well as some additional testimony taken by the Civil Service Commission's Regional Office, of which we have a narrative summary.

tions where, as here, there is a substantial risk that the employee may be subject to prosecution for actions connected with the subject of management's inquiry. It is now settled that the individual cannot be discharged simply because he invokes his Fifth Amendment privilege against self-incrimination in refusing to respond. Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968). Conversely, a later prosecution cannot constitutionally use statements (or their fruits) coerced from the employee—in an earlier disciplinary investigation or proceeding—by a threat of removal from office if he fails to answer the question. Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). But a governmental employer is not wholly barred from insisting that relevant information be given it; the public servant can be removed for not replying if he is adequately informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be employed against him in a criminal case. See Gardner v. Broderick, *supra*, 392 U.S. at 278, 88 S.Ct. 1913, 20 L.Ed.2d 1082; Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, *supra*, 392 U.S. at 283, 284, 285, 88 S.Ct. 1917, 20 L.Ed.2d 1089 [hereafter cited as *Uniformed Sanitation Men I*] Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 426 F.2d 619 (C.A.2, 1970), cert. denied, 406 U.S. 961, 92 S.Ct. 2055, 32 L.Ed.2d 349 (1972) [hereafter cited as *Uniformed Sanitation Men II*].

This requirement for a sufficient warning to the employee, before questioning, was foreshadowed by the Supreme Court in *Uniformed Sanitation Men I*, and has been set forth more exactly by the Second Circuit in *Uniformed Sanitation Men II*. The highest court said that public employees "subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights." 392 U.S. at 285, 88 S.Ct. at 1920. "Proper proceedings" of that type means, according to Chief Judge Friendly in *Uniformed Sanitation Men II*, inquiries, such as were held in that case,[4] "in which the employee is asked only pertinent questions about the performance of his duties *and is duly advised of his options and the consequences of his choice.*" 426 F.2d at 627 (emphasis added). The same opinion said: "To require a public body to continue to keep an officer or employee who refuses to answer pertinent questions concerning his official conduct, *although assured of protection against use of his answers or their fruits in any criminal prosecution,* would push the constitutional protection beyond its language, its history or any conceivable purpose of the framers of the Bill of Rights." 426 F.2d at 626 (emphasis added). We think that the general directives of the various Treasury and Customs manuals (footnote 1, *supra*) should be read with

4. Those employees were advised as follows at the time management put the questions to them (426 F.2d at 621):

"I want to advise you, Mr. ———, that you have all the rights and privileges guaranteed by the Laws of the State of New York and the Constitution of this State and of the United States, including the right to be represented by counsel at this inquiry, the right to remain silent, although you may be subject to disciplinary action by the Department of Sanitation for the failure to answer material and relevant questions relating to the performance of your duties as an employee of the City of New York.

"I further advise you that the answers you may give to the questions propounded to you at this proceeding, or any information or evidence which is gained by reason of your answers, may not be used against you in a criminal proceeding except that you may be subject to criminal prosecution for any false answer that you may give under any applicable law, including Section 1121 of the New York City Charter."

this specific gloss supplied by the *Uniformed Sanitation Men* opinions.

[3] The only issue we need address is whether plaintiff was "duly advised of his options and the consequences of his choice" and was adequately "assured of protection against use of his answers or their fruits in any criminal prosecution." For the reasons which follow, we hold that this requirement was not fulfilled on any of the four occasions at which he is charged with failing to respond, that as a consequence he did not transgress the duty-to-reply regulations, and therefore that he was invalidly discharged for not answering the questions put to him.

At the interview of November 28, 1967, it is clear that no advice or warnings as to his constitutional rights was given to Mr. Kalkines, though he was told of the requirement of the Customs Manual that he answer. Despite the fact that the matter had already been presented to the United States Attorney (as the customs agents knew), plaintiff was not told that his answers (or information stemming from them) could not be used against him in a criminal proceeding. So as far as the investigators were concerned, he was left sharply impaled on the dilemma of either answering had thereby subjecting himself to the possiblity of self-incrimination, or of avoiding giving such help to the prosecution at the cost of his livelihood. The record shows conclusively that at this interview Mr. Kalkines was keenly aware of, and troubled by, the possible criminal implications, and that his failure to respond stemmed, at least in very substantial part, from this anxiety. *See also* note 6 *infra*.

[4] The next specification is that plaintiff refused to answer pertinent questions on May 2, 1968.[5] By this time, he had retained an attorney, but counsel was not present. Mr. Kalkines declined to answer unless he had the opportunity of consulting with his lawyer. After an exchange on this subject, the customs agent did not attempt to question him further, but called the attorney on the telephone and arranged for a joint meeting on May 8th. The Regional Office of the Civil Service Commission "concluded that there was at the least an implied acquiescence to the [plaintiff's] request for the presence of his attorney as of May 2, 1968, and, in the circumstances, the [plaintiff's] failure to answer questions on that date may not be recognized to have established a substantive basis to support" the specification as to May 2d which, accordingly, the Regional Office held not to be sustained. Without overturning the Regional Office's factual finding on this point, the Board of Appeals and Review ruled that plaintiff was nevertheless guilty of failing to respond on May 2d. The basis for this holding appears to be that an employee's obligation to answer is so absolute that it cannot even be waived by the interrogating agent's agreement to wait until the lawyer is present. This, we hold, was plain error. If, as in this instance, the interrogator acquiesces in a request that questioning be deferred, the employee cannot be held to have violated his duty to account. The directives of the manuals cannot reasonably be interpreted in so absolute, rigid, and insensitive a fashion.[6]

In addition, there is no indication whatever that plaintiff was told on May

5. Between November 28, 1967, and May 2, 1968, he had been called for an interview on December 15th. On this occasion he was informed, according to the Civil Service Commission's Regional Office, "of his constitutional rights to remain silent and to have the presence of an attorney for consultation during the questioning, *and that anything he said could be used against him in court proceedings*" (emphasis added). He answered the questions posed, and his conduct at that interview is not charged against him in the present proceedings.

6. We are also very dubious about a related holding of the Board of Appeals and Review with respect to the first interview on November 28th, *supra*. The Regional Office accepted plaintiff's testimony that on that day he was first confronted with a serious allegation of miscon-

2d that any answers could *not* be used against him criminally. At the last meeting on December 15th (*see* note 5 *supra*), the agent had specifically informed Mr. Kalkines that his answers *could* be used against him in a criminal proceeding, and in the absence of an explicit disavowal that advice could be expected to retain its force. Plaintiff justifiably remained under the impression that his replies could lead to his conviction of a criminal offense.

The third day on which plaintiff is accused of not answering was May 8, 1968. At that time he appeared with counsel. There is a dispute in the testimony as to whether the attorney improperly interfered with the questioning by preventing, in effect, the putting of particular questions. In any event, no specific questions were asked or answered, and the agent ultimately directed counsel to withdraw from the room while a statement was taken from Mr. Kalkines. Thereupon both the attorney and plaintiff left the room. Plaintiff was told that he had to answer and that he had no right to have his counsel present but declined to stay or respond. Again, the significant element is that it is indisputable that neither the employee nor the lawyer was ever advised on May 8th that the responses to the questions, and their products, could not be used against plaintiff in a criminal trial or proceeding. In whatever way one interprets the controverted evidence as to the course of that meeting, this much is clear—no such caution was given, expressly or impliedly, by the agents.

On these facts, the only outcome, for the first three of the four specifications (November 28, 1967; May 2, 1968; May 8, 1968), must be that plaintiff cannot be held to have violated his obligation to answer. At those times a criminal investigation was either in the immediate offing or was actively being carried on. At the least, there is no question but that plaintiff thought so, and had no good reason to think otherwise. He obviously obtained a lawyer primarily because he was disturbed at the possibility of a criminal accusation; that danger was uppermost in his mind. It was reasonable for him to fear that any answer he gave to the customs agents might help to bring prosecution nearer; indeed, it was sensible to think that the civil and the criminal investigations were coordinated, so that the former would help the latter. He was never told that under the law his responses to the customs agents could not be used or would not be used as bricks to build him a prison cell. On the contrary, the one time the subject was mentioned by the agents (on December 15th, *see* note 5 *supra*), they said that his replies *could* be used against him. Under the standard of the *Uniformed Sanitation Men* decisions, these three proceedings cannot be called "proper." Plaintiff was not "duly advised of his options and the consequences of his choice." Quite the opposite, he was left to squirm with a

duct on his part (with criminal implications) and as a consequence became nervous and flustered, being unable to continue the interview and just "closed down." He did return the next day and answered detailed and extensive questions, including inquiries as to the $400 deposit on November 17th. On the basis of these facts, the Region found that plaintiff's "first refusal to reply on November 28, 1967 was effectively set aside as basis for the adverse action" and that the specification involving November 28th "is not sustained as substantive cause in support of that action."

Again, without reversing the Regional Office's finding of fact—paraphrased by the Board as: "the Region was persuaded that Mr. Kalkines' refusal to cooperate at the first interview could be attributed to shock and mental stress"—the Board of Appeals and Review reinstated that specification on the ground, apparently, that the duty to respond is so absolute that failure cannot be excused by "shock and mental stress", and even though the questions were answered the next day. This harsh position is very questionable. We have the greatest doubt that a federal employee can be validly discharged if it is determined, first, that his failure to answer queries on one day is due to such a disabling mental or emotional condition and, second, that he did respond to the questions shortly thereafter.

choice he should not have been put to—the possibility of going to jail or of losing his job. *Cf.* Stevens v. Marks, 383 U.S. 234, 86 S.Ct. 788, 15 L.Ed.2d 724 (1966).

The Government suggests that Mr. Kalkines, or at least his lawyer, should have known that his answers (and their fruits) could not be used to his disadvantage, and therefore that the explicit caution mandated by *Uniformed Sanitation Men II* might be omitted. With respect to the plaintiff, a frightened layman, this is certainly an unacceptable position; he could not be expected to know what lawyers and judges were even then arguing about. The case is hardly better for insisting that the attorney should have known, and should have been responsible for alerting his client. Garrity v. New Jersey, *supra*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562, was not decided until January 16, 1967, and its reach was uncertain for some years. *Gardner* and *Uniformed Sanitation Men I* did not come down until June 10, 1968—after the last failure-to-respond charged against this plaintiff. *Uniformed Sanitation Men II* was not decided until April 3, 1970 (the Supreme Court did not decline review until May 30, 1972). Many knowledgeable people believed that a specific immunity statute was necessary before anybody in the Federal Government could assure criminal immunity to individuals, including employees, being questioned in noncriminal proceedings. Perhaps, we may add, the law on the point is not yet wholly firm. At any rate, even the legendary Mr. Tutt, fictional legal genius of a generation or two ago, would have been hard put to know with any certainty, in the fall of 1967 and the spring of 1968, that this employee would be protected against prosecutorial use of his statements made to the customs agents.

This brings us to the last interview on June 5, 1968. Plaintiff was peremptorily ordered to come to Washington for this meeting with less than a day's notice; he came without his lawyer who was engaged at the time on other urgent legal business and could not leave the New York area. The record contains a transcript of a portion of the interview. An agent opened by informing Mr. Kalkines that he was required to answer questions, and inquired whether he would "answer such questions as they pertain to your employee-employer relationship to the Bureau of Customs and the duties you perform on behalf of the Customs Service." Plaintiff then said that he had "been advised by the customs agents that they are investigating me on an alleged criminal action. I was further advised by them to engage counsel." He denied that he had refused to answer proper questions and went on to say that his attorney had advised him that "since this is a criminal action" the counsel should be present; "all I [plaintiff] ask is that if there is a criminal action pending against me that I have a right to have my counsel present."

The agent replied "that the following interview is administrative in nature, that it is not criminal, that there is no criminal action pending against you and that the purpose of this interview is entirely on an employer-employee basis and that furthermore any answers given to questions put to you in the interview cannot and will not be used against you in any criminal action"; that if the interview were in connection with a criminal action the attorney would most certainly be permitted to be present and to advise; and "this is an administrative interview and do you understand that this interview is administrative and accordingly your attorney will not be permitted to be present during the interview." The agent concluded these observations by asking plaintiff whether he would answer questions in counsel's absence.

[5] The defendant urges that this was proper and sufficient advice to Mr. Kalkines that he had immunity against use of his responses. But even the agent's most explicit statement was incomplete since it did not refer to the fruits of the answers (in addition to the answers themselves). Moreover, and

very significantly, the remainder of the colloquy shows that plaintiff was still very concerned about a criminal prosecution and that the agent never properly brought home that he would have immunity with respect to his answers. This portion of the interview is set forth in the footnote.[7]

The essential aspects are four: First, in describing a "conduct" investigation the agent clearly indicated that a criminal investigation or trial was still possible; he contented himself with reiterating that his own concern was "administrative" and he was not pursuing a violation of criminal law, without denying that a criminal proceeding could possibly eventuate. Second, the agent never really responded to plaintiff's query as to whether the criminal investigation had been dropped, and did not tell him that the U. S. Attorney had refused to go forward with prosecution.[8] Third, the agent failed to repeat or even refer to the earlier statement about non-use for criminal purposes of plaintiff's answers in this "administrative" inquiry. Fourth, the plaintiff was obviously, and quite reasonably, left uncertain as to the connection between the questioning he was then being asked to undergo and a potential criminal action. This last element seems to us reinforced by some confused remarks of plaintiff's later on in the exchange—after the agent had commenced to ask specific questions—which seem to express great doubt about the separation between the civil and criminal sides of the investigation.[9] Moreover, at the agency hearing, both the interrogating agent and the plaintiff made it clear in their testimony that plaintiff was fearful on June 5th that the criminal aspect was still inextricably

7. "A. To go over what you just said, are you stating that there is no criminal investigation relative to this matter, has this been dropped?

"Q. This interview and the purpose of this interview is purely administrative and is not a criminal action or related to a criminal action as it pertains to you.

"A. I don't understand, you are not answering my question, is there an investigation relative to me, a criminal investigation?

"Q. No, there is a conduct investigation pending against you.

"A. For the record, may I state this is the first time that I have ever been told this. I have been advised for the last 6 months that I am under investigation for a criminal action and further I don't know the difference between a conduct and a criminal action.

"Q. It is possible that if you have acted improper in the conduct of your business that your conduct may have involved conduct which is in violation of some criminal law. I restate that this interview is administrative and is not pursuing the violation of criminal law if one existed and in view of its administrative nature, your attorney will not be present. Please answer will you or will you not answer the questions I am about to put to you?

"A. I can't see the separation in which you call an administrative interview and the allegations that have unjustly been made against me. In my position, as I have stated, I will answer any and all questions regarding my customs duties gladly, cheerfully, openly, but I would like to be afforded the opportunity of having my counsel present."

8. This is clear enough from the transcript of the interview. It is confirmed, moreover, by Mr. Kalkines' explicit testimony at the agency hearing that at no time during that meeting did the agents tell him that criminal proceedings were not pending against him or that all criminal charges had been dropped. The agents did not testify to the contrary.

9. When the agent began to ask about the questioned customs transaction, the plaintiff repeated that he had never refused, and did not then refuse, to answer about his customs duties, that he wished counsel, and that he had previously answered that question. He went on: "The records cannot substantiate that to sit here and to state that there is disassociation between the allegation made against me and that this is merely the ordinary practice of Customs, I don't think is correct. This is directly associated with an allegation against me and there is no disassociation, cannot be considered an administrative action, and again let me reiterate I have and will continue to answer every question relative to my customs duty, all I ask is that I have a right to have my counsel * * *."

linked to the so-called "conduct investigation."

The sum of this June 5th episode is that, by failing to make and maintain a clear and unequivocal declaration of plaintiff's "use" immunity, the customs agents gave the employee very good reason to be apprehensive that he could be walking into the criminal trap if he responded to potentially incriminating questions, and that in that dangerous situation he very much needed his lawyer's help. The record compels this conclusion. Perhaps the agents were not more positive in their statements because there still remained at that time the possibility of prosecution.[10] Whatever the basis for their failure to clear up plaintiff's reasonable doubts, we are convinced the record shows that he was not "duly advised of his options and the consequences of his choice." [11] His failure to respond was excused on this occasion, as on the earlier dates cited in the other specifications. The agency and the Civil Service Commission erred in disregarding this justification and in holding that the duty to respond was absolute and was violated.

The result is that, for this reason,[12] plaintiff's discharge in 1968 was invalid, and he is now entitled to recover his lost pay, less offsets. His motion for summary judgment is granted and the defendant's is denied. The amount of recovery will be determined under Rule 131(c).[13]

10. There is a question whether the idea of a criminal proceeding had been entirely dropped by June 5th. The defendant says it had been but admits that formal notification to that effect was not given by the United States Attorney's Office until some months later. In any event, the customs agent who interrogated plaintiff on June 5th conceded at the agency hearing that, if Mr. Kalkines had then made what appeared to the agents to be incriminating responses or had revealed circumstances which were obviously of a criminal nature, a report would probably have been made to the U.S. Attorney. The agent's superior, who was present at the interrogation, testified at the agency hearing to similar effect.

11. An example of proper advice is that given in *Uniformed Sanitation Men II*, *see* note 4 *supra*.

12. We do not reach or consider any of plaintiff's other contentions, including the argument that in any event he was entitled to the assistance of a lawyer at the May 8th and June 5th interviews even if properly advised as to his options.

13. Plaintiff is granted 30 days to file, if he desires, an amendment to his petition requesting restoration under Public Law 92-415, 86 Stat. 652 (August 29, 1972) to his position in the Bureau of Customs. *See* General Order No. 3 of 1972 (Dec. 12, 1972), paras. 3(a), 4(b).

D. A. FOSTER TRENCHING COMPANY, INC.
v.
The UNITED STATES.
No. 327-70.

United States Court of Claims.
Feb. 16, 1973.

Suit for recovery of federal income taxes and interest. The Court of Claims, Kashiwa, J., held that expenses incurred by taxpayer in maintaining fishing boat were not deductible with respect to occasions when use of boat was exclusively by taxpayer's business associates and without the presence of any employee of the taxpayer, save the captain, and when there were no business transactions on the boat other than the entertainment of customers, suppliers and business associates, and expenses could not be considered directly related to active conduct of taxpayer's business on theory that entertainment occurred in clear business setting directly in furtherance of taxpayer's trade or business.

Petition dismissed.

Internal Revenue ⇐555

Expenses incurred by taxpayer in maintaining fishing boat were not deductible with respect to occasions when use of boat was exclusively by taxpayer's business associates and without the presence of any employee of the taxpay-

Stewards' Privilege

The following information is provided for stewards who are subjected to demands that they testify or otherwise disclose information provided to them by employees in confidence in their representative capacity.

> **A demand by the Postal Service to interrogate union stewards concerning information communicated to them by employees they represent in their capacity as union stewards constitutes a violation of the National Labor Relations Act.**
>
> These demands which carry explicit or implicit threats of discipline of the steward if the steward does not cooperate are clearly demands to interrogate employees about their union activities.

In these circumstances, the *Local may file an unfair labor practice charge against the Postal Service* alleging violations of Section 8(a)(1).

> Those Locals should also ask for injunctive relief under Section 10(j) of the National Labor Relations Act: The damage done by such a demand is irreparable because of the ongoing chilling effect that it has both on an employee's willingness to consult stewards, and on the willingness of employees to serve as stewards.
>
> Such harm cannot he repaired with an eventual NLRB cease-and-desist order. For this same reason, the charge should not be deferred to arbitration. Such a charge should allege as follows:
>
> > On or about _____, the U.S. Postal Service interfered with, restrained and coerced employees in the exercise of their Section 7 rights, by, among other things, demanding under threat of discipline that union officials submit to interrogations about their union activities. Injunctive relief under Section 10(j) is requested.
>
> The Local should cite Cook Paint and Varnish Co., 258 NLRB 1230 (1981) when contacted by the Board Agent.

It is important to remember, however, that, although APWU stewards enjoy a **QUALIFIED PRIVILEGE** as stated by the Board in Cook Paint and Varnish, as employees of the Postal Service, they also have an **OBLIGATION TO COOPERATE WITH EMPLOYER INVESTIGATIONS.**[13]

Thus, the stewards' "privilege", spoken of above, is NOT AN "ATTORNEY-CLIENT" one, and is NOT, therefore, ABSOLUTE.

[13] ELM Section 665.3 states that "[e]mployees must cooperate in any postal investigation, including Office of Inspector General investigations."

Should a steward be subpoenaed to testify before a grand jury or in court, a steward may well be held in contempt if he or she refuses to testify based upon the NLRB privilege for union stewards spoken of above.

Unlike an attorney-client privilege which would be honored, there does not appear to be any judicial authority for a union steward to withhold information when questioned under oath by law enforcement officials.

If an employee informs the steward of criminal activity, the steward should advise the employee to **GET A CRIMINAL LAWYER.**

If the steward is NOT SURE if what an employee has told him or her is criminal activity, **ASK AN ATTORNEY.**

Hypotheticals for Discussion

1. Todd, a window clerk employee has been stealing on the job for five years. Todd is also a union steward, and has been one for three years. In a casual conversation on the workroom floor, Todd told Aaron, another union steward about how he had been stealing from the window for five years now and is racked with guilt. Todd thanks Aaron for listening and for always being a buddy to him. Todd and Aaron then return to their work duties. What should Aaron do now? Does he have an obligation to report Todd? What should Aaron tell Todd to do, if anything?

   A. The Postal Service has been secretly filming Todd, and has him on film stealing on the job. Todd tells the Postal Service that he had confided in Aaron. The Postal Service informs Aaron that someone from the Office of Inspector General would be coming over to take Aaron's statement. The Postal Service also tells Aaron that he will have to testify if this goes to court. What should Aaron do?

2. Employee Tiffany has been discharged from her job for excessive absences. Union steward Kristi has filed a grievance on behalf of Tiffany. When talking to Tiffany about her grievance, Kristi takes notes in a spiral notebook. The spiral notebook is Kristi's "union book" where she takes notes when investigating grievances, and anything else she does while on union time. The grievance goes to arbitration, and the management official subpoenas Kristi for her "union book." What should Kristi do?

   A. What if during the course of Tiffany's grievance, it comes to light that Tiffany was involved in a crime while she was on the job? Does Kristi have to turn the "union book" over if she took notes about the crime in it?

258 NLRB No. 166, 258 NLRB 1230, 108 L.R.R.M. (BNA) 1150, 1981-82 NLRB Dec. P 18433, 1981 WL 21122 (N.L.R.B.)

NATIONAL LABOR RELATIONS BOARD
(N.L.R.B.)

**1 *1230 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

September 30, 1981

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On November 30, 1979, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[FN1] 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 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.

On April 2, 1981, a panel of the court of appeals issued its decision,[FN2] 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." [FN3] Accordingly, since the Board had declined to pass on the issue of whether 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.

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.

**2 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 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.[FN4]

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 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."

****3** 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 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.[FN5]

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." [FN6] It further held, however, that the " interview may not pry into protected union activities." [FN7] 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 between an interview of an employee and an interview of a union steward." [FN8] 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.

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 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 eyewitness 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 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.

****4** 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 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.[FN9] Such actions by Respondent also inhibit stewards in obtaining needed information from 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.

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

****5** 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 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." [FN10] 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.

(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.

FN1. 246 NLRB 646.

FN2. 648 F.2d 712 (D.C. Cir. 1981).

FN3. *Id.* at 725.

FN4. 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.

FN5. 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.

FN6. 648 F.2d at 723.

FN7. *Id.*

FN8. *Id.* at 724.

FN9. 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.

FN10. 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

**6 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 COMPANY

258 NLRB No. 166, 258 NLRB 1230, 108 L.R.R.M. (BNA) 1150, 1981-82 NLRB Dec. P 18433, 1981 WL 21122 (N.L.R.B.)
END OF DOCUMENT

Steward Privilege Cases

1. In United States Postal Service and American Postal Workers Union, Columbus, Ohio Area Local, 250 NLRB 4 (1980), the Board affirmed the Administrative Law Judge's conclusion that an obscenity uttered by a steward was not so egregious as to remove the Act's protection from his grievance activities. In this case, the steward 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 the steward was speaking to provide an immediate and direct answer to the steward's questions.

2. In United States Postal Service and American Postal Workers Union, AFL-CIO (San Angelo, Texas Local), 251 NLRB 252 (1980), the Board found that two union officials came within the protection of the Act when they followed two supervisors back to the workroom floor, continuing to talk about their grievance as they walked along. One of the union officials, according to the supervisor, had used "loud, abusive, and profane language." When the employees and the supervisors reached the timeclock, one of the supervisors turned and said, "I am giving you a direct order. I want you to go back to work now." After a momentary hesitation, and before the supervisor had to repeat the order, the two employees complied and went back to work. The Board concluded that the language and conduct was not so opprobrious or extreme as to warrant the denial of protection under the Act.

3. In United States Postal Service and Patricia L. Moore, 252 NLRB 624 (1980), the Board concluded that a steward was within the scope of her official union functions and constituted protected concerted activity when she sought to honor three employees' request for union representation. This case involved three employees who had received disciplinary warnings in their records for being in the break area before their shifts ended. The employees met with the steward and requested her advice and assistance. The steward agreed to investigate the incident and then left her work station for the purpose of conducting this union business. The steward appeared as the same supervisor that had given the three employees the warnings was about to explain the work schedule to the employees. The supervisor told the steward, "This is not union business." The steward responded by asserting her right to represent the employees. During the course of the argument, the supervisor gave the steward several direct orders to return to her work place. The steward ignored the orders at first, protesting that she had a right to remain with , and represent the three employees, telling them that they did not have to speak with the supervisor without the presence of their union steward. The steward finally left. After the meeting the three employees told the steward that they had not been disciplined. Shortly after, the steward received a 5 day suspension notice for her "insubordination." Overturning the Administrative Law Judge's ruling, the Board found that the steward's sole basis

for the exchange between herself and the supervisor was a result of the steward's investigation at the request of the three employees, and thus, was within the scope of her official union functions.

4. In United States Postal Service and New Haven Connecticut Area Local APWU, 258 NLRB 274 (1983), the Board found that the Postal Service was justified in disciplining a steward even when the discipline was motivated in part by the steward's promise to file grievances on behalf of all employees who had problems with their timecards, which is protected activity. The Board came to this conclusion because the Postal Service had demonstrated that it had a legitimate, permissible reason for disciplining the steward and that it would have done so even in the absence of the steward's protected activity. In this case, the Postal Service showed that the steward became excessively loud and insulting while discussing his timecard with the supervisor. When asked to contain himself, he would not, and his actions caused fellow employees to stop work, albeit briefly, thus disrupting operations at the facility. The Board noted that the steward was not engaged in the formal pursuit of a grievance, but reacted with insubordination when the request to have his timecard adjusted was refused.

THE NATIONAL LABOR RELATIONS BOARD

STRUCTURE OF THE NATIONAL LABOR RELATIONS BOARD

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

The National Labor Relations Act (the NLRA) gives the National Labor Relations Board (the NLRB) jurisdiction over two types of proceedings:

(1) representation proceedings; and

(2) unfair labor practice proceedings.

2. 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 (the bargaining unit) request an election or authorize the union to represent them.

The NLRB hears and adjudicates claims arising out of NLRB conducted elections.

3. 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.

i. 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.

ii. 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.

i. 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.

ii. 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.

i. 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.

iii. 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.

MANUALS AVAILABLE AT THE NLRB'S WEBSITE

WWW.NLRB.GOV

- Division of Judges Bench Book
- "An Outline of Law and Procedure in Representation Cases"
- Casehandling Manual
  - Part One – Unfair Labor Practice Proceedings
  - Part Two – Representation Proceedings
  - Part Three – Compliance
- NLRB Rules and Regulations
- The NLRB--What it is, What it does
- The First Sixty Years: The Story of the National Labor Relations Board, 1935-1995
- Basic Guide to the National Labor Relations Act
- Text of the National Labor Relations Act
- The NLRB and You--Representation Cases
- The NLRB and You--Unfair Labor Practices
- Your Government Conducts an Election

A guide to basic law and procedures

under the

NATIONAL LABOR RELATIONS ACT

prepared at APWU National Headquarters sl//opeiu #2, afl-cio

This is a revised edition of a pamphlet originally issued in 1962. It provides a basic framework for a better understanding of the National Labor Relations Act and its administration.

A special chart that arranges systematically the types of cases in which an employer or a labor organization may be involved under the Act, including both unfair labor practice cases and representation election proceedings, appears in the booklet.

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A guide to basic law and procedures

under the

NATIONAL LABOR RELATIONS ACT

Prepared in the Office of the General Counsel
NATIONAL LABOR RELATIONS BOARD

Table of Contents

Foreword

The Regional Offices of the National Labor Relations Board have found that, more than five decades after its enactment, there is still a lack of basic information about the National Labor Relations Act. Staff members have expressed a need for a simply stated explanation of the Act to which anyone could be referred for guidance. To meet this demand, the basic law under the Act has been set forth in this pamphlet in a nontechnical way so that those who may be affected by it can better understand what their rights and obligations are.

Any effort to state basic principles of law in a simple way is a challenging and unenviable task. This is especially true about labor law, a relatively complex field of law. Anyone reading this booklet must bear in mind several cautions.

First, it must be emphasized that the Office of the General Counsel does not issue advisory opinions and this material cannot be considered as an official statement of law. It represents the view of the Office of the General Counsel as of the date of publication only. *It is important to note that the law changes and advances.* In fact, it is the duty of the Agency to keep its decisions abreast of changing conditions, yet within the basic statute. Accordingly, with the passage of time no one can rely on these statements as absolute until and unless a check has been made to see whether the law may have been changed substantially or specifically.

Furthermore, these are broad general principles only and countless subprinciples and detailed rules are not included. Only by evaluation of specific fact situations in the light of current principles and with the aid of expert advice would a person be in a position to know definitely where the proposed conduct may fit under the statute. No basic primer or text can constitute legal advice in particular fact situations. This effort to improve basic education about the statute should not be considered as such. Many areas of the statute remain untested. Legal advisers and other experts can find the total body of "Board law" reported in other Agency publications.

One other caution: This material does not deal with questions arising under other labor laws, but only with the National Labor Relations Act. Laws administered by other Government agencies, such as the Labor-Management Reporting and Disclosure Act of 1959, the Employee Retirement Income Security Act, the Occupational Safety and Health Act, the Railway Labor Act, the Fair Labor Standards,

Walsh-Healey and Davis-Bacon Acts, Title VII of the Civil Rights Act of 1964, the Federal Mine Safety and Health Act, and the Veterans' Preference Act, are not treated herein.

Lastly, this material does not reflect the view of the National Labor Relations Board as the adjudicating agency that in the end will decide each case as it comes before it.

It is hoped that with this cautionary note this booklet may be helpful to those in need of a better basic understanding of the National Labor Relations Act.

A Guide to Basic Law and Procedures Under the National Labor Relations Act

Summary of the Act

It is in the national interest of the United States to maintain full production in its economy. Industrial strife among employees, employers, and labor organizations interferes with full production and is contrary to our national interest. Experience has shown that labor disputes can be lessened if the parties involved recognize the legitimate rights of each in their relations with one another. To establish these rights under law, Congress enacted the National Labor Relations Act. Its purpose is to define and protect the rights of employees and employers, to encourage collective bargaining, and to eliminate certain practices on the part of labor and management that are harmful to the general welfare.

Purpose of the Act

The National Labor Relations Act states and defines the rights of employees to organize and to bargain collectively with their employers through representatives of their own choosing or not to do so. To ensure that employees can freely choose their own representatives for the purpose of collective bargaining, or choose not to be represented, the Act establishes a procedure by which they can exercise their choice at a secret-ballot election conducted by the National Labor Relations Board. Further, to protect the rights of employees and employers, and to prevent labor disputes that would adversely affect the rights of the public, Congress has defined certain practices of employers and unions as unfair labor practices.

What the Act provides

The law is administered and enforced principally by the National Labor Relations Board and the General Counsel acting through more than 52 regional and other field offices located in major cities in various sections of the country. The General Counsel and the staff of the Regional Offices investigate and prosecute unfair labor practice cases and conduct elections to determine employee representatives. The five-member Board decides cases involving charges of unfair labor practices and determines representation election questions that come to it from the Regional Offices.

How the Act is enforced

The rights of employees, including the rights to self-organization and collective bargaining that are protected by Section 7 of the Act, are presented first in this material. The Act's provisions concerning the requirements for union-security agreements are covered in the same section, which also includes a discussion of the right to strike and the right to picket. The obligations of collective bargaining and the Act's provisions for the selection of employee representatives are treated in the next section. Unfair labor practices of employers and of labor organizations are then presented in separate sections. The final section, entitled "How the Act Is Enforced," sets forth the organization of the NLRB; its authority

How this material is organized

and limitations; its procedures and powers in representation matters, in unfair labor practice cases, and in certain special proceedings under the Act; and the Act's provisions concerning enforcement of the Board's orders.

The Rights of Employees

The Section 7 Rights

The rights of employees are set forth principally in Section 7 of the Act, which provides as follows:

> 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 of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Examples of the rights protected by this section are the following:

Examples of Section 7 rights

- Forming or attempting to form a union among the employees of a company.
- Joining a union whether the union is recognized by the employer or not.
- Assisting a union to organize the employees of an employer.
- Going out on strike to secure better working conditions.
- Refraining from activity on behalf of a union.

Union Security

The Act permits, under certain conditions, a union and an employer to make an agreement, called a union-security agreement, that requires employees to make certain payments to the union in order to retain their jobs. A union-security agreement cannot require that applicants for employment be members of the union in order to be hired, and such an agreement cannot require employees to join or maintain membership in the union in order to retain their jobs. Under a union-security agreement, individuals choosing to be dues-paying nonmembers may be required, as may employees who actually join the union, to pay full initiation fees and dues within a certain period of time (a "grace period") after the collective-bargaining contract takes effect or after a new employee is hired. However, the most

that can be required of nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes is that they pay their share of the union's costs relating to representational activities (such as collective bargaining, contract administration, and grievance adjustment).

Union-security agreements

The grace period, after which the union-security agreement becomes effective, cannot be less than 30 days except in the building and construction industry. The Act allows a shorter grace period of 7 full days in the building and construction industry (Section 8 (f)). A union-security agreement that provides a shorter grace period than the law allows is invalid, and any employee discharged because he or she has not complied with such an agreement is entitled to reinstatement.

Requirements for union-security agreements

Under a union-security agreement, employees who have religious objections to becoming members of a union or to supporting a union financially may be exempt from paying union dues and initiation fees. These employees may, however, be required to make contributions to a nonreligious, nonlabor tax exempt organization instead of making payments to a union. Unions representing such employees may also charge them the reasonable cost of any grievances processed at the employees' request.

For a union-security agreement to be valid, it must meet all the following requirements:

1. The union must not have been assisted or controlled by the employer (see Section 8(a)(2) under "Unfair Labor Practices of Employers" on pp. 19-20).
2. The union must be the majority representative of the employees in the appropriate collective-bargaining unit covered by such agreement when made.
3. The union's authority to make such an agreement must not have been revoked within the previous 12 months by the employees in a Board election.
4. The agreement must provide for the appropriate grace period.

Prehire agreements in the construction industry

Section 8(f) of the Act allows an employer engaged primarily in the building and construction industry to sign a union-security agreement with a union without the union's having been

designated as the representative of its employees as otherwise required by the Act. The agreemen be made before the employer has hired any employees for a project and will apply to them when are hired. As noted above, however, the union-security provisions of a collective-bargaining con in the building and construction industry may become effective with respect to new employees 7 full days. If the agreement is made while employees are on the job, it must allow existing emplc the same 7-day grace period to comply. As with any other union-security agreement, the union invc must be free from employer assistance or control.

Collective-bargaining contracts in the building and construction industry can include, as s in Section 8(f), the following additional provisions:

1. A requirement that the employer notify the union concerning job openings.
2. A provision that gives the union an opportunity to refer qualified applicants for such
3. Job qualification standards based on training or experience.
4. A provision for priority in hiring based on length of service with the employer, in the indu or in the particular geographic area.

These four hiring provisions may lawfully be included in collective-bargaining contracts w cover employees in other industries as well.

Finally, pursuant to Section 14(b) of the Act, individual States may prohibit, and some States prohibited, certain forms of union-security agreements.

The Right to Strike

Section 7 of the Act states in part, "Employees shall have the right . . . to engage in other conce activities for the purpose of collective bargaining or other mutual aid or protection." Strikes are incl among the concerted activities protected for employees by this section. Section 13 also concern right to strike. It reads as follows:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as e to interfere with or impede or diminish in any way the right to strike, or to affect the limitat or qualifications on that right.

It is clear from a reading of these two provisions that the law not only guarantees the rig employees to strike, but also places limitations and qualifications on the exercise of that right. for example, restrictions on strikes in health care institutions, page 41.

Lawful and unlawful strikes

The lawfulness of a strike may depend on the object, or purpose, of the strike, on its timing, or on the conduct of the strikers. The object, or objects, of a strike and whether the objects are lawful are matters that are not always easy to determine. Such issues often have to be decided by the National Labor Relations Board. The consequences can be severe to striking employees and struck employers, involving as they do questions of reinstatement and backpay.

It must be emphasized that the following is only a brief outline. A detailed analysis of the law concerning strikes, and application of the law to all the factual situations that can arise in connection with strikes, is beyond the scope of this material. Employees and employers who anticipate being involved in strike action should proceed cautiously and on the basis of competent advice.

Strikes for a lawful object

Employees who strike for a lawful object fall into two classes—"economic strikers" and "unfair labor practice strikers." Both classes continue as employees, but unfair labor practice strikers have greater rights of reinstatement to their jobs.

Economic strikers defined

If the object of a strike is to obtain from the employer some economic concession such as higher wages, shorter hours, or better working conditions, the striking employees are called economic strikers. They retain their status as employees and cannot be discharged, but they can be replaced by their employer. If the employer has hired bona fide permanent replacements who are filling the jobs of the economic strikers when the strikers apply unconditionally to go back to work, the strikers are *not* entitled to reinstatement at that time. However, if the strikers do not obtain regular and substantially equivalent employment, they are entitled to be recalled to jobs for which they are qualified when openings in such jobs occur if they, or their bargaining representative, have made an unconditional request for their reinstatement.

Unfair labor practice strikers defined

Employees who strike to protest an unfair labor practice committed by their employer are called unfair labor practice strikers. Such strikers can be neither discharged nor permanently replaced. When the strike ends, unfair labor practice strikers, absent serious misconduct on their part, are entitled to have their jobs back even if employees hired to do their work have to be discharged.

If the Board finds that economic strikers or unfair labor practice strikers who have made an unconditional request for reinstatement have been unlawfully denied reinstatement by their employer, the Board may award such strikers backpay starting at the time they should have been reinstated.

Strikes unlawful because of purpose

A strike may be unlawful because an object, or purpose, of the strike is unlawful. A strike in support of a union unfair labor practice, or one that would cause an employer to commit an unfair labor practice, may be a strike for an unlawful object. For example, it is an unfair labor practice for an employer to discharge an employee for failure to make certain lawful payments to the union when there is no union-security agreement in effect (Section 8(a)(3)). A strike to compel an employer to do this would be a strike for an unlawful object and, therefore, an unlawful strike. Strikes of this nature will be discussed in connection with the various unfair labor practices in a later section of this guide.

Furthermore, Section 8(b)(4) of the Act prohibits strikes for certain objects even though the objects are not necessarily unlawful if achieved by other means. An example of this would be a strike to compel Employer A to cease doing business with Employer B. It is not unlawful for Employer A voluntarily to stop doing business with Employer B, nor is it unlawful for a union merely to request that it do so. It is, however, unlawful for the union to strike with an object of forcing the employer to do so. These points will be covered in more detail in the explanation of Section 8(b)(4).

In any event, employees who participate in an unlawful strike may be discharged and are not entitled to reinstatement.

Strikes unlawful because of timing—Effect of no-strike contract

A strike that violates a no-strike provision of a contract is not protected by the Act, and the striking employees can be discharged or otherwise disciplined, unless the strike is called to protest certain kinds of unfair labor practices committed by the employer. It should be noted that not all refusals to work are considered strikes and thus violations of no-strike provisions. A walkout because of conditions abnormally dangerous to health, such as a defective ventilation system in a spray-painting shop, has been held not to violate a no-strike provision.

Same—Strikes at end of contract period

Section 8(d) provides that when either party desires to terminate or change an existing contract, it must comply with certain conditions. (See p. 8.) If these requirements are not met, a strike to terminate or change a contract is unlawful and participating strikers lose their status as employees of the employer engaged in the labor dispute. If the strike was caused by the unfair labor practice of the employer, however, the strikers are classified as unfair labor practice strikers and their status is not affected by failure to follow the required procedure.

Strikers who engage in serious misconduct in the course of a strike may be refused reinstatement to their former jobs. This applies to both economic strikers and unfair labor practice strikers. Serious misconduct has been held to include, among other things, violence and threats of violence. The U.S. Supreme Court has ruled that a "sitdown" strike, when employees simply stay in the plant and refuse to work, thus depriving the owner of property, is not protected by the law. Examples of serious misconduct that could cause the employees involved to lose their right to reinstatement are:

Strikes unlawful because of misconduct of strikers

- Strikers physically blocking persons from entering or leaving a struck plant.
- Strikers threatening violence against nonstriking employees.
- Strikers attacking management representatives.

The Right to Picket

Likewise the right to picket is subject to limitations and qualifications. As with the right to strike, picketing can be prohibited because of its object or its timing, or misconduct on the picket line. In addition, Section 8(b)(7) declares it to be an unfair labor practice for a union to picket for certain objects whether the picketing accompanies a strike or not. This will be covered in more detail in the section on union unfair labor practices.

Collective Bargaining and Representation of Employees

Collective Bargaining

Collective bargaining is one of the keystones of the Act. Section 1 of the Act declares that the policy of the United States is to be carried out "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Collective bargaining is defined in the Act. Section 8(d) requires an employer and the representative of its employees to meet at reasonable times, to confer in good faith about certain matters, and to put into writing any agreement reached if requested by either party. The parties must confer in good faith with respect to wages, hours, and other terms or conditions of employment, the negotiation of an agreement, or any question arising under an agreement.

Duty to bargain imposed on both employer and union

These obligations are imposed equally on the employer and the representative of its employees. It is an unfair labor practice for either party to refuse to bargain collectively with the other. The obligation

does not, however, compel either party to agree to a proposal by the other, nor does it require either party to make a concession to the other.

Section 8(d) provides further that when a collective-bargaining agreement is in effect no party to the contract shall end or change the contract unless the party wishing to end or change it takes the following steps:

Bargaining steps to end or change a contract

1. The party must notify the other party to the contract in writing about the proposed termination or modification 60 days before the date on which the contract is scheduled to expire. If the contract is not scheduled to expire on any particular date, the notice in writing must be served 60 days before the time when it is proposed that the termination or modification take effect.
2. The party must offer to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed changes.
3. The party must, within 30 days after the notice to the party, notify the Federal Mediation and Conciliation Service of the existence of a dispute if no agreement has been reached by that time. Said party must also notify at the same time any State or Territorial mediation or conciliation agency in the State or Territory where the dispute occurred.
4. The party must continue in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract until 60 days after the notice to the other party was given or until the date the contract is scheduled to expire, whichever is later.

(In the case of a health care institution, the requirement in paragraphs 1 and 4 is 90 days, and in paragraph 3 is 60 days. In addition, there is a 30-day notice requirement to the agencies in paragraph 3 when a dispute arises in bargaining for an initial contract.)

When the bargaining steps are not required

The requirements of paragraphs 2, 3, and 4, above, cease to apply if the NLRB issues a certificate showing that the employees' representative who is a party to the contract has been replaced by a different representative or has been voted out by the employees. Neither party is required to discuss or agree to any change of the provisions of the contract if the other party proposes that the change become effective before the provision could be reopened according to the terms of the contract.

As has been pointed out, any employee who engages in a strike within the notice period loses status as an employee of the struck employer. This loss of status ends, however, if and when that individual is reemployed by the same employer.

The Employee Representative

Section 9(a) provides that the employee representatives that have been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining."

What is an appropriate bargaining unit

A unit of employees is a group of two or more employees who share a community of interest and may reasonably be grouped together for purposes of collective bargaining. The determination of what is an appropriate unit for such purposes is, under the Act, left to the discretion of the NLRB. Section 9(b) states that the Board shall decide in each representation case whether, "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

This broad discretion is, however, limited by several other provisions of the Act. Section 9(b)(1) provides that the Board shall not approve as appropriate a unit that includes both professional and nonprofessional employees, unless a majority of the professional employees involved vote to be included in the mixed unit.

Section 9(b)(2) provides that the Board shall not hold a proposed craft unit to be inappropriate simply because a different unit was previously approved by the Board, unless a majority of the employees in the proposed craft unit vote against being represented separately.

Section 9(b)(3) prohibits the Board from including plant guards in the same unit with other employees. It also prohibits the Board from certifying a labor organization as the representative of a plant guard unit if the labor organization has members who are nonguard employees or if it is "affiliated directly or indirectly" with an organization that has members who are nonguard employees.

How the appropriateness of a unit is determined

Generally, the appropriateness of a bargaining unit is determined on the basis of a community of interest of the employees involved. Those who have the same or substantially similar interests concerning wages, hours, and working conditions are grouped together in a bargaining unit. In determining whether a proposed unit is appropriate, the following factors are also considered:

1. Any history of collective bargaining.
2. The desires of the employees concerned.
3. The extent to which the employees are organized. Section 9(c)(5) forbids the Board from giving this factor controlling weight.

Finally, with regard to units in the health care industry, the Board also is guided by Congress' concern about preventing disruptions in the delivery of health care services, and its directive to minimize the number of appropriate bargaining units.

Who can or cannot be included in a unit

A unit may cover the employees in one plant of an employer, or it may cover employees in two or more plants of the same employer. In some industries in which employers are grouped together in voluntary associations, a unit may include employees of two or more employers in any number of locations. It should be noted that a bargaining unit can include only persons who are "employees" within the meaning of the Act. The Act excludes certain individuals, such as agricultural laborers, independent contractors, supervisors, and persons in managerial positions, from the meaning of "employees." None of these individuals can be included in a bargaining unit established by the Board. In addition, the Board, as a matter of policy, excludes from bargaining units employees who act in a confidential capacity to an employer's labor relations officials.

Duties of bargaining representative and employer

Once an employee representative has been designated by a majority of the employees in an appropriate unit, the Act makes that representative the exclusive bargaining agent for all employees in the unit. As exclusive bargaining agent it has a duty to represent equally and fairly all employees in the unit without regard to their union membership or activities. Once a collective-bargaining representative has been designated or selected by its employees, it is illegal for an employer to bargain with individual employees, with a group of employees, or with another employee representative.

Section 9(a) provides that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative provided:

1. The adjustment is not inconsistent with the terms of any collective-bargaining agreement then in effect.

2. The bargaining representative has been given the opportunity to be present at such adjustment.

How a Bargaining Representative Is Selected

The Act requires that an employer bargain with the representative selected by its employees. The most common method by which employees can select a bargaining representative is a secret-ballot representation election conducted by the Board.

The NLRB can conduct such an election only when a petition has been filed requesting one.

Petition for certification of representatives

A petition for certification of representatives can be filed by an employee or a group of employees or any individual or labor organization acting on their behalf, or it can be filed by an employer. If filed by or on behalf of employees, the petition must be supported by a substantial number of employees who wish to be represented for collective bargaining and must state that their employer declines to recognize their representative. If filed by an employer, the petition must allege that one or more individuals or organizations have made a claim for recognition as the exclusive representative of the same group of employees.

Petition for decertification election

The Act also contains a provision whereby employees or someone acting on their behalf can file a petition seeking an election to determine if the employees wish to retain the individual or labor organization currently acting as their bargaining representative, whether the representative has been certified or voluntarily recognized by the employer. This is called a decertification election.

Union-security deauthorization

Provision is also made for the Board to determine by secret ballot whether the employees covered by a union-security agreement desire to withdraw the authority of their representative to continue the agreement. This is called a union-security deauthorization election and can be brought about by the filing of a petition signed by 30 percent or more of the employees covered by the agreement.

If you will refer to the "Types of Cases" on pages 22 and 23 of this booklet you may find it easier to understand the differences between the six types of petitions that can be filed under the Act.

Purpose of investigation and hearing

The same petition form is used for any kind of Board election. When the petition is filed, the NLRB must investigate the petition, hold a hearing if necessary, and direct an election if it finds that a question of representation exists. The purpose of the investigation is to determine, among other things, the following:

1. Whether the Board has jurisdiction to conduct an election.
2. Whether there is a sufficient showing of employee interest to justify an election.
3. Whether a question of representation exists.
4. Whether the election is sought in an appropriate unit of employees.
5. Whether the representative named in the petition is qualified.
6. Whether there are any barriers to an election in the form of existing contracts or prior elections.

Jurisdiction to conduct an election

The jurisdiction of the NLRB to direct and conduct an election is limited to those enterprises that affect commerce. (This is discussed in greater detail at pp. 42–46.) The other matters listed above will be discussed in turn.

Expedited elections under Section 8(b)(7)(C)

First, however, it should be noted that Section 8(b)(7)(C) provides, among other things, that when a petition is filed within a reasonable period, not to exceed 30 days, after the commencement of recognitional or organizational picketing, the NLRB shall "forthwith" order an election and certify the results. This is so if the picketing is not within the protection of the second proviso to Section 8(b)(7)(C). When an election under Section (8)(b)(7)(C) is appropriate, neither a hearing nor a showing of interest is required, and the election is scheduled sooner than under the ordinary procedure.

Showing of interest required

Regarding the showing of interest, it is the policy to require that a petitioner requesting an election for either certification of representatives or decertification show that at least 30 percent of the employees favor an election. The Act also requires that a petition for a union-security deauthorization election be filed by 30 percent or more of the employees in the unit covered by the agreement for the NLRB to conduct an election for that purpose. The showing of interest must be exclusively by employees who are in the appropriate bargaining unit in which an election is sought.

Existence of question of representation

Section 9(c)(1) authorizes the NLRB to direct an election and certify the results thereof, provided the record shows that a question of representation exists. Petitions for certification of representatives present a question of representation if, among other things, they are based on a demand for recognition by the employee representative and a denial of recognition by the employer. The demand for recognition need not be made in any particular form; in fact, the filing of a petition by the representative itself is considered to be a demand for recognition. The NLRB has held that even a representative that is currently recognized by the employer can file a petition for certification and that such petition presents a question of representation provided the representative has not previously been certified.

A question of representation is also raised by a decertification petition that challenges the representative status of a bargaining agent previously certified or currently recognized by the employer. However, a decertification petition filed by a supervisor does not raise a valid question of representation and must be dismissed.

Section 2(4) of the Act provides that the employee representative for collective bargaining can be "any individual or labor organization." A supervisor or any other management representative may not be an employee representative. It is NLRB policy to direct an election and to issue a certification unless the proposed bargaining agent fails to qualify as a bona fide representative of the employees. In determining a union's qualifications as bargaining agent, it is the union's willingness to represent the employees rather than its constitution and bylaws that is the controlling factor. The NLRB's power to certify a labor organization as bargaining representative is limited by Section 9(b)(3) which prohibits certification of a union as the representative of a unit of plant guards if the union "admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Who can qualify as bargaining representative

Bars to Election

The NLRB has established the policy of not directing an election among employees presently covered by a valid collective-bargaining agreement except in accordance with certain rules. These rules, followed in determining whether or not an existing collective-bargaining contract will bar an election, are called the NLRB contract-bar rules. Not every contract will bar an election. Examples of contracts that would *not* bar an election are:

Existing collective-bargaining contract

- The contract is not in writing, or is not signed.
- The contract has not been ratified by the members or the union, if such is expressly required.
- The contract does not contain substantial terms or conditions of employment sufficient to stabilize the bargaining relationship.
- The contract can be terminated by either party at any time for any reason.
- The contract contains a clearly illegal union-security clause.
- The bargaining unit is not appropriate.
- The union that entered the contract with the employer is no longer in existence or is unable or unwilling to represent the employees.

- The contract discriminates between employees on racial grounds.
- The contract covers union members only.
- The contracting union is involved in a basic internal conflict at the highest levels with resulting unstabilizing confusion about the identity of the union.
- The employer's operations have changed substantially since the contract was executed.

Time provisions

Under the NLRB rules a valid contract for a fixed period of 3 years or less will bar an election for the period covered by the contract. A contract for a fixed period of more than 3 years will bar an election sought by a contracting party during the life of the contract, but will act as a bar to an election sought by an outside party for only 3 years following its effective date. A contract of no fixed period will not act as a bar at all.

When a petition can be filed if there is an existing contract

If there is no existing contract, a petition can bring about an election if it is filed before the day a contract is signed. If the petition is filed on the same day the contract is signed, the contract bars an election, provided the contract is effective immediately or retroactively and the employer has not been informed at the time of execution that a petition has been filed. Once the contract becomes effective as a bar to an election, no petition will be accepted until near the end of the period during which the contract is effective as a bar. Petitions filed not more than 90 days but over 60 days before the end of the contract-bar period will be accepted and can bring about an election. These time periods for filing petitions involving health care institutions are 120 and 90 days, respectively. Of course, a petition can be filed after the contract expires. However, the last 60 days of the contract-bar period is called an "insulated" period. During this time the parties to the existing contract are free to negotiate a new contract or to agree to extend the old one. If they reach agreement in this period, petitions will not be accepted until 90 days before the end of the new contract-bar period.

Effect of certification

In addition to the contract-bar rules, the NLRB has established a rule that when a representative has been certified by the Board, the certification will ordinarily be binding for at least 1 year and a petition filed before the end of the certification year will be dismissed. In cases in which the certified representative and the employer enter a valid collective-bargaining contract during the year, the contract becomes controlling, and whether a petition for an election can be filed is determined by the Board's contract-bar rules.

Section 9(c)(3) prohibits the holding of an election in any collective-bargaining unit or subdivision thereof in which a valid election has been held during the preceding 12-month period. A new election may be held, however, in a larger unit, but not in the same unit or subdivision in which the previous election was held. For example, if all the production and maintenance employees in Company A, including draftsmen in the company's engineering office, are included in a collective-bargaining unit, an election among all the employees in the unit would bar another election among all the employees in the unit for 12 months. Similarly, an election among the draftsmen only would bar another election among the draftsmen for 12 months. However, an election among the draftsmen would not bar a later election during the 12-month period among all the production and maintenance employees including the draftsmen.

Effect of prior election

It is the Board's interpretation that Section 9(c)(3) prohibits only the holding of an election during the 12-month period, but does not prohibit the filing of a petition. Accordingly, the NLRB will accept a petition filed not more than 60 days before the end of the 12-month period. The election cannot be held, of course, until after the 12-month period. If an election is held and a representative certified, that certification is binding for 1 year and a petition for another election in the same unit will be dismissed if it is filed during the 1-year period after the certification. If an election is held and no representative is certified, the election bars another election for 12 months. A petition for another election in the same unit can be filed not more than 60 days before the end of the 12-month period and the election can be held after the 12-month period expires.

When a petition can be filed if there has been a prior election

The Representation Election

Section 9(c)(1) provides that if a question of representation exists, the NLRB must make its determination by means of a secret-ballot election. In a representation election employees are given a choice of one or more bargaining representatives or no representative at all. To be certified as the bargaining representative, an individual or a labor organization must receive a majority of the valid votes cast.

An election may be held by agreement between the employer and the individual or labor organization claiming to represent the employees. In such an agreement the parties would state the time and place agreed on, the choices to be included on the ballot, and a method to determine who is eligible to vote. They would also authorize the NLRB Regional Director to conduct the election.

Consent-election agreements

If the parties are unable to reach an agreement, the Act authorizes the NLRB to order an election after a hearing. The Act also authorizes the Board to delegate to its Regional Directors the determina-

Who determines election matters

tion on matters concerning elections. Under this delegation of authority the Regional Directors can determine the appropriateness of the unit, direct an election, and certify the outcome. Upon the request of an interested party, the Board may review the action of a Regional Director, but such review does not stop the election process unless the Board so orders. The election details are left to the Regional Director. Such matters as who may vote, when the election will be held, and what standards of conduct will be imposed on the parties are decided in accordance with the Board's rules and its decisions.

Who may vote in a representation election

To be entitled to vote, an employee must have worked in the unit during the eligibility period set by the Board and must be employed in the unit on the date of the election. Generally, the eligibility period is the employer's payroll period just before the date on which the election was directed. This requirement does not apply, however, to employees who are ill, on vacation, or temporarily laid off, or to employees in military service who appear in person at the polls. The NLRB rules take into consideration the fact that employment is typically irregular in certain industries. In such industries eligibility to vote is determined according to formulas designed to permit all employees who have a substantial continuing interest in their employment conditions to vote. Examples of these formulas, which differ from case to case, are:

- In one case, employees of a construction company were allowed to vote if they worked for the employer at least 65 days during the year before the "eligibility date" for the election.
- In another case longshoremen who worked at least 700 hours during a specified contract year, and at least 20 hours in each full month between the end of that year and the date on which the election was directed, were allowed to vote.
- Radio and television talent employees and musicians in the television film, motion picture, and recording industries have been held eligible to vote if they worked in the unit 2 or more days during the year before the date on which the election was directed.

When strikers may be allowed to vote

Section 9(c)(3) provides that economic strikers who have been replaced by bona fide permanent employees may be entitled to vote in "any election conducted within 12 months after the commencement of the strike." The permanent replacements are also eligible to vote at the same time. As a general proposition, a striker is considered to be an economic striker unless found by the NLRB to be on strike over unfair labor practices of the employer. Whether the economic striker is eligible to vote is determined on the facts of each case.

When elections are held

Ordinarily, elections are held within 30 days after they are directed. Seasonal drops in employment or any change in operations that would prevent a normal work force from being present may cause a different election date to be set. Normally an election will not be conducted when unfair labor practice charges have been filed based on conduct of a nature which would have a tendency to interfere with the free choice of the employees in an election, except that, in certain cases, the Board may proceed to the election if the charging party so requests.

Conduct of elections

NLRB elections are conducted in accordance with strict standards designed to give the employee voters an opportunity to freely indicate whether they wish to be represented for purposes of collective bargaining. Election details, such as time, place, and notice of an election, are left largely to the Regional Director who usually obtains the agreement of the parties on these matters. Any party to an election who believes that the Board election standards were not met may, within 7 days after the tally of ballots has been furnished, file objections to the election with the Regional Director under whose supervision the election was held. In most cases, the Regional Director's rulings on these objections may be appealed to the Board for decision.

An election will be set aside if it was accompanied by conduct that the NLRB considers created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' freedom of choice. In any particular case the NLRB does not attempt to determine whether the conduct actually interfered with the employees' expression of free choice, but rather asks whether the conduct tended to do so. If it is reasonable to believe that the conduct would tend to interfere with the free expression of the employees' choice, the election may be set aside. Examples of conduct the Board considers to interfere with employee free choice are:

- Threats of loss of jobs or benefits by an employer or a union to influence the votes or union activities of employees.
- A grant of benefits or promise to grant benefits to influence the votes or union activities of employees.
- An employer firing employees to discourage or encourage their union activities or a union causing an employer to take such action.

- An employer or a union making campaign speeches to assembled groups of employees on company time within the 24-hour period before the election.
- The incitement of racial or religious prejudice by inflammatory campaign appeals made by either an employer or a union.
- Threats or the use of physical force or violence against employees by an employer or a union to influence their votes.
- The occurrence of extensive violence or trouble or widespread fear of job losses which prevents the holding of a fair election, whether caused by an employer or a union.

Unfair Labor Practices of Employers

The unfair labor practices of employers are listed in Section 8(a) of the Act; those of labor organizations in Section 8(b). Section 8(e) lists an unfair labor practice that can be committed only by an employer and a labor organization acting together. The "Types of Cases" chart at pages 22–23 may be helpful in getting to know the relationship between the various unfair labor practice sections of the Act.

Section 8(a)(1)—Interference with Section 7 Rights

Section 8(a)(1) forbids an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Any prohibited interference by an employer with the rights of employees to organize, to form, join, or assist a labor organization, to bargain collectively, to engage in other concerted activities for mutual aid or protection, or to refrain from any or all of these activities, constitutes a violation of this section. This is a broad prohibition on employer interference, and an employer violates this section whenever it commits any of the other employer unfair labor practices. In consequence, whenever a violation of Section 8(a) (2), (3), (4), or (5) is committed a violation of Section 8(a)(1) is also found. This is called a "derivative violation" of Section 8(a)(1).

Examples of violations of Section 8(a)(1)

Employer conduct may, of course, independently violate Section 8(a)(1). Examples of such independent violations are:

- Threatening employees with loss of jobs or benefits if they should join or vote for a union.
- Threatening to close down the plant if a union should be organized in it.
- Questioning employees about their union activities or membership in such circumstances as will tend to restrain or coerce the employees.

Even when there is a valid union-security agreement in effect, an employer may not pay the union the dues and fees owed by its employees. The employer may, however, deduct these amounts from the wages of its employees and forward them to the union for each employee who has *voluntarily* signed a dues "checkoff" authorization. Such checkoff authorization may be made irrevocable for no more than a year. But employees may revoke their checkoff authorizations after a Board-conducted election in which the union's authority to maintain a union-security agreement has been withdrawn.

The Act does not limit employer's right to discharge for economic reasons

This section does not limit an employer's right to discharge, transfer, or lay off an employee for genuine economic reasons or for such good cause as disobedience or bad work. This right applies equally to employees who are active in support of a union and to those who are not.

In situations in which an employer disciplines an employee both because the employee has violated a work rule and because the employee has engaged in protected union activity, the discipline is unlawful unless the employer can show that the employee would have received the same discipline even if he or she had not engaged in the protected union activity.

An employer who is engaged in good-faith bargaining with a union may lock out the represented employees, sometimes even before impasse is reached in the negotiations, if it does so to further its position in bargaining. But a bargaining lockout may be unlawful if the employer is at that time unlawfully refusing to bargain or is bargaining in bad faith. It is also unlawful if the employer's purpose in locking out its employees is to discourage them in their union loyalties and activities, that is, if the employer is motivated by hostility toward the union. Thus, a lockout to defeat a union's efforts to organize the employer's employees would violate the Act, as would the lockout of only those of its employees who are members of the union. On the other hand, lockouts are lawful that are intended to prevent any unusual losses or safety hazards that would be caused by an anticipated "quickie" strike. And a whipsaw strike against one employer engaged in multiemployer bargaining justifies a lockout by any of the other employers who are party to the bargaining.

Examples of illegal discrimination under Section 8(a)(3) include:

Examples of violations of Section 8(a)(3)

- Discharging employees because they urged other employees to join a union.
- Refusing to reinstate employees when jobs they are qualified for are open because they took part in a union's lawful strike.
- Granting of "superseniority" to those hired to replace employees engaged in a lawful strike.

1. CHARGES OF UNFAIR LABOR PRACTICES (C CASES)

Charge Against Employer

Section of the Act **CA**

8(a)(1) To interfere with, restrain, or coerce employees in exercise of their rights under Section 7 (to join or assist a labor organization or to refrain).

8(a)(2) To dominate or interfere with the formation or administration of a labor organization or contribute financial or other support to it.

8(a)(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

8(a)(4) To discharge or otherwise discriminate against employees because they have given testimony under the Act.

8(a)(5) To refuse to bargain collectively with representatives of its employees.

Charge Against Labor Organization

Section of the Act **CB**

8(b)(1)(A) To restrain or coerce employees in exercise of their rights under Section 7 (to join or assist a labor organization or to refrain).

8(b)(1)(B) To restrain or coerce an employer in the selection of its representatives for collective bargaining or adjustment of grievances.

8(b)(2) To cause or attempt to cause an employer to discriminate against an employee.

8(b)(3) To refuse to bargain collectively with an employer.

8(b)(5) To require of employees the payment of excessive or discriminatory fees for membership.

8(b)(6) To cause or attempt to cause an employer to pay or agree to pay money or other thing of value for services which are not performed or not to be performed.

Section of the Act **CC**

8(b)(4)(i) To engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike, work stoppage, or boycott, or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object is:

(A) To force or require any employer or self-employed person to join any labor or employer organization or to enter into any agreement prohibited by Section 8(e).

(B) To force or require any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or force or require any other employer to recognize or bargain with a labor organization as the representative of its employees unless such labor organization has been so certified.

(C) To force or require any employer to recognize or bargain with a particular labor organization as the representative of its employees if another labor organization has been certified as the representative.

Section of the Act **CD**

(D) To force or require any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another trade, craft, or class, unless such employer is failing to conform to an appropriate Board order or certification.

Section of the Act **CG**

8(g) To strike, picket, or otherwise concertedly refuse to work at any health care institution without notifying the institution and the Federal Mediation and Conciliation Service in writing 10 days prior to such action.

- Spying on union gatherings, or pretending to spy.
- Granting wage increases deliberately timed to discourage employees from forming or joining a union.

Section 8(a)(2)—Domination or Illegal Assistance and Support of a Labor Organization

Section 8(a)(2) makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." This section not only outlaws "company unions" that are dominated by the employer, but also forbids an employer to contribute money to a union it favors or to give a union improper advantages that are denied to rival unions.

Domination

A labor organization is considered dominated within the meaning of this section if the employer has interfered with its formation and has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Such domination is the result of a combination of factors and has been found to exist where there is not only the factor of the employer getting the organization started, but also such other factors as the employer deciding how the organization will be set up and what it will do, or representatives of management actually taking part in the meetings and activities of the organization and trying to influence its actions and policies.

Illegal assistance and support

Certain lesser kinds of employer assistance to a union may constitute unlawful "interference" even if the union is not "dominated" by the employer. For example, an employer may not provide financial support to a union either by direct payments or indirect financial aid. (But an employer does not violate this prohibition by permitting employees to confer with it and/or the union regarding grievances or other union business during working hours without loss of pay.)

When rival unions are competing to organize an employer's employees, the employer is forbidden to give the union it favors privileges it denies to the other union. It is also forbidden to recognize either union once it knows that one of the unions has filed a valid petition with the Board requesting a representation election. When an employer and a union already have an established bargaining relationship, however, the employer is required to continue bargaining with the incumbent even though a rival union is attempting to organize the employees. In these circumstances, the rival's filing of a petition does not prevent continued dealing between the employer and the incumbent unless the incumbent has lost the support of a majority of the employees.

Examples of violations of Section 8(a)(2)

An employer violates Section 8(a)(2) by:

- Taking an active part in organizing a union or a committee to represent employees.
- Bringing pressure on employees to support a union financially, except in the enforcement of a lawful union-security agreement.
- Allowing one of several unions, competing to represent employees, to solicit on company premises during working hours and denying other unions the same privilege.
- Soliciting and obtaining from employees and applicants for employment, during the hiring procedure, applications for union membership and signed authorizations for the check-off of union dues.

Remedy in cases of domination differs from that in cases of illegal assistance and support

In remedying such unfair labor practices, the NLRB distinguishes between domination of a labor organization and conduct which amounts to no more than illegal assistance. When a union is found to be dominated by an employer, the Board has announced it will order the organization completely disestablished as a representative of employees. But, if the organization is found only to have been supported by employer assistance amounting to less than domination, the Board usually orders the employer to stop such support and to withhold recognition from the organization until such time as it has been certified by the Board as a bona fide representative of employees.

Section 8(a)(3) – Discrimination Against Employees

Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment" for the purpose of encouraging or discouraging membership in a labor organization. In general, the Act makes it illegal for an employer to discriminate in employment because of an employee's union or other group activity within the protection of the Act. A banding together of employees, even in the absence of a formal organization, may constitute a labor organization for purposes of Section 8(a)(3). It also prohibits discrimination because an employee has refrained from taking part in such union or group activity except where a valid union-security agreement is in effect. Discrimination within the meaning of the Act would include such action as refusing to hire, discharging, demoting, assigning to a less desirable shift or job, or withholding benefits.

The union-security exception to Section 8(a)(3)

As previously noted, Section 8(a)(3) provides that an employee may be discharged for failing to make certain lawfully required payments to the exclusive bargaining representative under a lawful union-security agreement. For a fuller discussion of this issue, see pages 2–4, above.

		2. PETITIONS FOR CERTIFICATION OR DECERTIFICATION OF REPRESENTATIVES (R CASES)	3. OTHER PETITIONS
	Charge Against Labor Organization and Employer	**By or on Behalf of Employees**	**By or on Behalf of Employees**
Section of the Act **CP** *8(b)(7)* To picket, or cause or threaten the picketing of, any employer where an object is to force or require an employer to recognize or bargain with a labor organization as the representative of its employees, or to force or require the employees of an employer to select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c). (B) where within the preceding 12 months a valid election under Section 9(c) has been conducted, or (C) where picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing; except where the picketing is for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, and it does not have an effect of interference with deliveries or services.	*Section of the Act* **CE** *8(e)* To enter into any contract or agreement (any labor organization and any employer) whereby such employer ceases or refrains or agrees to cease or refrain from handling or dealing in any product of any other employer, or to cease doing business with any other person.	*Section of the Act* **RC** *9(c)(1)(A)(i)* Alleging that a substantial number of employees wish to be represented for collective bargaining and their employer declines to recognize their representative.* *Section of the Act* **RD** *9(c)(1)(A)(ii)* Alleging that a substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.* **By an Employer** *Section of the Act* **RM** *9(c)(1)(B)* Alleging that one or more claims for recognition as exclusive bargaining representative have been received by the employer.* *If an 8(b)(7) charge has been filed involving the same employer, these statements in RC, RD, and RM petitions are not required.	*Section of the Act* **UD** *9(e)(1)* Alleging that employees (30 percent or more of an appropriate unit) wish to rescind an existing union-security agreement. **By a Labor Organization or an Employer** *Board Rules* **UC** *Subpart C* Seeking clarification of an existing bargaining unit. *Board Rules* **AC** *Subpart C* Seeking amendment of an outstanding certification of bargaining representative.

Charges filed with the National Labor Relations Board are letter-coded and numbered. Unfair labor practice charges are classified as "C" cases and petitions for certification or decertification of representatives as "R" cases. This chart indicates the letter codes used for "C" cases, at left, and "R" cases, above, and also presents a summary of each section involved.

- Demoting employees because they circulated a union petition among other employees asking the employer for an increase in pay.
- Discontinuing an operation at one plant and discharging the employees involved followed by opening the same operation at another plant with new employees because the employees at the first plant joined a union.
- Refusing to hire qualified applicants for jobs because they belong to a union. It would also be a violation if the qualified applicants were refused employment because they did not belong to a union, or because they belonged to one union rather than another.

Section 8(a)(4)—Discrimination for NLRB Activity

Section 8(a)(4) makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." This provision guards the right of employees to seek the protection of the Act by using the processes of the NLRB. Like the previous section, it forbids an employer to discharge, lay off, or engage in other forms of discrimination in working conditions against employees who have filed charges with the NLRB, given affidavits to NLRB investigators, or testified at an NLRB hearing. Violations of this section are in most cases also violations of Section 8(a)(3).

Examples of violations of Section 8(a)(4) are:

Examples of violations of Section 8(a)(4)

- Refusing to reinstate employees when jobs they are otherwise qualified for are open because they filed charges with the NLRB claiming their layoffs were based on union activity.
- Demoting employees because they testified at an NLRB hearing.

Section 8(a)(5)—Refusal to Bargain in Good Faith

Section 8(a)(5) makes it illegal for an employer to refuse to bargain in good faith about wages, hours, and other conditions of employment with the representative selected by a majority of the employees in a unit appropriate for collective bargaining. A bargaining representative which seeks to enforce its right concerning an employer under this section must show that it has been designated by a majority of the employees, that the unit is appropriate, and that there has been both a demand that the employer bargain and a refusal by the employer to do so.

The duty to bargain covers all matters concerning rates of pay, wages, hours of employment, or other conditions of employment. These are called "mandatory" subjects of bargaining about which the employer, as well as the employees' representative, must bargain in good faith, although the law does not require "either party to agree to a proposal or require the making of a concession." In addition to wages and hours of work, these mandatory subjects of bargaining include but are not limited to such matters as pensions for present employees, bonuses, group insurance, grievance procedures,

Required subjects of bargaining

safety practices, seniority, procedures for discharge, layoff, recall, or discipline, and union security. Certain managerial decisions such as subcontracting, relocation, and other operational changes may not be mandatory subjects of bargaining, even though they affect employees' job security and working conditions. The issue of whether these decisions are mandatory subjects of bargaining depends on the employer's reasons for taking action. Even if the employer is not required to bargain about the decision itself, it must bargain about the decision's effects on unit employees. On "nonmandatory" subjects, that is, matters that are lawful but not related to "wages, hours, and other conditions of employment," the parties are free to bargain and to agree, but neither party may insist on bargaining on such subjects over the objection of the other party.

Duty to bargain defined

An employer who is required to bargain under this section must, as stated in Section 8(d), "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."

What constitutes a violation of Section 8(a)(5)

An employer, therefore, will be found to have violated Section 8(a)(5) if its conduct in bargaining, viewed in its entirety, indicates that the employer did not negotiate with a good-faith intention to reach agreement. However, the employer's good faith is not at issue when its conduct constitutes an out-and-out refusal to bargain on a mandatory subject. For example, it is a violation for an employer, regardless of good faith, to refuse to bargain about a subject that it believes is not a mandatory subject of bargaining, when in fact it is.

Duty to meet and confer

The duty of an employer to meet and confer with the representative of its employees includes the duty to deal with whoever is designated by the employees' representative to carry on negotiations. An employer may not dictate to a union its selection of agents or representatives and the employer must, in general, recognize the designated agent.

Duty to supply information

The employer's duty to bargain includes the duty to supply, on request, information that is "relevant and necessary" to allow the employees' representative to bargain intelligently and effectively with respect to wages, hours, and other conditions of employment.

When there is a history of bargaining between a union and a number of employers acting jointly, the employees who are thus represented constitute a multiemployer bargaining unit. Once such a unit has been established, any of the participating employers—or the union—may retire from this

Multiemployer bargaining

multiemployer bargaining relationship only by mutual assent or by a timely submitted withdrawal. Withdrawal is considered timely if unequivocal notice of the withdrawal is given near the termination of a collective-bargaining agreement but before bargaining begins on the next agreement.

Duty to refrain from unilateral action

Finally, the duty of an employer to bargain includes the duty to refrain from unilateral action, that is, taking action on its own with respect to matters concerning which it is required to bargain, and from making changes in terms and conditions of employment without consulting the employees' representative.

Duty of successor employers

An employer who purchases or otherwise acquires the operations of another may be obligated to recognize and bargain with the union that represented the employees before the business was transferred. In general, these bargaining obligations exist—and the purchaser is termed a successor employer—when there is a substantial continuity in the employing enterprise despite the sale and transfer of the business. Whether the purchaser is a successor employer is dependent on several factors, including the number of employees taken over by the purchasing employer, the similarity in operations and product of the two employers, the manner in which the purchaser integrates the purchased operations into its other operations, and the character of the bargaining relationship and agreement between the union and the original employer.

Examples of violations of Section 8(a)(5)

Examples of violations of Section 8(a)(5) are as follows:

- Refusing to meet with the employees' representative because the employees are out on strike.
- Insisting, until bargaining negotiations break down, on a contract provision that all employees will be polled by secret ballot before the union calls a strike.
- Refusing to supply the employees' representative with cost and other data concerning a group insurance plan covering the employees.
- Announcing a wage increase without consulting the employees' representative.
- Failing to bargain about the effects of a decision to close one of the employer's plants.

Section 8(e)—Entering a Hot Cargo Agreement

Section 8(e), added to the Act in 1959, makes it an unfair labor practice for any labor organization and any employer to enter into what is commonly called a "hot cargo" or "hot goods" agreement. It may also limit the restrictions that can be placed on the subcontracting of work by an

employer. The typical hot cargo or hot goods clause in use before the 1959 amendment to the Act provided that employees would not be required by their employer to handle or work on goods or materials going to, or coming from, an employer designated by the union as "unfair." Such goods were said to be "hot cargo" thereby giving Section 8(e) its popular name. These clauses were most common in the construction and trucking industries.

Section 8(e) forbids an employer and a labor organization to make an agreement whereby the employer agrees to stop doing business with any other employer and declares void and unenforceable any such agreement that is made. It should be noted that a strike or picketing, or any other union action, or the threat of it, to force an employer to agree to a hot cargo provision, or to force it to act in accordance with such a clause, has been held by the Board to be a violation of Section 8(b)(4). Exceptions are allowed in the construction and garment industries, and a union may seek, by contract, to keep within a bargaining unit work that is being done by the employees in the unit or to secure work that is "fairly claimable" in that unit.

What is prohibited

In the construction industry a union and an employer in the industry may agree to a provision that restricts the contracting or subcontracting of work to be done at the construction site. Such a clause contained in the agreement between the employer and the union typically provides that if work is subcontracted by the employer it must go to an employer who has an agreement with the union. A union in the construction industry may engage in a strike and picketing to obtain, but not to enforce, contractual restrictions of this nature. Similarly, in the garment industry an employer and a union can agree that work to be done on the goods or on the premises of a jobber or manufacturer, or work that is part of "an integrated process of production in the apparel and closing industry," can be subcontracted only to an employer who has an agreement with the union. This exception, unlike the previous one concerning the construction industry, allows a labor organization in the garment industry not only to seek to obtain, but also to enforce, such a restriction on subcontracting by striking, picketing, or other lawful actions.

Exceptions for construction and garment industries

Unfair Labor Practices of Labor Organizations

Section 8(b)(1)(A) forbids a labor organization or its agents "to restrain or coerce employees in the exercise of the rights guaranteed in section 7." The section also provides that it is not intended to "impair the rights of a labor organization to prescribe its own rules" concerning membership in the labor organization.

Section 8(b)(1)(A)—Restraint and Coercion of Employees

Section 8(b)(1)(A) compared with Section 8(a)(1)

Like Section 8(a)(1), Section 8(b)(1)(A) is violated by conduct that independently restrains or coerces employees in the exercise of their Section 7 rights regardless of whether the conduct also violates other provisions of Section 8(b). But whereas employer violations of Section 8(a) (2), (3), (4), and (5) are held to be violations of Section 8(a)(1) too, the Board has held, based on the intent of Congress when Section 8(b)(1)(A) was written, that violation of Section 8(b)(2) through (7) do not also "derivatively" violate Section 8(b)(1)(A). The Board does hold, however, that making or enforcing illegal union-security agreements or hiring agreements that condition employment on union membership not only violates Section 8(b)(2) but also Section 8(b)(1)(A), because such action restrains or coerces employees in their Section 7 rights.

Union conduct that is reasonably calculated to restrain or coerce employees in their Section 7 rights violates Section 8(b)(1)(A) whether it succeeds in actually restraining or coercing employees.

A union may violate Section 8(b)(1)(A) by coercive conduct of its officers or agents, of pickets on a picket line endorsed by the union, or of strikers who engage in coercion in the presence of union representatives who do not repudiate the conduct.

Unlawful coercion may consist of acts specifically directed at an employee such as physical assaults, threats of violence, and threats to affect an employee's job status. Coercion also includes other forms of pressure against employees such as acts of a union while representing employees as their exclusive bargaining agent (see Section 9(a), p. 10). A union that is a statutory bargaining representative owes a duty of fair representation to all the employees it represents. It may exercise a wide range of reasonable discretion in carrying out the representative function, but it violates Section 8(b)(1)(A) if, while acting as the employees' statutory bargaining representative, it takes or withholds action in connection with their employment because of their union activities or for any irrelevant or arbitrary reason such as an employee's race or sex.

What violates Section 8(b)(1)(A)

Section 8(b)(1)(A) recognizes the right of unions to establish and enforce rules of membership and to control their internal affairs. This right is limited to union rules and discipline that affect the rights of employees as union members and that are not enforced by action affecting an employee's employment. Also, rules to be protected must be aimed at matters of legitimate concern to unions such

as the encouragement of members to support a lawful strike or participation in union meetings. Rules that conflict with public policy, such as rules that limit a member's right to file unfair labor practice charges, are not protected. And a union may not fine a member for filing a decertification petition although it may expel that individual for doing so. A rule that prohibits a member from resigning from the union is unlawful. The union may not fine a former member for any protected conduct engaged in after he or she resigns.

Examples of restraint or coercion that violate Section 8(b)(1)(A) when done by a union or its agents include the following:

Examples of violations of Section 8(b)(1)(A)

- Mass picketing in such numbers that nonstriking employees are physically barred from entering the plant.
- Acts of force or violence on the picket line, or in connection with a strike.
- Threats to do bodily injury to nonstriking employees.
- Threats to employees that they will lose their jobs unless they support the union's activities.
- Statement to employees who oppose the union that the employees will lose their jobs if the union wins a majority in the plant.
- Entering into an agreement with an employer that recognizes the union as exclusive bargaining representative when it has not been chosen by a majority of the employees.
- Fining or expelling members for crossing a picket line that is unlawful under the Act or that violates a no-strike agreement.
- Fining employees for crossing a picket line after they resigned from the union.
- Fining or expelling members for filing unfair labor practice charges with the Board or for participating in an investigation conducted by the Board.

The following are examples of restraint or coercion that violate Section 8(b)(1)(A) when done by a union that is the exclusive bargaining representative:

- Refusing to process a grievance in retaliation against an employee's criticism of union officers.
- Maintaining a seniority arrangement with an employer under which seniority is based on the employee's prior representation by the union elsewhere.
- Rejecting an application for referral to a job in a unit represented by the union based on the applicant's race or union activities.

Section 8(b)(1)(B)—Restraint and Coercion of Employers

Section 8(b)(1)(B) prohibits a labor organization from restraining or coercing an employer in the selection of a bargaining representative. The prohibition applies regardless of whether the labor organization is the majority representative of the employees in the bargaining unit. The prohibition extends to coercion applied by a union to a union member who is a representative of the employer in the adjustment of grievances. This section is violated by such conduct as the following:

Examples of violations of Section 8(b)(1)(B)

- Insisting on meeting only with a company's owners and refusing to meet with the attorney the company has engaged to represent the company in contract negotiations, and threatening to strike to force the company to accept its demands.
- Striking members of an employer association that bargains with the union as the representative of the employers to compel the struck employers to sign individual contracts with the union.
- Insisting during contract negotiations that the employer agree to accept working conditions that will be established by a bargaining group to which it does not belong.
- Fining or expelling supervisors for the way they apply the bargaining contract while carrying out their supervisory functions or for crossing a picket line during a strike to perform their supervisory duties.

Section 8(b)(2)—Causing or Attempting to Cause Discrimination

Section 8(b)(2) makes it an unfair labor practice for a labor organization to cause an employer to discriminate against an employee in violation of Section 8(a)(3). As discussed earlier, Section 8(a)(3) prohibits an employer from discriminating against an employee in regard to wages, hours, and other conditions of employment for the purpose of encouraging or discouraging membership in a labor organization. It does allow, however, the making of union-security agreements under certain specified conditions. (See pp. 2-4, above.)

A union violates Section 8(b)(2), for example, by demanding that an employer discriminate against employees because of their failure to make certain otherwise lawful payments to the union when there is no valid union-security agreement in effect. (See pp. 2-4, above.) The section can also be violated by agreements or arrangements with employers that unlawfully condition employment or job benefits on union membership, on the performance of union membership obligations, or on arbitrary grounds.

What violates Section 8(b)(2)

Union conduct affecting an employee's employment in a way that is contrary to provisions of the

bargaining contract may likewise be violative of the section. But union action that causes detriment to an individual employee in that individual's employment does not violate Section 8(b)(2) if it is consistent with nondiscriminatory provisions of a bargaining contract negotiated for the benefit of the total bargaining unit or if it is for some other legitimate purpose.

To find that a union caused an employer to discriminate, it is not necessary to show that any express demand was spoken. A union's conduct, accompanied by statements advising or suggesting that action is expected of an employer, may be enough to find a violation of this section if the union's action can be shown to be a causal factor in the employer's discrimination.

Contracts or informal arrangements with a union under which an employer gives preferential treatment to union members are violations of Section 8(b)(2). It is not unlawful for an employer and a union to enter into an agreement whereby the employer agrees to hire new employees exclusively through the union hiring hall so long as there is neither a provision in the agreement nor a practice in effect that discriminates against nonunion members in favor of union members or otherwise discriminates on the basis of union membership obligations. Both the agreement and the actual operation of the hiring hall must be nondiscriminatory; referrals must be made without reference to union membership or irrelevant or arbitrary considerations such as race. Referral standards or procedures, even if nondiscriminatory on their face, are unlawful when they continue previously discriminatory conditions of referral. However, a union may, in setting referral standards, consider legitimate aims such as sharing available work and easing the impact of local unemployment. It may also charge referral fees if the amount of the fee is reasonably related to the cost of operating the referral service.

Illegal hiring hall agreements and practices

Union-security agreements that require employees to make certain lawfully required payments to the union after they are hired are permitted by this section as previously discussed. Union-security agreements that do not meet all the requirements listed on page 3 will not support a discharge. A union that attempts to force an employer to enter into an illegal union-security agreement, or that enters into and keeps in effect such an agreement, violates Section 8(b)(2), as does a union that attempts to enforce such an illegal agreement by bringing about an employee's discharge. Even when a union-security provision of a bargaining contract meets all statutory requirements so that it is permitted by Section 8(a)(3), a union may not lawfully require the discharge of employees under the provision unless the employees had been informed of the union-security agreement and of their specific obligation under

Illegal union-security agreements

it. And a union violates Section 8(b)(2) if it tries to use the union-security provisions of a contract to collect payments other than those that lawfully may be required. (See pp. 2-4, above.) Assessments, fines, and penalties may not be enforced by application of a union-security agreement.

Examples of violations of Section 8(b)(2) are:

Examples of violations of Section 8(b)(2)

- Causing an employer to discharge employees because they circulated a petition urging a change in the union's method of selecting shop stewards.
- Causing an employer to discharge employees because they made speeches against a contract proposed by the union.
- Making a contract that requires an employer to hire only members of the union or employees "satisfactory" to the union.
- Causing an employer to reduce employees' seniority because they engaged in antiunion acts.
- Refusing referral or giving preference on the basis of race or union activities in making job referrals to units represented by the union.
- Seeking the discharge of an employee under a union-security agreement for failure to pay a fine levied by the union.

Section 8(b)(3)—Refusal to Bargain in Good Faith

Section 8(b)(3) makes it illegal for a labor organization to refuse to bargain in good faith with an employer about wages, hours, and other conditions of employment if it is the representative of that employer's employees. This section imposes on labor organizations the same duty to bargain in good faith that is imposed on employers by Section 8(a)(5). Both the labor organization and the employer are required to follow the procedure set out in Section 8(d) before terminating or changing an existing contract (see p. 8).

A labor organization that is the employees' representative must meet at reasonable times with the employer or his designated representative, must confer in good faith on matters pertaining to wages, hours, or other conditions of employment, or the negotiation of an agreement, or any question arising under an agreement, and must sign a written agreement if requested and if one is reached. The obligation does not require the labor organization or the employer to agree to a proposal by the other party or make a concession to the other party, but it does require bargaining with an open mind in an attempt

to reach agreement. So, while a union may try in contract negotiations to establish wages and benefits comparable to those contained in other bargaining agreements in the area, it may not insist on such terms without giving the employer an opportunity to bargain about the terms. Likewise, a union may seek *voluntary* bargaining on nonmandatory subjects of bargaining (p. 24), such as a provision for an industry promotion fund, but may not *insist* on bargaining about such subjects or condition execution of a contract on the reaching of agreement on a nonmandatory subject.

When a union has been bargaining with a group of employers in a multiemployer bargaining unit, it may withdraw at any time from bargaining on that basis and bargain with one of the employers individually if the individual employer and the multiemployer group agree to the union's withdrawal. And even in the absence of employer consent, a union may withdraw from multiemployer bargaining by giving the employers unequivocal notice of its withdrawal near the expiration of the agreement but before bargaining on a new contract has begun.

Section 8(b)(3) not only requires that a union representative bargain in good faith with employers, but also requires that the union carry out its bargaining duty fairly with respect to the employees it represents. A union, therefore, violates Section 8(b)(3) if it negotiates a contract that conflicts with that duty, such as a contract with racially discriminatory provisions, or if it refuses to handle grievances under the contract for irrelevant or arbitrary reasons.

Section 8(b)(3) is violated by any of the following:

Examples of violations of Section 8(b)(3)

- Insisting on the inclusion of illegal provisions in a contract, such as a closed shop or a discriminatory hiring hall.
- Refusing to negotiate on a proposal for a written contract.
- Striking against an employer who has bargained, and continues to bargain, on a multiemployer basis to compel it to bargain separately.
- Refusing to meet with the attorney designated by the employer as its representative in negotiations.
- Terminating an existing contract and striking for a new one without notifying the employer, the Federal Mediation and Conciliation Service, and the state mediation service, if any.
- Conditioning the execution of an agreement on inclusion of a nonmandatory provision such as a performance bond.

- Refusing to process a grievance because of the race, sex, or union activities of an employee for whom the union is the statutory bargaining representative.

Section 8(b)(4)—Prohibited Strikes and Boycotts

Section 8(b)(4) prohibits a labor organization from engaging in strikes or boycotts or taking other specified actions to accomplish certain purposes or "objects" as they are called in the Act. The proscribed action is listed in clauses (i) and (ii), the objects are described in subparagraphs (A) through (D). A union commits an unfair labor practice if it takes any of the kinds of action listed in clauses (i) and (ii) as a means of accomplishing any of the objects listed in the four subparagraphs.

Proscribed action: Inducing or encouraging a strike, work stoppage, or boycott

Clause (i) forbids a union to engage in a strike, or to induce or encourage a strike, work stoppage, or a refusal to perform services by "any individual employed by any person engaged in commerce or in an industry affecting commerce" for one of the objects listed in subparagraphs (A) through (D). The words "induce and encourage" are considered by the U.S. Supreme Court to be broad enough to include every form of influence or persuasion. For example, it has been held by the NLRB that a work stoppage on a picketed construction project was "induced" by a union through its business agents who, when they learned about the picketing, told the job stewards that they (the business agents) would not work behind the picket line. It was considered that this advice not only induced the stewards to leave the job, but caused them to pass the information on to their fellow employees, and that such conduct informed the other employees that they were expected not to work behind the picket line. The world "person" is defined in Section 2(1) as including "one or more individuals, labor organizations, partnerships, associations, corporations," and other legal persons. As so defined, the word "person" is broader than the word "employer." For example, a railroad company, although covered by the Railway Labor Act, is excluded from the definition of "employer" in the National Labor Relations Act and, therefore, neither the railroad company nor its employees are covered by the National Labor Relations Act. But a railroad company is a "person engaged in commerce" as defined above and, therefore, a labor organization is forbidden to "induce or encourage" individuals employed by a railroad company to engage in a strike, work stoppage, or boycott for any of the objects in subparagraphs (A) through (D).

Clause (ii) makes it an unfair labor practice for a union to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce" for any of the proscribed objects. Even though no direct threat is voiced by the union, there may nevertheless be coercion and restraint that

violates this clause. For example, when a union picketed a construction job to bring about the removal of a nonunion subcontractor in violation of Section 8(b)(4)(B), the picketing induced employees of several other subcontractors to stop work. When the general contractor asked what could be done to stop the picketing, the union's business agent replied that the picketing would stop only if the nonunion subcontractor were removed from the job. The NLRB held this to be "coercion and restraint" within the meaning of clause (ii).

Proscribed action: Threats, coercion, and restraint

Section 8(b)(4)(A) prohibits unions from engaging in clause (i) or (ii) action to compel an employer or self-employed person to join any labor or employer organization or to force an employer to enter a hot cargo agreement prohibited by Section 8(e). Examples of violations of this section are:

Subparagraph (A)—Prohibited object: Compelling membership in an employer or labor organization or compelling a hot cargo agreement

Examples of violations of Section 8(b)(4)(A)

- In an attempt to compel a beer distributor to join a union, the union prevents the distributor from obtaining beer at a brewery by inducing the brewery's employees to refuse to fill the distributor's orders.
- In an attempt to secure for its members certain stevedoring work required at an employer's unloading operation, the union pickets to force the employer to join an employer association with which the union has a contract.
- A union pickets an employer (one not in the construction and garment industries), or threatens to picket it, to compel that employer to enter into an agreement whereby the employer will only do business with persons who have an agreement with a union.

Section 8(b)(4)(B) contains the Act's secondary boycott provision. A secondary boycott occurs if a union has a dispute with Company A and, in furtherance of that dispute, causes the employees of Company B to stop handling the products of Company A, or otherwise forces Company B to stop doing business with Company A. The dispute is with Company A, called the "primary" employer, the union's action is against Company B, called the "secondary" employer, hence the term "secondary boycott." In many cases the secondary employer is a customer or supplier of the primary employer with whom the union has the dispute. In general, the Act prohibits both the secondary boycott and the threat of it. Examples of prohibited secondary boycotts are:

Subparagraph (B)—Prohibited object: Compelling recognition of an uncertified union

- Picketing an employer to force it to stop doing business with another employer who has refused to recognize the union.

Examples of violations of Section 8(b)(4)(B)

- Asking the employees of a plumbing contractor not to work on connecting up air-conditioning equipment manufactured by a nonunion employer whom the union is attempting to organize.
- Urging employees of a building contractor not to install doors that were made by a manufacturer that is nonunion or that employs members of a rival union.
- Telling an employer that its plant will be picketed if that employer continues to do business with an employer the union has designated as "unfair."

The prohibitions of Section 8(b)(4)(B) do not protect a secondary employer from the incidental effects of union action that is taken directly against the primary employer. Thus, it is lawful for a union to urge employees of a secondary supplier at the primary employer's plant not to cross a picket line there. Section 8(b)(4)(B) also does not proscribe union action to prevent an employer from contracting out work customarily performed by its employees, even though an incidental effect of such conduct might be to compel that employer to cease doing business with the subcontractor.

When an employer is not protected from secondary strikes and boycotts

In order to be protected against the union action that is prohibited under this subparagraph, the secondary employer has to be a neutral as concerns the dispute between the union and the primary employer. For secondary boycott purposes an employer is considered an "ally" of the primary employer and, therefore, not protected from union action in certain situations. One is based on the ownership and operational relationship between the primary and secondary employers. Here, a number of factors are considered, particularly the following: Are the primary and secondary employers owned and controlled by the same person or persons? Are they engaged in "closely integrated operations"? May they be treated as a single employer under the Act? Another test of the "ally" relationship is based on the conduct of the secondary employer. If an employer, despite its claim of neutrality in the dispute, acts in a way that indicates that it has abandoned its "neutral" position, the employer opens itself up to primary action by the union. An example of this would be an employer who, claiming to be a neutral, enters into an arrangement with a struck employer whereby it accepts and performs farmed-out work of that employer who would normally do the work itself, but who cannot perform the work because its plant is closed by a strike.

When employees of a primary employer and those of a secondary employer work on the same premises, a special situation is involved and the usual rules do not apply. A typical example of the shared site or "common situs" situation is when a subcontractor with whom a union has a dispute is engaged at work on a construction site alongside other subcontractors with whom the union has no dispute. Picketing at a common situs is permissible if directed solely against the primary employer. But it is prohibited if directed against secondary employers regularly engaged at that site. To assist in determining whether picketing at a common situs is restricted to the primary employer and therefore permissible, or directed at a secondary employer and therefore violative of the statute, the NLRB and the courts have suggested various guidelines for evaluating the object of the picketing, including the following.

When a union may picket an employer who shares a site with another employer

Subject to the qualification noted below, the picketing would appear to be primary picketing if the picketing is:

1. Limited to times when the employees of the primary employer are working on the premises.
2. Limited to times when the primary employer is carrying on its normal business there.
3. Confined to places reasonably close to where the employees of the primary employer are working.
4. Conducted so that the picket signs, the banners, and the conduct of the pickets indicate clearly that the dispute is with the primary employer and not with the secondary employer.

These guidelines are known as the *Moore Dry Dock* standards from the case in which they were first formulated by the NLRB. However, the NLRB has held that picketing at a common situs may be unlawful notwithstanding compliance with the *Moore Dry Dock* standards if a union's statements or actions otherwise indicate that the picketing has an unlawful objective.

In some situations a company may set aside, or reserve, a certain plant gate, or entrance to its premises, for the exclusive use of a contractor. If a union has a labor dispute with the company and pickets the company's premises, including the gate so reserved, the union may be held to have violated Section 8(b)(4)(B). The U.S. Supreme Court has stated the circumstances under which such a violation may be found as follows:

Picketing contractors' gates

There must be a separate gate, marked and set apart from other gates; the work done by the employees who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations.

However, if the reserved gate is used by employees of both the company and the contractor, the picketing would be considered primary and not a violation of Section 8(b)(4)(B).

Subparagraph (B)—Prohibited object: Compelling recognition of an uncertified union

Section 8(b)(4)(B) also prohibits secondary action to compel an employer to recognize or bargain with a union that is not the certified representative of its employees. If a union takes action described in clause (i) or (ii) against a secondary employer, and the union's object is recognition by the primary employer, the union commits an unfair labor practice under this section. To establish that the union has an object of recognition, a specific demand by the union for recognition need not be shown; a demand for a contract, which implies recognition or at least bargaining, is enough to establish an 8(b)(4)(B) object.

Subparagraph (C)—Prohibited object: Compelling recognition of a union if another union has been certified

Section 8(b)(4)(C) forbids a labor organization from using clause (i) or (ii) conduct to force an employer to recognize or bargain with a labor organization other than the one that is currently certified as the representative of its employees. Section 8(b)(4)(C) has been held not to apply when the picketing union is merely protesting working conditions that are substandard for the area.

Subparagraph (D)—Prohibited object: Compelling assignment of certain work to certain employees

Section 8(b)(4)(D) forbids a labor organization from engaging in action described in clauses (i) and (ii) for the purpose of forcing any employer to assign certain work to "employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." The Act sets up a special procedure for handling disputes over work assignments that will be discussed later in this material (see p. 50).

Publicity such as handbilling allowed by Section 8(b)(4)

The final provision in Section 8(b)(4) provides that nothing in Section 8(b)(4) shall be construed "to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." Such publicity is not protected if it has "an effect of inducing any individual employed by any persons other than the primary employer" to refuse to handle any goods or not to perform services. The

Supreme Court has held that this provision permitted a union to distribute handbills at the stores of neutral food chains asking the public not to buy certain items distributed by a wholesaler with whom the union had a primary dispute. Moreover, it has also held that peaceful picketing at the stores of a neutral food chain to persuade customers not to buy the products of a struck employer when they traded in these stores was not prohibited by Section 8(b)(4).

Section 8(b)(5)—Excessive or Discriminatory Membership Fees

Section 8(b)(5) makes it illegal for a union to charge employees who are covered by an authorized union-security agreement a membership fee "in an amount which the Board finds excessive or discriminatory under all the circumstances." The section also provides that the Board in making its finding must consider among other factors "the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected."

Examples of violations of this section include:

Examples of violations of Section 8(b)(5)

- Charging old employees who do not join the union until after a union-security agreement goes into effect an initiation fee of $15 while charging new employees only $5.
- Increasing the initiation fee from $75 to $250 and thus charging new members an amount equal to about 4 weeks' wages when other unions in the area charge a fee equal to about one-half the employee's first week's pay.

Section 8(b)(6)—"Featherbedding"

Section 8(b)(6) forbids a labor organization "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

Section 8(b)(7)—Organizational and Recognitional Picketing by Noncertified Unions

Section 8(b)(7) prohibits a labor organization that is not currently certified as the employees' representative from picketing or threatening to picket with an object of obtaining recognition by the employer (recognitional picketing) or acceptance by his employees as their representative (organizational picketing). The object of picketing is ascertained from all the surrounding facts including the message on the picket signs and any communications between the union and the employer. "Recognitional" picketing as used in Section 8(b)(7) refers to picketing to obtain an employer's initial recognition of the union as bargaining representative of its employees or to force the employer, without formal recognition of the union, to maintain a specific and detailed set of working conditions. It does not include picketing by an incumbent union for continued recognition or for a new contract. Neither

does it include picketing that seeks to prevent the employer from undermining area standards of working conditions by operating at less than the labor costs which prevail under bargaining contracts in the area.

Recognitional and organizational picketing are prohibited in three specific instances:

A. When the employer has lawfully recognized another union and a representation election would be barred by either the provisions of the Act or the Board's Rules, as in the case of a valid contract between the employer and the other union (8(b)(7)(A)). (A union is considered lawfully recognized when the employer's recognition of the union cannot be attacked under the unfair labor practice provisions of Section 8 of the Act.)

B. When a valid NLRB representation election has been held within the previous 12 months (8(b)(7)(B)).

C. When a representation petition is not filed "within a reasonable period of time not to exceed thirty days from the commencement of such picketing" (8(b)(7)(C)).

Publicity picketing

Subparagraph (C) is subject to an exception, called a proviso, which permits picketing "for the purpose of truthfully advising the public (including consumers)" that an employer does not employ union members or have a contract with a labor organization. However, such picketing loses the protection of this proviso if it has a substantial effect on the employer's business because it induces "any individual employed by any other person" to refuse to pick up or deliver goods or to perform other services.

Expedited elections under Section 8(b)(7)(C)

If an 8(b)(7)(C) charge is filed against the picketing union and a representation petition is filed within a reasonable time after the picketing starts, subparagraph (C) provides for an election to be held forthwith. This election requires neither a hearing nor a showing of interest among the employees. As a consequence the election can be held and the results obtained faster than in a regular election under Section 9(c), and for this reason it is called an "expedited" election. Petitions filed more than a reasonable time after picketing begins and petitions filed during picketing protected by the 8(b)(7)(C) proviso, discussed above, are processed under normal election procedures and the election will not be expedited. The reasonable period in which to file a petition cannot exceed 30 days and may be shorter, when, for instance, picketing is accompanied by violence.

Examples of violations of Section 8(b)(7) are as follows:

- Picketing by a union for organizational purposes shortly after the employer has entered a lawful contract with another union (8(b)(7)(A)).
- Picketing by a union for organizational purposes within 12 months after a valid NLRB election in which a majority of the employees in the unit voted to have no union (8(b)(7)(B)).
- Picketing by a union for recognition continuing for more than 30 days without the filing of a representation petition wherein the picketing stops all deliveries by employees of another employer (8(b)(7)(C)).

Examples of violations of Section 8(b)(7)

Section 8(e)—Entering a Hot Cargo Agreement

Section 8(e) makes it an unfair labor practice for an employer or a labor organization to enter a hot cargo agreement. This section applies equally to unions and to employers. The discussion of this section as an unfair labor practice of employers has been treated as a discussion of an unfair labor practice of unions as well. (See pp. 26 and 27.)

Section 8(g)—Striking or Picketing a Health Care Institution Without Notice

Section 8(g) prohibits a labor organization from engaging in a strike, picketing, or other concerted refusal to work at any health care institution without first giving at least 10 days' notice in writing to the institution and the Federal Mediation and Conciliation Service.

How the Act Is Enforced

The rights of employees declared by Congress in the National Labor Relations Act are not self-enforcing. To ensure that employees may exercise these rights, and to protect them and the public from unfair labor practices, Congress established the NLRB to administer and enforce the Act.

Organization of the NLRB

The NLRB includes the Board, which is composed of five members with their respective staffs, the General Counsel and staff, and the Regional, Subregional, and Resident Offices. The General Counsel has final and independent authority on behalf of the Board, in respect to the investigation of charges and issuance of complaints. Members of the Board are appointed by the President, with consent of the Senate, for 5-year terms. The General Counsel is also appointed by the President, with consent of the Senate, for a 4-year term. Offices of the Board and the General Counsel are in Washington, D.C. To assist in administering and enforcing the law, the NLRB has established 33 regional and a number of other field offices. These offices, located in major cities in various States and Puerto Rico, are under the general supervision of the General Counsel.

The Board

The General Counsel

The Regional Offices

The Agency has two main functions: to conduct representation elections and certify the results,

Functions of the NLRB

and to prevent employers and unions from engaging in unfair labor practices. In both kinds of cases the processes of the NLRB are begun only when requested. Requests for such action must be made in writing on forms provided by the NLRB and filed with the proper Regional Office. The form used to request an election is called a "petition," and the form for unfair labor practices is called a "charge." The filing of a petition or a charge sets in motion the machinery of the NLRB under the Act. Before discussing the machinery established by the Act, it would be well to understand the nature and extent of the authority of the NLRB.

Authority of the NLRB

The NLRB gets its authority from Congress by way of the National Labor Relations Act. The power of Congress to regulate labor-management relations is limited by the commerce clause of the United States Constitution. Although it can declare generally what the rights of employees are or should be, Congress can make its declaration of rights effective only in respect to enterprises whose operations "affect commerce" and labor disputes that "affect commerce." The NLRB, therefore, can direct elections and certify the results only in the case of an employer whose operations affect commerce. Similarly, it can act to prevent unfair labor practices only in cases involving labor disputes that affect, or would affect, commerce.

Enterprises whose operations affect commerce

"Commerce" includes trade, traffic, transportation, or communication within the District of Columbia or any Territory of the United States; or between any State or Territory and any other State, Territory, or the District of Columbia; or between two points in the same State, but through any other State, Territory, the District of Columbia, or a foreign country. Examples of enterprises engaged in commerce are:

What is commerce

- A manufacturing company in California that sells and ships its product to buyers in Oregon.
- A company in Georgia that buys supplies in Louisiana.
- A trucking company that transports goods from one point in New York State through Pennsylvania to another point in New York State.
- A radio station in Minnesota that has listeners in Wisconsin.

Although a company may not have any direct dealings with enterprises in any other State, its operations may nevertheless affect commerce. The operations of a Massachusetts manufacturing company that sells all of its goods to Massachusetts wholesalers affect commerce if the wholesalers ship to buyers in other States. The effects of a labor dispute involving the Massachusetts manufacturing

concern would be felt in other States and the labor dispute would, therefore, "affect" commerce. Using this test, it can be seen that the operations of almost any employer can be said to affect commerce. As a result, the authority of the NLRB could extend to all but purely local enterprises.

When the operations of an employer affect commerce

The scope of the commerce clause is limited, however, by the first amendment's prohibition against Congress' enacting laws restricting the free exercise of religion. Because of this potential conflict, and because Congress has not clearly expressed an intention that the Act cover lay faculty in church-operated schools, the Supreme Court has held that the Board may not assert jurisdiction over faculty members in such institutions.

Although the National Labor Relations Board could exercise its powers to enforce the Act in all cases involving enterprises whose operations affect commerce, the Board does not act in all such cases. In its discretion it limits the exercise of its power to cases involving enterprises whose effect on commerce is substantial. The Board's requirements for exercising its power or jurisdiction are called "jurisdictional standards." These standards are based on the yearly amount of business done by the enterprise, or on the yearly amount of its sales or of its purchases. They are stated in terms of total dollar volume of business and are different for different kinds of enterprises. The Board's standards in effect on July 1, 1990, are as follows:

The Board does not act in all cases affecting commerce

1. *Nonretail business:* Direct sales of goods to consumers in other States, or indirect sales through others (called outflow), of at least $50,000 a year; or direct purchases of goods from suppliers in other States, or indirect purchases through others (called inflow), of at least $50,000 a year.
2. *Office buildings:* Total annual revenue of $100,000 of which $25,000 or more is derived from organizations that meet any of the standards except the indirect outflow and indirect inflow standards established for nonretail enterprises.
3. *Retail enterprises:* At least $500,000 total annual volume of business.
4. *Public utilities:* At least $250,000 total annual volume of business, or $50,000 direct or indirect outflow or inflow.
5. *Newspapers:* At least $200,000 total annual volume of business.
6. Radio, telegraph, television, and telephone enterprises: At least $100,000 total annual volume of business.

NLRB jurisdictional standards

7. *Hotels, motels, and residential apartment houses:* At least $500,000 total annual volume of business.
8. *Privately operated health care institutions:* At least $250,000 total annual volume of business for hospitals; at least $100,000 for nursing homes, visiting nurses associations, and related facilities; at least $250,000 for all other types of private health care institutions defined in the 1974 amendments to the Act. The statutory definition includes: "any hospital, convalescent hospital, health maintenance organizations, health clinic, nursing home, extended care facility or other institution devoted to the care of the sick, infirm, or aged person." Public hospitals are excluded from NLRB jurisdiction by Section 2(2) of the Act.
9. *Transportation enterprise, links and channels of interstate commerce:* At least $50,000 total annual income from furnishing interstate passenger and freight transportation services; also performing services valued at $50,000 or more for businesses which meet any of the jurisdictional standards except the indirect outflow and indirect inflow of standards established for nonretail enterprises.
10. *Transit systems:* At least $250,000 total annual volume of business.
11. *Taxicab companies:* At least $500,000 total annual volume of business.
12. *Associations:* These are regarded as a single employer in that the annual business of all association members is totaled to determine whether any of the standards apply.
13. *Enterprises in the Territories and the District of Columbia:* The jurisdictional standards apply in the Territories; all businesses in the District of Columbia come under NLRB jurisdiction.
14. *National defense:* Jurisdiction is asserted over all enterprises affecting commerce when their operations have a substantial impact on national defense, whether the enterprises satisfy any other standard.
15. *Private universities and colleges:* At least $1 million gross annual revenue from all sources (excluding contributions not available for operating expenses because of limitations imposed by the grantor).

16. *Symphony orchestras:* At least $1 million gross annual revenue from all sources (excluding contributions not available for operating expenses because of limitations imposed by the grantor).

17. *Law firms and legal assistance programs:* At least $250,000 gross annual revenues.

18. *Employers that provide social services:* At least $250,000 gross annual revenues.

Through enactment of the 1970 Postal Reorganization Act, jurisdiction of the NLRB was extended to the United States Postal Service, effective July 1, 1971.

In addition to the above-listed standards, the Board asserts jurisdiction over gambling casinos when these enterprises are legally operated, when their total annual revenue from gambling is at least $500,000.

Ordinarily, if an enterprise does the total annual volume of business listed in the standard, it will necessarily be engaged in activities that "affect" commerce. The Board must find, however, based on evidence, that the enterprise does in fact "affect" commerce.

The Board has established the policy that when an employer whose operations "affect" commerce refuses to supply the Board with information concerning total annual business, the Board may dispense with this requirement and exercise jurisdiction.

Finally, Section 14(c)(1) authorizes the Board, in its discretion, to decline to exercise jurisdiction over any class or category of employers when a labor dispute involving such employees is not sufficiently substantial to warrant the exercise of jurisdiction, provided that it cannot refuse to exercise jurisdiction over any labor dispute over which it would have asserted jurisdiction under the standards it had in effect on August 1, 1959. In accordance with this provision the Board has determined that it will not exercise jurisdiction over racetracks, owners, breeders, and trainers of racehorses, and real estate brokers.

In addition to the foregoing limitations, the Act states that the term "employee" shall include any employee *except* the following:

- Agricultural laborers.
- Domestic servants.
- Any individual employed by his parent or spouse.
- Independent contractors.
- Supervisors.

The Act does not cover certain individuals

- Individuals employed by an employer subject to the Railway Labor Act.
- Government employees, including those employed by the U.S. Government, any Government corporation or Federal Reserve Bank, or any State or political subdivision such as a city, town, or school district.

Supervisors are excluded from the definition of "employee" and, therefore, not covered by the Act. Whether an individual is a supervisor for purposes of the Act depends on that individual's authority over employees and not merely a title. A supervisor is defined by the Act as any individual who has the authority, acting in the interest of an employer, to cause another employee to be hired, transferred, suspended, laid off, recalled, promoted, discharged, assigned, rewarded, or disciplined, either by taking such action or by recommending it to a superior; or who has the authority responsibly to direct other employees or adjust their grievances; provided, in all cases, that the exercise of authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment. For example, a foreman who determined which employees would be laid off after being directed by the job superintendent to lay off four employees would be considered a supervisor and would, therefore, not be covered by the Act; a "strawboss" who, after someone else determined which employees would be laid off, merely informed the employees of the layoff and who neither directed other employees nor adjusted their grievances would not be considered a supervisor and would be covered by the Act.

Supervisor defined

"Managerial" employees are also excluded from the protection of the Act. A managerial employee is one who represents management interests by taking or recommending actions that effectively control or implement employer policy.

The term "employer" includes any person who acts as an agent of an employer, but it does not include the following:

The Act does not cover certain employers

- The United States or any State Government, or any political subdivision of either, or any Government corporation or Federal Reserve Bank.
- Any employer subject to the Railway Labor Act.

NLRB Procedures

The authority of the NLRB can be brought to bear in a representation proceeding only by the filing of a petition. Forms for petitions must be signed, sworn to or affirmed under oath, and filed with the Regional Office in the area where the unit of employees is located. If employees in the unit regularly work in more than one regional area, the petition may be filed with the Regional Office of any of such regions.

Section 9(c)(1) provides that when a petition is filed, "the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice." If the Board finds from the evidence presented at the hearing that "such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." When there are three or more choices on the ballot and none receives a majority, Section 9(c)(3) provides for a runoff between the choice that received the largest and the choice that received the second largest number of valid votes in the election. After the election, if a union receives a majority of the votes cast, it is certified; if no union gets a majority, that result is certified. A union that has been certified is entitled to be recognized by the employer as the exclusive bargaining agent for the employees in the unit. If the employer fails to bargain with the union, it commits an unfair labor practice.

Procedure in representation cases

The procedure in an unfair labor practice case is begun by the filing of a charge. A charge may be filed by an employee, an employer, a labor organization, or any other person. Like petitions, charge forms, which are also available at Regional Offices, must be signed, sworn to or affirmed under oath, and filed with the appropriate Regional Office—that is, the Regional Office in the area where the alleged unfair labor practice was committed. Section 10 provides for the issuance of a complaint stating the charges and notifying the charged party of a hearing to be held concerning the charges. Such a complaint will issue only after investigation of the charges through the Regional Office indicates that an unfair labor practice has in fact occurred.

Procedure in unfair labor practice cases

In certain limited circumstances when an employer and union have an agreed-upon grievance arbitration procedure that will resolve the dispute, the Board will defer processing an unfair labor practice case and await resolution of the issues through that grievance arbitration procedure. If the grievance arbitration process meets the Board's standards, the Board may accept the final resolution and defer that decision. If the procedure fails to meet all the Board standards for deferral, the Board may then resume processing of the unfair labor practice issues.

An unfair labor practice hearing is conducted before an NLRB administrative law judge in accordance with the rules of evidence and procedure that apply in the U.S. district courts. Based on the hearing record, the administrative law judge makes findings and recommendations to the Board. All parties to the hearing may appeal the administrative law judge's decision to the Board. If the Board

considers that the party named in the complaint has engaged in or is engaging in the unfair labor practices charged, the Board is authorized to issue an order requiring such person to cease and desist from such practices and to take appropriate affirmative action.

The 6-month rule limiting issuance of complaint

Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." An exception is made if the charging party "was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge." It should be noted that the charging party must, within 6 months after the unfair labor practice occurs, file the charge with the Regional Office *and* serve copies of the charge on each person against whom the charge is made. Normally service is made by sending the charge by registered mail, return receipt requested.

Appeal to the General Counsel if complaint is not issued

If the Regional Director refuses to issue a complaint in any case, the person who filed the charge may appeal the decision to the General Counsel in Washington. Section 3(d) places in the General Counsel "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints." If the General Counsel reverses the Regional Director's decision, a complaint will be issued. If the General Counsel approves the decision not to issue a complaint, there is no further appeal.

Powers of the NLRB

To enable the NLRB to perform its duties under the Act, Congress delegated to the Agency certain powers that can be used in all cases. These are principally powers having to do with investigations and hearings.

Powers concerning investigations

As previously indicated, all charges that are filed with the Regional Office are investigated, as are petitions for representation elections. Section 11 establishes the powers of the Board and the Regional Offices in respect to hearings and investigations. The provisions of Section 11(1) authorize the Board or its agents to

- Examine and copy "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question."
- Issues subpoenas, on the application of any party to the proceeding, requiring the attendance and testimony of witnesses or the production of any evidence.

- Administer oaths and affirmations, examine witnesses, and receive evidence.
- Obtain a court order to compel the production of evidence or the giving of testimony.

The Act is remedial, not criminal

The National Labor Relations Act is not a criminal statute. It is entirely remedial. It is intended to prevent and remedy unfair labor practices, not to punish the person responsible for them. The Board is authorized by Section 10(c) not only to issue a cease-and-desist order, but "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

The object of the Board's order in any case is twofold: to eliminate the unfair labor practice and to undo the effects of the violation as much as possible. In determining what the remedy will be in any given case, the Board has considerable discretion. Ordinarily, its order in regard to any particular unfair labor practice will follow a standard form that is designed to remedy that unfair labor practice, but the Board can, and often does, change the standard order to meet the needs of the case. Typical affirmative action of the Board may include orders to an employer who has engaged in unfair labor practices to:

Affirmative action may be ordered by the Board

- Disestablish an employer-dominated union.
- Offer certain named individuals immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges, and with backpay, including interest.
- On request, bargain collectively with a certain union as the exclusive representative of the employees in a certain described unit and sign a written agreement if an understanding is reached.

Examples of affirmative action directed to employers

Examples of affirmative action that may be required of a union that has engaged in unfair labor practices include orders to:

- Notify the employer and the employees that it has no objection to reinstatement of certain employees, or employment of certain applicants, whose discriminatory discharge, or denial of employment, was caused by the union.
- Refund dues or fees illegally collected, plus interest.
- On request, bargain collectively with a certain employer and sign a written agreement if one is reached.

Examples of affirmative action directed to unions

The Board's order usually includes a direction to the employer or the union or both requiring them to post notices in the employer's plant or the union's office notifying the employees that they will cease the unfair labor practices and informing them of any affirmative action being undertaken to remedy the violation. Special care is taken to be sure that these notices are readily understandable by the employees to whom they are addressed.

Special Proceedings in Certain Cases

Special proceedings are required by the Act in certain kinds of cases. These include the determination of jurisdictional disputes under Section 10(k) and injunction proceedings under Section 10(l) and (j).

Proceedings in jurisdictional disputes

Whenever it is charged that any person has engaged in an unfair labor practice in violation of Section 8(b)(4)(D), the Board must hear and determine the dispute out of which the unfair labor practice arises. Section 8(b)(4)(D) prohibits unions from striking or inducing a strike to compel an employer to assign particular work to employees in one union, or in one trade or craft, rather than another. For a jurisdictional dispute to exist, there must be real competition between unions or between groups of employees for certain work. In effect, Section 10(k) provides an opportunity for the parties to adjust the dispute during a 10-day period after notice of the 8(b)(4)(D) charge has been served. At the end of this period if the parties have not submitted to the Board satisfactory evidence that they have adjusted, or agreed on a method of adjusting, the dispute, the Board is "empowered and directed" to determine which of the competing groups is entitled to have the work.

The investigation of certain charges must be given priority

Section 10(l) provides that whenever a charge is filed alleging a violation of certain sections of the Act relating to boycotts, picketing, and work stoppages, the preliminary investigation of the charge must be given priority over all other types of cases in the Regional Office where it is filed. The unfair labor practices subject to this priority concerning the investigation are those defined in Section 8(b)(4)(A), (B), or (C), all three subparagraphs of Section 8(b)(7), and Section 8(e). Section 10(m) requires that second priority be given to charges alleging violations of Section 8(a)(3), the prohibition against employer discrimination to encourage or discourage membership in a union, and Section 8(b)(2), which forbids unions to cause or attempt to cause such discrimination.

Injunction proceedings under Section 10(l)

If the preliminary investigation of any of the first priority cases shows that there is reasonable cause to believe that the charge is true and that a complaint should issue, Section 10(l) further requires that the U.S. district court be petitioned to grant an injunction pending the final determina-

tion of the Board. The section authorizes the court to grant "such injunctive relief or temporary restraining order as it deems just and proper." Another provision of the section prohibits the application for an injunction based on a charge of violation of Section 8(b)(7) (the prohibition on organizational or recognitional picketing in certain situations) if a charge against an employer alleging violation of Section 8(a)(2) has been filed and the preliminary investigation establishes reasonable cause to believe that such charge is true.

Injunctive relief may be sought in other cases

Section 10(j) allows the Board to petition for an injunction in connection with any unfair labor practice after a complaint has been issued. This section does not require that injunctive relief be sought, but only makes it possible for the Board to do so in cases when it is considered appropriate.

Court Enforcement of Board Orders

If an employer or a union fails to comply with a Board order, Section 10(e) empowers the Board to petition the U.S. court of appeals for a court decree enforcing the order of the Board. Section 10(f) provides that any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any appropriate circuit court of appeals.

In the U.S. court of appeals

When the court of appeals hears a petition concerning a Board order, it may enforce the order, remand it to the Board for reconsideration, change it, or set it aside entirely. If the court of appeals issues a judgment enforcing the Board order, failure to comply may be punishable by fine or imprisonment for contempt of court.

Review by the U.S. Supreme Court

In some cases the U.S. Supreme Court may be asked to review the decision of a circuit court of appeals, particularly when there is a conflict in the views of different courts on the same important problem.

Conclusion

In this material the entire Act has been covered, but, of necessity, the coverage has been brief. No attempt has been made to state the law in detail or to supply you with a textbook on labor law. We have tried to explain the Act in a manner intended to make it easier to understand what the basic provisions of the Act are and how they may concern you. If it helps you to recognize and know your rights and obligations under the Act, and aids in determining whether you need expert assistance when a problem arises, its purpose will have been satisfied. More than that, the objective of the Act will have been furthered.

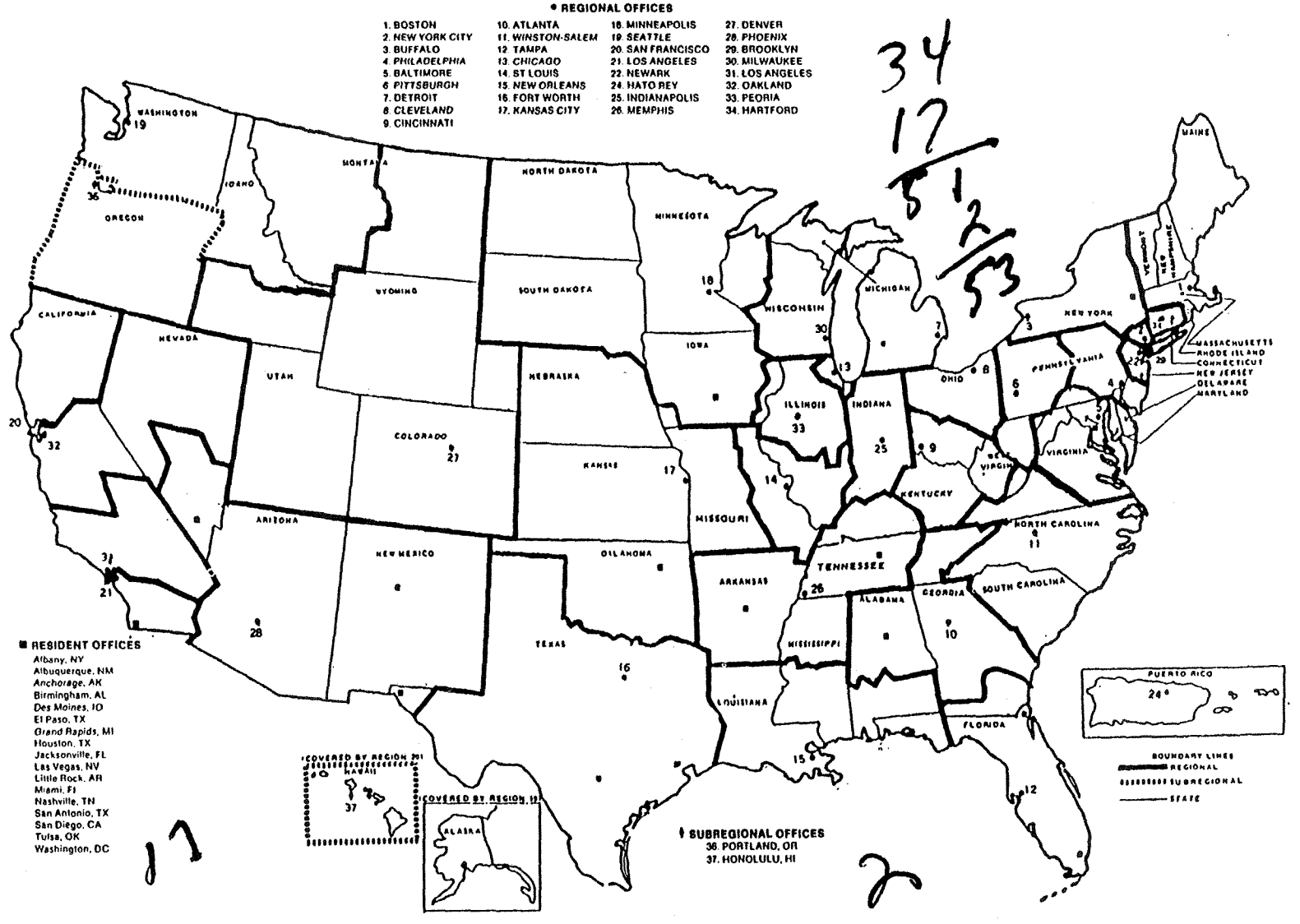
The objective of the National Labor Relations Act, to avoid or reduce industrial strife and protect the public health, safety, and interest, can best be achieved by the parties or those who may become

parties to an individual dispute. Voluntary adjustment of differences at the community and local level is almost invariably the speediest, most satisfactory, and longest lasting way of carrying out the objective of the Act.

Efforts are being made in all our Regional Offices to increase the understanding of all parties about what the law requires of them. Long experience has taught us that when the parties fully understand their rights and obligations, they are more ready and able to adjust their differences voluntarily. Seldom do individuals go into a courtroom, a hearing, or any other avoidable contest, knowing that they are in the wrong and that they can expect to lose the decision. No one really likes to be publicly recorded as a law violator (and a loser too). Similarly, it is seldom that individuals refuse to accept an informal adjustment of differences that is reasonable, knowing that they can obtain no better result from the formal proceeding, even if they prevail.

The consequences of ignorance in these matters—formal proceedings that can be time-consuming and costly, and that are often followed by bitterness and antagonism—are economically wasteful, and usually it is accurate to say that neither party really wins. It is in an attempt to bring about more widespread awareness of the basic law and thus help the parties avoid these consequences that this material has been prepared and presented as a part of a continuing program to increase understanding of the National Labor Relations Act.

Map Showing Regional Boundaries



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HANDLING UNFAIR LABOR PRACTICE PROCEEDINGS

1. Preparation for Filing the ULP Charge

A. Prior to filing ULP charge:

i. Identify when you knew or should have known about the alleged unfair labor practice conduct.

There is a six-month statute of limitations.

ii. 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.

iii. 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.

2. Filing the Charge

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

i. ULP forms are available at www.nlrb.gov or at Regional offices.

ii. Language alleging ULP can be one sentence and need not contain a thorough statement of the allegation.

iii. 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.

iv. Call by telephone or visit your Region's "information officer" for assistance in filing a ULP charge.

v. You can amend your ULP charge later if necessary.

vi. Once you have filed your ULP charge, you become the "Charging Party" and the Postal Service becomes the "Respondent."

vii. You may also include a position statement laying out any pertinent facts or law.

A position statement is not necessary.

viii. 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.

3. Board Investigation of Charge

A. The Regional Director will assign a Field Examiner 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.

i. Timely respond to the requests of the investigator.

ii. 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.

iii. 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.

iv. Individuals who give affidavits should ask for a copy of the affidavit so that the union can get a copy.

v. Ask the investigator if he wants additional evidence.

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

i. 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.

ii. 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.

4. 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.

5. Settlement of ULP Charges

The Regions are generally eager to settle any charge that it finds meritorious.

There are three general types of settlement:

A. *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.

B. *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.

C. *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.

6. 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.

INFORMATION REQUEST ULPs

The Postal Service Must Provide a Broad Spectrum of Information

1. Upon a request by a union, the Postal Service must provide information that is necessary for the union to process grievances, administer the National Agreement or collectively bargain.

Good Samaritan Hosp., 335 NLRB 901, 918 (2001); Yeshiva University, 315 NLRB 1245, 1247 (1994); NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

2. A union is presumptively entitled to information concerning bargaining unit employees' wages, hours, and terms and conditions of work.

   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.

Good Samaritan, 335 NLRB at 918; Yeshiva, 315 NLRB at 1247; Country Ford Trucks, 330 NLRB 328 (1999); Carriage Enterprises, 330 NLRB 331 (1999).

3. Other information requests are governed by a "broad discovery-type standard."

Good Samaritan, 335 NLRB at 918; see also Acme Industrial, 385 U.S. at 437.

4. Under this broad test for relevancy, a union is entitled to any information that is "of probable use to the labor organization in carrying out its statutory responsibilities."

Good Samaritan, 335 at 918.

5. If the "information has some bearing on the issue between the parties" it must be supplied.

U.S. Postal Service, 289 NLRB 942 (1988) enf'd, 888 F.2d 1568 (11th Cir. 1989).

6. "[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), enf'd in relevant part 86 F.3d 1401 (5th Cir. 1996). See 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.").

7. The Postal Service must "either produce the [requested information] or provide the [u]nion with some timely legitimate explanation for its refusal."

U.S. Postal Service, 332 NLRB at 636.

8. Thus, an employer is not only under the obligation to furnish a union with requested information, but to do so in a timely manner.

9. 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.

Confidentiality Defense

1. Substantial claims of confidentiality may justify an employer's refusal to furnish information.

Detroit Newspaper Agency, 317 NLRB 1071, 1072-1074 (1995).

2. 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).

3. The NLRB does not accept blanket claims of confidentiality; the employer must justify such claims.

U.S. Postal Service, 289 NLRB at 942. See also McDonnell Douglas Corp., 224 NLRB 881, 890 (1976).

4. To trigger the balancing test under Detroit Edison, an employer must first timely raise its confidentiality claim.

Detroit Newspaper, 317 NLRB at 1072-1074; Tritac Corp., 286 NLRB 522 (1987).

5. 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 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).

6. 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 942 (1988).

7. 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.

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).

What To Do When a ULP is Filed Against the Union

1. **DO NOT TALK to the NLRB (i.e., a Board agent) before talking to an attorney.**

   A. The Board agent may say that he or she will just take notes.

   However, the Board agent will produce a memorandum based on those notes, and you will be held accountable to it at trial.

2. **DO NOT GET ANGRY. Stay calm.**

   A. Although it is easy to get angry when a charge is filed that you perceive to be false and/or meritless, it does not help you or the Union to let emotions cloud your judgment.

   Getting angry may also prompt you to say things that you do not mean or will regret later.

   Be patient. The investigation may take some time, and letting angry comments be recorded and factored into an investigation will serve neither you nor the Union.

3. **DO NOT confront or THREATEN the accusers.**

   A. If you want to talk to the employees that brought the charge against the Union, do so with a WITNESS.

   The witness will be able to corroborate what happened at the meeting if that becomes an issue later on.

   Do not get angry with the employees that brought the charge against the Union. This will only exacerbate the situation.

   Do NOT ask or tell the employees to withdraw their Board charges filed against the Union.

   Do NOT tell the employees that the Union will file law suits against them.

4. **DO NOT SIGN anything without talking to an attorney first.**

   A. The most common document a Board agent will ask you to sign is an affidavit.

Even if you think the affidavit is a good statement of what happened, do NOT sign anything until you have talked to an attorney.

B. ALWAYS look over the affidavit before signing it.

Be firm with the investigator if the affidavit mischaracterizes your testimony.

5. **ALWAYS ask for a COPY of everything.**

A. This includes your own affidavit, and anything the investigator has that is relevant to the charge.

Hypothetical for Discussion

Jake is the President of his Local. Two months ago, Jake bid for a job that Rebecca also bid for. Jake got the job. Rebecca felt she deserved the job and requested that the Local file a grievance on her behalf and that Jake not be her representative. Jake felt he could be impartial and told Rebecca that she could not choose a specific representative to represent her on her grievance. Shortly after, Rebecca filed a charge with the Board against the Union.

The Board agent called Jake and told him that he was investigating a charge brought by Rebecca where she accuses Jake of threatening her if she did not drop the Board charge against the Union. Jake was infuriated, and told the Board agent that that was a lie. What should Jake do next?

The Board agent then told Jake that he would like to get his side of the story. Jake then proceeded to tell him that he never threatened Rebecca, and she was just angry with him because he had received a job that she had bid for and wanted. Jake met with the Board agent the next day to draw up an affidavit as the Board agent suggested. Jake wanted the Board agent to know that Rebecca was greatly exaggerating the meeting between that took place between him and Rebecca. What did Jake do wrong here?

Jake let the Board agent know that he did have a discussion with Rebecca regarding the Board charge against the union, but that he was only trying to clarify the situation to Rebecca. Jake told the Board agent that he thought Rebecca did not understand that filing a charge against the Union was not a charge against him personally. After meeting with the Board agent, Jake felt that the Board agent really understood his side of what had happened with Rebecca. After Jake signed the affidavit, he went to go look for Rebecca on the workroom floor to let her know that he was not angry with her. Is this a good idea?

TYPICAL UNFAIR LABOR PRACTICES

EMPLOYER ULPs

Section 8 (a) (1) — Interference with Section 7 Rights

- Threats of reprisal
- Grants of benefits
- Interrogation
- Surveillance of union activities
- Creating the impression of surveillance
- Weingarten violations ("mutual aid and protection")

Section 8 (a) (2) — Employer domination and assistance to labor organizations

- Employer-created committees

Section 8 (a) (3) — Anti-union discrimination

Section 8 (a) (4) — Discrimination for filing ULP charges

Section 8 (a) (5) — Failure to bargain in good faith

- Repudiation of settlements (sometimes)
- Failure to provide bargaining information

UNION ULPs

Section 8 (b) (1) (A)	Restraint & Coercion • Threats and discrimination against nonmembers • Breach of DFR
Section 8 (b) (2)	Coercing choice of bargaining representative
Section 8 (b) (3)	Failure to bargain in good faith
Section 8 (b) (4)	Secondary boycotts
Section 8 (b) (7)	Certain recognitional picketing

DUTY OF FAIR REPRESENTATION

THE DUTY OF FAIR REPRESENTATION

A union has ***"a wide range of reasonableness"*** in carrying out its collective bargaining functions, and this discretion is limited only by the requirementthat the union act with ***"complete good faith and honesty of purpose".***

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564, (1976)

BREACH OF THE DUTY OF FAIR REPRESENTATION

A union breaches its duty of fair representation if its conduct is ***arbitrary, discriminatory, perfunctory or in bad faith.***

Vaca v. Sipes, 386 U.S. 171 (1967)

APPLICATION OF THE DUTY OF FAIR REPRESENTATION

The duty of fair representation applies to a union's contract administration, enforcement, and negotiation, as well as any other instances where a union ***acts in a representative role.***

Air Line Pilots Association v. O'Neill, 499 U.S. 65, 77-78 (1991)

TO WHOM IS THE DUTY OF FAIR REPRESENTATION OWED

The duty of fair representation is owed to all individuals for whom the Union is the exclusive bargaining representative. This means that the Union owes a duty of fair representation to all members of the bargaining unit, ***member and non-member alike.***

Vaca v. Sipes, 386 U.S. 171, 190 (1967)

DUTY OF FAIR REPRESENTATION CHECK LIST

This checklist contains the universal possibilities that a union official could do to make the union less vulnerable to a lawsuit or unfair labor practice charge. As circumstances are different for every case, apply the list below accordingly to your discretion.

1. **Are you treating the grievant the way you would like to be treated?**

   A. Have you ***listened*** carefully to everything the grievant wants to tell you?

      i. Have you asked questions to make sure you have a full picture?

      ii. Have you taken ***notes***?

         a. Have you asked the grievant to check your notes over with you, so you and the grievant know you didn't miss anything?

   B. Have you interviewed any ***witnesses*** the grievant mentioned?

      i. Have you taken notes?

         a. Have you reviewed your notes with the grievant, so the grievant could respond to other witnesses' statements?

      ii. Have you gathered your ***evidence promptly***, while people's memories are fresh and you still have time to do a good job?

         a. Have you tried to see all sides of the events, so you can think with an open mind about what your employer might say or do?

   C. Have you checked for ***any evidence and documents that might relate*** to what the grievant and other witnesses told you?

      i. Have you checked employer manuals and policies?

      ii. Have you sought personnel files?

      iii. Have you obtained the employer's investigation reports and requested witness statements and other documents?

a. If the employer refuses to supply information or documents, have you filed an unfair labor practice charge or asked an arbitrator to issue a subpoena?

iv. Have you gathered the evidence and made ***copies*** of the documents?

a. Have you gone over the evidence and copies with the grievant, so the grievant could respond to them?

v. Have you ***checked in regularly with the grievant***, so the grievant knows about the efforts you're making, can suggest additional possibilities, and can share in the work as appropriate?

a. Have you returned the grievant's telephone calls, e-mails, or other messages promptly and regularly?

vi. If your interests conflict with those of the grievant, have you arranged for another steward or local union representative to take over the case?

a. If you are someone else deciding whether to go forward with the case has interests that conflict with the grievant's, or is personally involved, has that person been removed from the discussion and decision?

vii. Have you shown that you will represent the grievant aggressively, without regard to pressures from management that do not relate to the merits of the grievance?

viii. If your union is dropping or compromising a grievance, have you either

a. given the grievant a written explanation of its decision and kept proof of having done so (for example, a return receipt from certified mail) or

b. explained the decision to the grievant in a witness's presence?

c. Have you explained any procedure for appealing the decision?

2. Have you checked your collective bargaining agreement?

A. Have you made sure you're meeting all the ***deadlines*** for processing a grievance?

i. Do you have a system of reminders from the start of a grievance on your calendar or computer?

B. Have you reviewed the entire collective bargaining agreement for any provisions that might apply to the grievance?

i. Have you checked for resolved grievances under the collective bargaining agreement and arbitral decisions?

ii. Have you checked past practices?

iii. Have you talked with:

a. an international union representative,

b. local union officers and staff, and

c. bargaining unit representatives and members?

3. Have you checked applicable laws or asked a union representative or counsel about them?

4. Are you focusing on the merits of the grievance?

A. Have you avoided basing your judgment on the grievant's race, gender, ethnic background, religion, politics, previous grievances, or other factors not relevant to ***this*** grievance?

B. If the grievant is not a member of your union, have you treated him or her just as you would a member?

C. Have you applied ***consistent standards*** to this grievance as to other similar grievances?

D. Are you comfortable that you could explain the reasons for your evaluation of the grievance in public?

E. Have you kept your statements about the grievance focused on the facts, and not put down people in the bargaining unit or in management?

5. Have you organized all the materials in files that allow you to retrieve them without difficulty?

A. Have you checked the materials to see what holes remain to investigate?

B. Have you kept ***written records*** of:

i. When and where you held meetings, and who attended?

ii. When you made telephone calls?

iii. Each step of your investigation?

iv. What you and your union decided at each step and why?

v. How the employer responded at each step?

6. **Have you taken into account the interests of the bargaining unit as a whole?**

A. Will processing this grievance:

i. Assist in enforcing your collective bargaining agreement?

a. Is it likely to set a good precedent for the future?

ii. Pave the way to a stronger position in your next negotiations?

iii. Give voice to an important sentiment among many bargaining unit members?

iv. Help build solidarity among members of your unit?

v. Be worth the resources your union will spend at each step?

B. If a grievance involves a conflict between two bargaining unit members, have you thought about the possibility of arranging for separate representation for each?

SUBSTANTIVE GUIDELINES

The following is largely a summarization of a memorandum dated July 9, 1979, from the Office of the General Counsel of the National Labor Relations Board regarding Section 8(b)(1)(A) cases involving a union's duty of fair representation.

Improper Motives or Fraud

1. Examples: If the union refuses to process a grievance because of

   - the employee's efforts to bring in another union, or
   - the employee's intra-union political activities, or
   - the employee's nonmembership in the union
   - the employee's race or gender
   - personal animosity between the employee and the union's leadership

Pacific Coast Utilities Services, Inc., 238 NLRB 599 (1978); ESI, Inc, 296 NLRB 1319 (1989); Owens-Illinois, 240 NLRB 324 (1979).

2. Where there is some evidence of improper motivation, but the union asserts that it refused to process a grievance because the grievance was not meritorious, the fact the union made only a ***cursory inquiry*** into the merits of the grievance may undercut the union's defense.

   Accordingly, that fact is relevant to the Region's analysis.

   However, the fact, standing alone, would not establish the improper motive.

Newport News Shipbuilding & Dry Dock Co, 236 NLRB 1470 (1978).

3. Involves intentional misconduct

Humphrey v. Moore, 375 U.S. 335 (1964).

4. Proof of fraud requires evidence that the union intentionally mislead the employee as to a material fact concerning his/her employment, and that the employee reasonably relied thereon to his/her detriment.

Arbitrary Conduct

Arbitrary conduct is when there is no basis upon which the union's conduct can be explained.

So long as the union makes some inquiry into the facts and/or so long as the union's contract interpretation has some basis in reason, the union's refusal to process the grievance will not be considered arbitrary.

1. Example: Refusing to process a grievance without any inquiry or with such a perfunctory or cursory inquiry that it is tantamount to no inquiry at all.

Beverly Manor Convalescent Center, 229 NLRB 692 (1977)

2. Example: If there is a contract or an internal union policy which clearly and unambiguously supports the employee's position, and the union, without explanation, refuses to support the employee

Miranda Fuel Co., 140 NLRB 181 (1962); U.S. Postal Service, 240 NLRB No. 178 (1979).

3. Example: if the union had an employment-related rule which had no objective standards at all, so that the implementation of the rule is left wholly to the unfettered discretion of union officialdom, and the employees are left in the dark about how the rule will be implemented.

See Boilermakers Local 667, 242 NLRB No. 167 (1979).

4. Union's inquiry into the facts concerning the grievance need not be the kind of exhaustive inquiry that one would expect from a skilled investigator.

Jelco Inc., 238 NLRB No. 202 (1978); Plumbers Local 195 (Stone & Webster Engineering Corp.), 240 NLRB No. 61 (1979).

5. Mere fact that the union's investigation reaches a conclusion that is later shown to be erroneous does not establish a violation.

6. If a contract provision supports the employee under one interpretation, and the union reasonably gives the contract another interpretation, the fact that the union's interpretation may be "wrong" (as others might see it) does not establish a violation.

Washington-Baltimore Newspaper Guild (CWA), 239 NLRB No. 175 (1979).

Gross Negligence

There could be cases where the negligence was so gross as to constitute a reckless disregard of the interests of the unit employee.

Certain Circuits have indicated that gross negligence may violate Section 8(b)(2)(A).

1. It is well established that mere negligence will not establish a breach of the duty of fair representation.

Great Western Unifreight System, 209 NLRB 446 (1974).

2. Example: failing to notify an employee that her grievance would not be taken to arbitration, thereby leading her to reject a settlement offer she otherwise would have accepted.

Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082 (9th Cir. 1978); see also Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975).

Union's Conduct After It Has Decided To Grieve on Behalf of the Employee

1. There is some indication in the decided cases that a union may have the higher responsibility of an advocate once it decides to process a grievance on the employee's behalf.

Jelco Inc., 238 NLRB No. 202 (1978); Associated Transport Inc., 209 NLRB 292, enfd. sub nom. Kesner v. NLRB, 532 F.2d 1169 (7th Cir. 1976); Owens-Illinois, 240 NLRB 324 (1979).

2. However, the cases in which a violation has been found involve improper motives or arbitrary conduct, as these terms are used above.

Owens-Illinois, 240 NLRB 324 (1979).

3. The mere fact that the union has invoked the grievance machinery does not mean that it is statutorily precluded from thereafter settling the grievance or acquiescing in the employer's position.

    - With respect to settlements, the union can consider the costs of further processing the grievance and decide to accept less than that which the employee seeks.

See UAW, Local 122 (Chrysler Corporation), 239 NLRB No. 151 (1978).

Adapted From Materials from the George Meany Center for Labor Studies

Questionnaire on the Duty of Fair Representation

TRUE/FALSE

1. The union is legally obligated to represent members only. _____

2. Unions win most duty of fair representation lawsuits. _____

3. A union may not agree to a contract provision that benefits one group of workers more than another group. _____

4. A union has a duty to inform members, prior to a strike vote, that they could lose their jobs as a result of the strike. _____

5. As long as the union processes a grievance through the steps of the procedure, a court will not examine how good a job the union does in its representation. _____

6. A union representative should keep a written record on every grievance case. _____

7. If a grievance is filed late (beyond the contractual time limits), this violates the union's duty of fair representation. _____

8. The law gives an individual employee the right to have his/her grievance taken to arbitration. _____

9. A union may refuse to arbitrate a case based on the potential cost of an arbitration. _____

10. A court may not review the thoroughness of the union's preparation and presentation of an arbitration case. _____

11. If one or more employees have conflicting claims (like in a promotion dispute), the union must take a neutral position and not favor a particular employee. _____

12. If a union loses a duty of fair representation suit, it is the employer who must pay back wages to the wronged employee. _____

13. A duty of fair representation suit must be started (a complaint filed with the court) within six months. _____

Answers to Questionnaire on the Duty of Fair Representation

		TRUE/FALSE
1.	The union is legally obligated to represent members only.	False
2.	Unions win most duty of fair representation lawsuits.	True
3.	A union may not agree to a contract provision that benefits one group of workers more than another group.	False
4.	A union has a duty to inform members, prior to a strike vote, that they could lose their jobs as a result of the strike.	True
5.	As long as the union processes a grievance through the steps of the procedure, a court will not examine how good a job the union does in its representation.	False
6.	A union representative should keep a written record on every grievance case.	True
7.	If a grievance is filed late (beyond the contractual time limits), this violates the union's duty of fair representation.	Not Necessarily
8.	The law gives an individual employee the right to have his/her grievance taken to arbitration.	False
9.	A union may refuse to arbitrate a case based on the potential cost of an arbitration.	True (In Part)
10.	A court may not review the thoroughness of the union's preparation and presentation of an arbitration case.	False
11.	If one or more employees have conflicting claims (like in a promotion dispute), the union must take a neutral position and not favor a particular employee.	False
12.	If a union loses a duty of fair representation suit, it is the employer who must pay back wages to the wronged employee.	False
13.	A duty of fair representation suit must be started (a complaint filed with the court) within six months.	True

HYPOTHETICALS FOR DISCUSSION

1. John is a distribution clerk in the bargaining unit. But, John refuses to become a member of the Union. In fact, John is a stool pigeon for management. John frequently reports to management on the activities of the Union.

   John often times talks bad about the Union and tries to convince other employees that they do not need to be member of the Union. John has been a thorn in your side since the day you became President of the Local Union.

   One day the Postal Service, despite John's pro-management actions, changed John's schedule in violation of the collective bargaining agreement in a manner that cut his hours. John comes running to you demanding that you need to take action in response to management's conduct.

   What, if anything, should you do for John? Why? Do you have any legal obligation to John?

2. Carl, Al and Sue bid on a best qualified position in the Maintenance Craft. Under the National Agreement, the position in question was to be filled by the best qualified applicant. The Postal Service awarded the position to Sue.

   Sue received the highest score but only has three years of seniority. Carl has thirty years of seniority but received the lowest score, 35 points lower than Sue. Al has ten years of seniority and scored only four points lower than Sue on the Postal Service's rating. Carl and Al want you to file grievances.

   What, if anything, should you do for Carl and Al? Why? Do you have any legal obligation to Carl and Al?

3. Betty is a window clerk in the bargaining unit. Betty was terminated for allegedly stealing money from her cash drawer. Betty insists that she is innocent.

   The problem is that Betty was the only one in her area of the facility at the time. There are no other suspects, and there are no witnesses to vouch that Betty did not steal. Prior to arbitration, the Postal Service offers to return Betty to work with no back pay.

   You believe that there is a good chance that you will lose the arbitration. When you tell Betty about the settlement offer, she tells you that although she really

wants her job back, she does not want to settle the grievance unless the Postal Service offers her the back pay she believes she is owed.

What, if anything, should you do for Betty? Why? Do you have any legal obligation to arbitrate the case because Betty does not want to accept the settlement?

4. The Union filed a grievance on behalf of Sam, a Tractor-Trailer Operator who was wrongfully denied overtime.

You are the Union representative for the grievance, and somehow, you missed the deadline for appealing the grievance to Step 2.

What, if anything, should you do? Why? Have you violated any legal obligation to Sam?

5. Tammy and Robert are two FSM clerks who work next to each other in the same facility. Tammy comes to you and says that Robert is sexually harassing her on the workroom floor and asks you for help.

What, if anything, should you do? Why? What legal obligations do you have to Tammy? What legal obligations do you have to Robert?

6. Fred is a custodian with a back condition called scoliosis that results in pain in his back when he lifts over twenty pounds. Fred's position requires him to perform lifts of over twenty pounds several times a day.

After two months on the job, an office job in the facility, with no lifting, gets posted. Fred bids for the job. You discover that Gina has also submitted a bid for the job.

Gina has more seniority than Fred, but Gina has no medical condition that prevents her from lifting over twenty pounds. The National Agreement states that all positions are to be filled based on seniority.

What, if anything, should you do? Why? What legal obligations do you have to Fred? What legal obligations do you have to Gina?

7. Dennis was given a seven day suspension for excessive absences. During your Step 2 investigation you meet with Dennis. At that meeting Dennis insists that you introduce the 25 EEO charges that he has filed against the Postal Service the past five years.

What should you do? Why? What legal obligations do you have to Dennis?

8. Employee Jane Doe complains to both her union steward and local union president on a number of occasions over a period of a year and a half about numerous sexually offensive remarks and conduct committed by male co-workers on the job.

On each of these occasions, Employee Doe demands that the local union file a grievance to remedy what she believes is a sexually hostile work environment. On several occasions, Employee Doe and other female employees are subjected to sexually suggestive remarks by both the union steward and the local union president.

The Union Employee Doe and takes no other action to remedy Employee Doe's complaints.

What will be the result if Employee Doe files an NLRB DFR charge, or a Federal court DFR lawsuit claiming that the local union breached its duty of fair representation by failing to file a grievance protesting sexual harassment of Employee Doe and other female employees?

9. Employee George asks Employee Janet for a date and Janet refuses. Employee George repeats his request for a date over a period of six months, and on each occasion Employee Janet refuses. Both employees are in the bargaining unit.

Employee George then begins to make explicit sexual remarks to Employee Janet in the presence of other bargaining unit employees. Employee Janet reports Employee George's conduct to management, and Employee George is fired.

Employee George asks the local union to file a grievance on his behalf. What should the local union do?

Employee Janet used to be in the letter carrier craft, and is only a member of the APWU bargaining unit because of a light duty assignment. Does this change what the local union should do?

If the local union files a grievance on behalf of Employee George, what would be the result if Employee Janet filed a Federal court lawsuit or an NLRB DFR charge alleging a breach in the duty of fair representation based upon the conduct by the local union?

10. Employee Jones is removed from his job with the Postal Service after an extended illness, and continuous resulting absences caused by injuries to his feet while serving with the military in Vietnam.

Employee Jones decides not to go to arbitration under the National Agreement, but rather files an appeal with the Merit Systems Protection Board. Employee Jones designates the Union as his representative on the Appeal form he submits to the MSPB. He does this without the Union's knowledge or approval.

Employee Jones comes to the Union and demands that the Union represent him at his upcoming MSPB hearing. The Union refuses, stating its policy not to represent employees at MSPB hearings.

What will be the outcome of an NLRB charge or DFR lawsuit against the Union?

11. Postal Service Employee Johnson is not a member of the APWU. In fact, Johnson just came into the APWU bargaining unit on light duty from the Letter Carrier Craft, but has recently been made a full-time clerk. The APWU Local has published Johnson's name in its newspaper as a non-member. Johnson is not sure whether, as an employee on light duty, he has a right to sign the overtime desired list.

He poses this question to Supervisor Scott, who does not know the answer but promises to find the answer and inform Employee Johnson. Supervisor Scott informs Employee Johnson, only after the ODL is closed for the quarter, that, yes, Employee Johnson has a right to sign.

The APWU Local files a grievance for Employee Johnson which is denied at Step 1. At the Step 2 meeting, the Postal Service representative offers to settle the grievance by paying Johnson for the loss of overtime work for the two week period the current ODL has been in effect, and to place Johnson's name on the current ODL.

The Union representative agrees to the payment of two weeks overtime, but refuses to allow Johnson's name to be placed on the current ODL, since it has already closed for the quarter.

The APWU representative remarks that "Putting his name on the ODL at this point would violate the rights of dues-paying APWU members, and Johnson is a non-member. I won't agree to do that."

What result if Johnson files an NLRB DFR charge or a DFR lawsuit?

12. Postal Employee P was employed as a Truck Driver in a Postal facility in New Jersey when, at the request of the Postal Inspection Service, he agreed to be transferred to a Postal facility in Wichita, Kansas as a Mailhandler.

The Inspection Service intended to use Employee P to infiltrate a suspected drug ring in the Postal facility in Wichita, Kansas. Neither Employee P, the Postal Inspection Service nor the Postal Service notified the APWU of these facts.

Employee P kept his APWU membership current, and continued to have Union dues deducted from his paychecks and submitted to the APWU. In addition, Employee P obtained a Mailhandlers Union membership, and had dues checked off to the Mailhandlers.

Before Employee P was transferred, the Postal Inspection Service promised him that once the assignment in Wichita, Kansas had been brought to a successful conclusion he would be transferred back to his old position in Bellmawr, New Jersey. This fact was also never disclosed to the APWU.

When the "undercover" assignment had been concluded, Employee P demanded that the Postal Service return him to his prior position in Bellmawr, New Jersey, and the Postal Service refused to do so. Employee P then goes to an APWU Steward in Wichita, Kansas and demands that a grievance be filed to return him to his position as a truck driver in Bellmawr, New Jersey.

The APWU Local in Wichita refuses to file a grievance for Employee P, claiming that he is not a member of the APWU bargaining unit.

What would be the result if Employee P filed an NLRB DFR charge or a DFR lawsuit against the APWU?

13. Postal Employee D was issued an emergency suspension and a Notice of Removal when the Postal Service accused him of having threatened and physically assaulted a female postal supervisor on the job. The Local Union filed a grievance on Employee D's behalf and that grievance was processed to arbitration.

During the course of the arbitration hearing, two employee witnesses testified that they observed D both verbally and physically assault the female supervisor in question. In addition, the female supervisor testified consistently with the two employee witnesses against Employee D.

Employee D testified under oath and denied either verbally or physically assaulting the supervisor. The Arbitrator credited the testimony of the supervisor and the two employee witnesses, and discredited Employee D. Based upon these credibility resolutions, the Arbitrator denied the grievance finding that the Postal Service had "just cause" to remove Employee D.

After the Arbitrator's Award is issued, Employee D demands that the Union file a federal court action seeking to overturn the Arbitrator's Award. The Union refuses.

What will be the result if Employee D files an NLRB duty of fair representation unfair labor practice charge or a DFR lawsuit because of the Union's refusal to seek to overturn the Arbitrator's Award?

14. Employee V is physically accosted on the workroom floor by Supervisor Johnson. Employee V does not resist Supervisor Johnson physically, but rather rolls up into a ball on the floor and yells, "Please stop, please stop hitting me." Four fellow employees observed Supervisor Johnson attack Employee V and are willing to testify to Employee V's version of the facts.

The Postal Service issues a Notice of Removal to both Employee V and Supervisor Johnson. Within one week after Supervisor Johnson receives his Notice of Removal, the Postal Service rescinds it, and brings Supervisor Johnson back to work. The Postal Service does not, however, return Employee V to his job.

Employee V, two days after having received the Notice of Removal, goes to Union Steward Kelly to file a grievance. Kelly takes down the facts given him by Employee V and promises to file a grievance. Instead, however, Union Steward Kelly goes on vacation for two weeks and fails to file a grievance until one month following Employee V's receipt of the Notice of Removal.

The Postal Service's response to the grievance is that it is untimely and it is therefore denied.

What would be the result if Employee V files an unfair labor practice charge against the Union or a DFR lawsuit claiming a failure in the duty of fair representation based on Union Steward Johnson's conduct?

SETTLEMENT HYPOTHETICALS FOR DISCUSSION

1. The local union has received a $17 million settlement of casuals in lieu grievances covering the time period from 1996 to 2005. The Postal Service has agreed to pay the $17 million directly to employees deemed eligible by the local union. There were no restrictions placed on how the local union would determine who was eligible to receive settlement money. Also, the local union did not receive any of the money to distribute. Rather, the Postal Service retained the settlement money and distributed it directly to the individuals deemed eligible by the local union.

    A. The local union president decides that she will determine who will receive the settlement money herself. She decides that every current union member of the bargaining unit will receive an equal share of the settlement. Is this a good way to distribute the settlement? Why or why not?

        i. Can she give herself and her steward a bigger share because they worked on the grievance?

        ii. What if she decides to give the settlement money in equal amounts to members of the bargaining unit, whether they are a member of the union or not?

            i. Are we forgetting anyone?

        iii. What are other ways to decide who is eligible to receive settlement money besides the local union president deciding by herself?

    B. The local union has decided to appoint a committee to determine who is eligible to receive settlement money, and how much each person will receive. The committee has decided to have the Postal Service make an initial payment of $16 million, and leave the remaining $1 million on hold for at least four (4) months after the initial payment so that it can be used to pay any other eligible individuals who were inadvertently "missed" during the first payment. After the initial payment, five (5) families/estates of deceased former employees claimed that they should have been included in the settlement. The local union decides not to include them in the settlement. Is that a breach of the union's DFR?

        i. What if the Postal Service had told the union that it would keep the money if a settlement check to an employee was returned unclaimed?

2. The local union has received a $5 million settlement. The local union submitted an initial settlement list of employees that were owed payment pursuant to the settlement that included approximately 1000 employees, to the Postal Service.

   The local union then learned that 20 employees were mistakenly left off of the initial list. Upon becoming aware of this mistake, the local union submitted a supplemental list to the Postal Service.

   However, the Postal Service has taken the position that all employees on the initial settlement list were paid and all the settlement funds distributed, and thus, have fulfilled their arbitration award obligation, despite the local union's claim that 20 employee were inadvertently left off the list.

   What could have been done differently here?

3. The local union has received a $2 million arbitration award in a Casual in Lieu of Class Action. The local union has come up with a list of employees that had worked during the relevant time period, and thus eligible to receive settlement monies. Five (5) of those employees were now supervisors. Should the local union take them off the list?

   A. What about persons who are no longer employed?

4. The local union was awarded $2 million in an arbitration award to be divided amongst the APWU Clerk Craft employees. The union determined that the time period covered by the award constituted 15 quarters within the Postal Service calendar. Thus, the union divided the $2 million granted by the arbitrator by 25.

   The number obtained as a result of that calculation was then divided by the number of people employed in APWU Clerk Craft positions. Equal amounts were granted to each of those people who were employed for each full quarter.

   The union decided not to disburse any money to those employees who, at the time of the arbitrator's award, had voluntarily resigned from their positions from the Postal Service, or were discharged without grieving their discharge.

   Accordingly, checks were disbursed, using the aforementioned formula to bargaining unit employees in the Clerk Craft at the time of the arbitrator's award, or who had pursued a grievance after having been discharged.

   Has the union breached its duty of fair representation?

American Postal Workers Union, AFL-CIO

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M E M O R A N D U M

TO: Local Presidents

FROM: Greg Bell, Director
Industrial Relations Department

DATE: June 1, 2000

RE: Legal Issues

Certain issues which have legal consequences keep coming up. The purpose of this revised memo is to suggest ways to deal with these issues that will minimize your Local's and the APWU's exposure to lawsuits and other legal actions. In most cases, these suggestions go beyond what the Local or the APWU is required to do, however, in appropriate cases doing a little more than necessary may prevent the desire to sue or may make winning the eventual lawsuit or unfair labor practice charge easier. Unless otherwise stated, these are suggestions, not APWU policy.

If you have any questions on how to handle a specific case, please feel free to contact my office.

1. Notification to Grievants.

While courts have suggested that it would be better if unions made grievants aware of the conclusion of grievances affecting them, none have found that notification is required. Courts do say that grievants have an obligation to exert due diligence to find out what is going on. Grievants should be reminded that they are required to tell the APWU at the appropriate levels if they move while a grievance is pending.

Proof that the grievant was notified of developments helps the Local or the APWU defend itself, especially when grievants are slow to sue. The courts and the NLRB have a six month time limit for filing against unions. If we can prove that a grievant knew about the alleged problem more than six months before the case was filed, the Union can

usually have that grievant's suit or unfair labor practice charge dismissed with minimal expense.

There are two types of situations where it would be good to attempt to notify grievants effectively: (a) When you are trying to get grievants to attend meetings or hearings about grievances concerning them, and (b) when an arbitration award concerning them is received or a grievance concerning them is settled or dropped.

Notification is most difficult when grievants are no longer employed by the Postal Service. To be able to document attempts to reach these grievants to attend meetings or an arbitration, at times it may make sense to send duplicate mailings -- one by regular mail, the other certified, return receipt requested -- with the notation "Regular and Certified Mail" on the dated cover letter. This way, if a grievant fails to pick up the certified letter, but the regular mail piece is not returned, a strong argument can be made that the grievant has been notified. Especially if the letter you are sending tells an employee that the grievance over his or her discharge will be dropped if the grievant does not contact you by a certain time or appear at a preparation meeting, it makes sense to try to make sure the grievant receives the letter.

When a grievance is over, either because it is dropped, a settlement is reached or an award is issued, it helps to establish a time limit defense if there is proof that the grievant was notified of the result of the grievance procedure. In some parts of the country, notification can be most efficiently accomplished by the NBA; in others, the Locals will be more effective; in still others, the practice may vary Local by Local. In most cases, it will depend on what level of the grievance process the grievance is over. To help the Union preserve the time limit defense, Locals should make sure that each grievant is notified, either by the NBA office or by the Local, with proof of delivery, when a case that reaches Step 3 is over.

2. Receipt of NLRB Charges.

If you are mailed an NLRB charge against the Local, you should respond to it, with the help of the Local's attorneys. If you are mailed an NLRB charge against APWU, you should call my office immediately. If you are in doubt whether a charge is against the Local or the National, contact my office right away.

Often the Board wants a statement from an Officer or Steward. You should not speak to a Board Agent without first seeking legal advice. If you do not have a local attorney, you should seek

advice from my office. Sometimes the Board wants a statement from an NBA or other National Officer in a case against a Local. Before a National Officer speaks to a Board Agent in any Board case, he or she must talk to the APWU's attorneys first.

3. Receipt of Summons and Complaint or Subpoena.

When people want to sue the APWU, the APWU Health Plan or an APWU Local in court, they often begin by mailing or delivering the legal papers to a Local Officer, steward or employee. When this happens, no matter how frivolous the case seems to be, it is imperative that the attorneys know about the situation immediately. Often courts require a response to the lawsuit to be filed in only 20 days, so speed is essential. If the Union fails to respond in time, the Union might automatically lose!

If anyone in your local, including employees of the Local, receive papers in a lawsuit against the APWU, the APWU Health Plan, the Local or an individual for representing the APWU, the Health Plan or the Local, you should call my office immediately. The first question that needs to be resolved is who is being sued. If the APWU or the APWU Health Plan is being sued, the APWU's attorneys will be involved in preparing the response. If only the Local is being sued, the APWU's attorneys can help the Local arrange for counsel.

To determine who is being sued and to begin the process of preparing a defense, you should make a copy of everything you received, including the envelope, fax my office a copy, and mail the copy with a brief explanation of who received it and how it was received, to my office by Express Mail on the day you get it, if at all possible. Often the attorneys will want grievance files. Do not hold up mailing the summons and complaint in order to get all the grievance files together. Do not sign anything and return it to the person suing or that person's lawyer, except, of course, the green Return Receipt for Certified Mail. Do not call the grievant or the grievant's lawyer after a lawsuit has been filed.

This procedure applies whether the lawsuit was filed in Federal Court, State Court, Small Claims Court or any other court. You should be aware that hand-written lawsuits are valid - we once had one written in crayon. You should also be aware that cases filed in Family Court or Traffic Court still have to be taken seriously, even though they are filed in the wrong place.

The same procedure applies when you receive a subpoena in a case, whether or not the APWU, the APWU Health Plan or the Local is a party. It is imperative that the APWU's attorneys know about the situation immediately, as time for response to a subpoena is often

extremely short. Call my office as soon as you receive the subpoena. If you cannot reach me, call O'Donnell, Schwartz & Anderson, P.C., at (202) 898-1707 and tell them you have received a subpoena. Do not call or talk to the grievant, the grievant's lawyer, or anyone else connected with the case, unless directed to do so by the APWU's attorneys.

4. Request for Grievance Files.

Grievants, their lawyers, and, occasionally, USPS representatives request copies of APWU grievance files. The following responses to such requests are suggested:

a) Grievant - After making an appointment, grievants should be allowed to come to the Union's office to see the moving papers of grievances affecting them, and upon their request, should be given a copy of the moving papers. You can charge them for the reasonable cost of photocopying the moving papers. If you choose to do so, you should establish a reasonable rate that you will charge and consistently charge it. This is a modification of advice given in an earlier memo based upon recent NLRB decisions. Those decisions hold that in some circumstances the Union commits a failure in its duty of fair representation by refusing to allow visual inspection or to give a copy of the moving papers in a grievance to the grievant, however, the requesting employee can be required to pay the reasonable cost of copying records. The moving papers are limited to: Step 1 Worksheet (if used and shown to management), Step 2 Appeal Form, Step 2 Answer, Step 3 Appeal Form, Step 3 Answer, Appeal to Arbitration, Grievance Settlement and/or Arbitration Award. If you are in a modified program, the equivalent documents should be considered the moving papers. Notes, supporting documents, including statements from someone other than the grievant, should not be included. You should alert other Union officials who may get approached by a grievant, including NBAs, and advise them that they may be approached for these files.

b) Grievant's Attorney - After receiving a written authorization from a grievant stating that they are represented by a lawyer who is authorized to see and receive copies of documents relating to that grievant, the same procedures that apply to the grievant apply to the grievant's lawyer.

c) USPS Representative - Occasionally, a USPS representative loses a file. It is appropriate to copy the moving papers and all previously exchanged supporting documents and give them to the representative. Remove all notes.

5. Requests for Other Documents.

Under the Labor Management Reporting and Disclosure Act (LMRDA), unions are required to make their Constitutions and Bylaws available to their members. It is also appropriate to make available the Collective Bargaining Agreement. If people make appointments, they should be allowed to come in and see these documents, but they are not entitled to copies. Of course, The National Agreement and the APWU Constitution and Bylaws can be bought through the APWU Order Department.

6. Files.

When a grievance is closed, either because an arbitration award has been issued or because the grievance is withdrawn or settled, the file should be straightened up and put away. There is no reason to leave copies of the Collective Bargaining Agreement in files. Arbitration Awards and Sign-Offs referred to in preparation of the case can be removed for use in other cases if a list of Awards and Sign-Offs is left in the file. Files should not be stripped of notes and evidence -- to do so would leave the Union without the documents that might be necessary to prove the Union provided fair representation.

There are two schools of thought on how long a grievance file should be kept after a case is closed -- either as long as possible, or the minimum necessary. No hard and fast rule exists. Retaining grievance files for the current and previous contract would be reasonable. Much depends on your storage space, levels of grievance activity of the relationship of a particular grievance to other grievances or issues. If you store files outside your office, please make sure your insurance agent knows so the Local's insurance policy can be modified if necessary.

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DISCRIMINATION

DISCRIMINATION CLAIMS IN A UNION CONTEXT: How a Union Could Be Liable

1. Creating a hostile work environment in the employer's work site.

   Example: Union official places flyers in swing room that contain racially or sexually harassing content, intended as a joke.

2. Refusal to file a grievance challenging discrimination

   Example: An employee comes to the union wishing to file a grievance alleging discrimination/harassment by a supervisor. The union rep is about to settle an unrelated arbitration case with this manager and doesn't want to cause any bad blood if it's not necessary. The union rep decides not to grieve the discrimination/harassment right away in hopes that things will improve.

   Example: Union just doesn't bother filing grievance grievances presented by black employees alleging discrimination by the employer because the union knows that management would disfavor or resent such grievances.

3. Condoning an employer's discriminatory conduct - a fuzzier concept.

   Example: The union is made aware that the employer is discriminating, but doesn't bother to investigate, or investigates and then does not file a grievance if there is a valid claim for discrimination.

4. Obstructing or interfering with an employer's attempts at remedial action. Some states have laws that make it illegal to interfere with or obstruct an employer's remedial action.

   Example: One member of the bargaining unit is terminated for sexually harassing another member of the bargaining unit. The union must carefully consider whether it would interfere with the employer's remedial action to grieve this termination or whether the union must file a grievance to comply with the duty of fair representation. This is an

awkward situation with two competing duties. If the union must grieve the termination, it would be in a much better position if it had already been assisting the victim of the harassment

5. The union may not discriminate in its own internal membership, disciplinary or representational decisions. This is the case under both Title VII and the duty of fair representation

   Example: It is illegal for a union rep to decide to ignore time limits and "forget" to file a grievance over an employee's suspension for absenteeism because the grievant is of Middle Eastern decent.

What Happens When Two Members Have Competing Claims?

The Situation: A female employee has accused a male employee of sexual harassment.

The female employee comes to the union wanting to file a grievance concerning the harassment.

She claims that the Postal Service has known about this problem for a long time and has failed to take steps to provide her with a non-hostile working environment.

The union files a grievance on her behalf under Article 2.

Having finally felt some pressure, the Postal Service decides to act and terminates the male employee for sexual harassment.

It's unclear whether the Postal Service actually investigated the claim of sexual harassment.

Now the alleged harasser comes to the union and asks the union to file a grievance challenging his termination. What should the union do?

Rule of Thumb: The union must fairly represent the interests of all employees.

What that means:

1. The union could legally conduct an impartial investigation of the whole situation.

   After fully investigating, the union could make an informed and reasonable judgment regarding the merits of the competing claims and choose to represent one employee.

2. A safer course of action would be to take a neutral position and provide separate representation to each grievant, leaving to an arbitrator to decide who was more credible.

3. A union is not required to process a grievance that is lacking in merit.

   Therefore, if the union conducts an investigation and finds that there is nothing to support a claim of discrimination, the union is not required by law to pursue the grievance anyway.

Similarly, if an employee was disciplined for sexually harassing another employee and an investigation reveals that the harassment took place and the discipline was fairly imposed, the union is not required to file a grievance.

The discipline was for just cause.

(If, however, there are substantial procedural defects in the way that the discipline was implemented, the union may not simply dispense with the grievance, because harassment may have occurred. In this instance, if the grievance is sustained and the harassing employee returns to a position in which he may continue the harassment, then the union would be well advised to monitor the situation carefully to protect the interests of the victim.)

In order to avoid confusion and bad feelings, it is helpful for the union to have a policy and to publicize that policy, explaining that when there are competing claims in which two members are pitted against each other, the union has a duty to fairly represent both members.

That means that each member will receive separate representation and the union will do its best to fairly pursue any member's meritorious grievance.

The fact that the union may takes action to represent the interests of all members does not mean that the union supports any form of unlawful discrimination.

HYPOTHETICALS FOR DISCUSSION

Please read and think about the questions that follow each hypothetical for discussion as a group.

1. Group of white employees grabbed a black employee while he was on the workroom floor and tied him up. The white employees blindfolded the black employee and forced him to stand on the chair. The white employees then put a noose around the black employee's neck. The white employees start kicking the chair. After approximately ten minutes of kicking the chair and laughing, the white employees take the noose off the black employee's neck and untie him. The black employee reports what happened to management. The white employees tell management that "it was a joke," and that the noose around the black employee's neck was never tied to anything. The white employees are fired.

   The white employees ask the local union to file a grievance on their behalf. What should the local union do?

   The local union believes the white employees when they say "it was just a joke." Does that make a difference?

   Does it matter whether the black employee knew the noose was tied or not?

   The white employees are not fired, but disciplined with a 5 day suspension. The white employees ask the local union to file a grievance for the suspension. The black employee asks the local union to file a grievance because management did not fire the white employees. What should the union do?

2. White employee in the bargaining unit is member of the Ku Klux Klan. White employee has had disciplinary problems in the past, and will get discharged if he gets in trouble one more time. White employee takes a sick day. Another employee anonymously mails management a photo of white employee at a Ku Klux Klan rally on the day he called in sick. Management fires white employee. White employee asks the local union to file a grievance on his behalf.

   The local union steward, who is black, goes up to White employee to talk to him about his potential grievance. White employee refuses to talk to union steward because he is black, and calls the union steward derogatory names. What should the local union do?

   The union steward files a grievance on behalf of White employee. Right before arbitration, the management official tells the steward that he really hates White employee and will grant any three of the local union's grievances in exchange for withdrawing White employee's grievance before arbitration. The local union believes that White employee will likely lose at arbitration. What should the local union do?

   The local union conducts an investigation and finds out that the person in the photo in not actually White employee. What should the union do?

   The local union takes White employee's grievance to arbitration and loses. White employee files an unfair labor practice against the local union, accusing the local union of purposefully losing his case because of his views. What is the outcome?

3. Sexual Harassment

Male clerk has been sexually harassing female clerk. Male clerk had compromising pictures of female clerk and showed the photos to co-workers. Female clerk informs management, and male clerk is discharged. Male clerk asks the local union to file a grievance on its behalf. What should the local union do?

Does it make a difference if female clerk and male clerk had dated at one point?

Does it make a difference whether male clerk confessed to management about what he did?

What if female clerk had asked the local union for advice before she went to management?

What if female clerk had asked the local union to file a grievance on her behalf because management was not doing anything about the harassment after she had told them about it?

If the local union ignores female clerk, what is the result if she sues the union for breach of its duty of fair representation?

If the local union ignores female clerk, what is the result if she sues the union for condoning the harassment for ignoring her request to file a grievance against management?