

Recent NLRB Developments

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I. INTRODUCTION

During the past year,¹ the National Labor Relations Board ("Board" or "NLRB") has issued a number of decisions that represent marked changes in Board interpretation of the National Labor Relations Act.² Because members of the NLRB are appointed by the President of the United States,³ and because the NLRB's interpretations of the Act are to be upheld by reviewing courts so long as they are reasonable,⁴ the potential is great for a given Board to have a substantial impact on labor law. The current Board, led particularly by Chairman Donald Dotson, whom President Reagan appointed in 1984, has effected a number of significant changes. These changes have been heralded by some⁵ and lamented by others,⁶ but are of undeniable importance to all who advise employers, unions, or employees of their rights under the National Labor Relations Act.

This Article will survey those Board decisions from the past year that mark significant departures from prior Board policy. Also included will be discussion of pertinent United States Supreme Court and Seventh Circuit Court of Appeals⁷ decisions.

II. CONCERTED ACTIVITY

Section seven of the NLRA provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

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¹The Survey period extends from June, 1984 through May, 1985.

²29 U.S.C. §§ 141-187 (1982).

³29 U.S.C. § 153 (1982). For an empirical study of the ramifications of political appointments to the Board, see Cooke and Gautschi, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539 (1982).

⁴See, e.g., *Pattern Makers' League v. NLRB*, 105 S. Ct. 3064, 3075 (1985).

⁵See, e.g., Coupe & Murphy, *NLRB Strike Rulings Likely to Weaken Union's Power*, L.A. Daily J., Aug. 20, 1984, at 4, col. 3.

⁶See, e.g., Simon, *Has There Been a Shift In the NLRB's Policy?*, 5 NAT'L L.J. 17, at 5, col. 1 (Jan. 3, 1983).

⁷It should be noted, of course, that given the "race to the circuits" phenomenon, decisions from other circuits may be of major significance as well.

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. . . .⁸

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of rights guaranteed under section seven.⁹ One of the recurring problems confronting the NLRB has been the determination of what constitutes "concerted activities" under section seven, and what therefore enjoys the protection of section 8(a)(1).

A. Meyers Industries

On January 6, 1984, the Board rendered a definition of "concerted activities" that has had a far-reaching impact on subsequent Board decisions. In *Meyers Industries*,¹⁰ the Board adopted a restrictive view of concerted activity and, in so doing, overruled *Alleluia Cushion*¹¹ and its nine years of progeny.¹² The employer in *Meyers* had discharged an employee because of his safety complaints and his refusal to drive an unsafe truck after reporting its condition to state safety authorities. Rather than follow the *Alleluia* presumption that safety concerns are necessarily of interest to and shared by all others within a particular work force, so that even individual action in furtherance of such objectives must be considered concerted, the *Meyers* Board purported to resurrect a prior standard of concerted activity. The essence of this standard lay in "employee interaction in support of a common goal."¹³ This objective notion of employee "interaction," as subsumed in the new test enunciated in *Meyers*, does not consider an activity concerted unless it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."¹⁴

Significantly, the Court of Appeals for the District of Columbia denied enforcement of the Board's order in *Meyers*,¹⁵ finding that the Board had "misconstrued the bounds of the law" by interpreting concerted activity

⁸29 U.S.C. § 157 (1982).

⁹*Id.* § 158(a)(1).

¹⁰268 N.L.R.B. 493 (1984), *enforcement denied sub nom.* Prill v. NLRB, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 54 U.S.L.W. 3310 (U.S. Nov. 4, 1985) (No. 85-463). Although *Meyers Industries* is technically outside the Survey period, a discussion of that decision is essential for understanding subsequent developments.

¹¹*Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975).

¹²*See, e.g., Pink Moody, Inc.*, 237 N.L.R.B. 39 (1978).

¹³268 N.L.R.B. at 494 (citing *Traylor-Pamco*, 154 N.L.R.B. 380 (1965)).

¹⁴268 N.L.R.B. at 497.

¹⁵*Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

so restrictively.¹⁶ Despite the circuit court's denial of enforcement, the NLRB has continued to employ the test it set out in *Meyers*. Several recent Board decisions therefore reflect the significance of *Meyers* and the intention of a majority of the current Board to view "concerted activities" narrowly.

B. ABF Freight Systems

In *ABF Freight Systems*,¹⁷ the Board applied *Meyers* and found that a truck driver who was fired when he refused to operate what he considered an unsafe vehicle had not engaged in concerted activity. While this factual setting closely resembled that of *Meyers*, it differed in one important respect: the ABF employee was covered by a collective bargaining agreement, which provided that no employee could be required to operate an unsafe truck.¹⁸

It has long been held by the Board, under the *Interboro*¹⁹ doctrine, that the reasonable and honest attempt of a single individual to enforce the terms of a collective bargaining agreement constitutes concerted activity.²⁰ That doctrine was recently upheld by the Supreme Court in *City Disposal Systems*.²¹

In *Freight Systems*, the Board utilized a novel, two-tiered approach in resolving the question whether concerted activity was present. The Board first applied the *Meyers* test to the conduct at issue: "Accordingly, applying *Meyers*, we find that Callahan's refusal to drive did not constitute actual concerted activity."²² Then, and only then, did the Board turn to *Interboro*. Finding the driver's refusal "petty" and "unfounded,"²³ rather than "reasonable" and "honest,"²⁴ the Board concluded "that under the *Interboro* doctrine, as affirmed by the Supreme Court in *City Disposal*, Callahan's refusal to drive based on those complaints was neither concerted nor protected activity within the meaning of Section 7 of the Act."²⁵

Had the Board approached the facts of *Freight Systems* strictly from the *Interboro* perspective, the case would not have marked a significant development, for the facts fall easily within an *Interboro* mode of analysis. But the preliminary application of *Meyers* to the case obscures even the clear line of distinction the Supreme Court seemed to envision between

¹⁶*Id.* at 942.

¹⁷271 N.L.R.B. 35 (1984).

¹⁸*Id.*

¹⁹*Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, *enf'd*, 388 F.2d 495 (2d Cir. 1967).

²⁰*Id.* at 1298.

²¹NLRB v. *City Disposal Systems, Inc.*, 104 S. Ct. 1505 (1984).

²²271 N.L.R.B. at 35.

²³*Id.* at 36-37.

²⁴*Interboro*, 157 N.L.R.B. at 1298.

²⁵271 N.L.R.B. at 37.

Meyers and *Interboro*, the existence of a collective bargaining agreement. The Court noted in *City Disposal*: “[W]here a group of employees are *not unionized* and there is *no collective-bargaining agreement*, an employee’s assertion of a right that can only be presumed to be of interest to other employees is not concerted activity. . . . The *Meyers* case is thus of no relevance here.”²⁶

While the long-range significance of *Freight Systems* is impossible to predict, the case does suggest that the present Board will make liberal use of *Meyers* in resolving questions of concerted activity. This approach may act to narrow the scope of *Interboro*. Indeed, had application of the *Meyers* test in *Freight Systems* indicated concerted activity, the Board, presumably, would not even have needed to refer to *Interboro*.

C. Jefferson Electric Company

Even in the context of very serious health and safety complaints, the Board has strictly applied *Meyers* to require group action for concerted activity. For example, in *Jefferson Electric Company*,²⁷ a group of workers was exposed to noxious fumes caused by a clogged air vent. Several employees complained to management, but the company did not correct the problem. The following day, eleven employees had to be sent to the company doctor; three required hospitalization. The employee most severely ill filed a state OSHA complaint. She was later discharged for filing the complaint.²⁸ The Board held her action unconcerted under *Meyers* because it found no evidence that she had solicited the support of other employees before filing her complaint.²⁹

Jefferson Electric also plainly illustrates another change *Meyers* has wrought. Under *Alleluia Cushion*, the decision overruled by *Meyers*, the Board had taken the position that

where an employee speaks up and seeks to enforce a statutory provision relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.³⁰

This presumption of mutual concern was expressly rejected in *Meyers*. The burden of proof is now on the General Counsel to demonstrate support by other employees for the particular action at issue. As tacitly mandated by *Meyers*, this burden will not easily be met: “Taken by

²⁶104 S. Ct. at 1510 n.6 (emphasis added).

²⁷271 N.L.R.B. 1089 (1984).

²⁸*Id.*

²⁹*Id.*

³⁰221 N.L.R.B. at 1000.

itself . . . *individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert of action."³¹

D. Mannington Mills

In *Mannington Mills*,³² the Board tightened the *Meyers* harness even further. There, it was held that an employee's threat that he and others on his shift would refuse to do work left by an earlier shift was an individual action and not concerted activity.³³

Frie, the employee, was a crew leader on the night shift and was the employee representative elected by his department to the company's safety committee. This committee had a history of raising general issues of employee concern as well as safety problems. Others in Frie's department had a longstanding complaint about the company's requiring night shift employees to do work left uncompleted by the first shift. Frie, acting in his capacity as employee representative, informed the committee of this complaint in July of 1980. In October of the same year, Frie again complained about the extra work to the company foreman and stated that the night crew was not going to do that work in the future. At that point, Frie also shouted to a fellow employee, "[I]sn't that right, Wayne." The reply was not heard.³⁴ Frie also testified that several other employees had indicated to him that they were going to refuse to do the work, but none of those employees testified at the hearing. Other employees did testify, however, that they had complained to Frie and the employer about the extra work assignments.³⁵

Following the October incident, the company discharged Frie, contending that he had been discharged for horseplay. An administrative law judge concluded that the company's stated reason for the termination was pretextual and that Frie had actually been discharged because of his earlier complaints about work assignments. The Board found it unnecessary to ascertain the employer's true motivation, however, concluding that Frie had not engaged in concerted activity when he threatened to refuse to accept certain work assignments.³⁶

Member Zimmerman registered a strong dissent, maintaining that Frie's October action was a continuation of his earlier complaint to the committee and had been made in his representative capacity.³⁷ He also

³¹268 N.L.R.B. at 498 (emphasis in original).

³²272 N.L.R.B. 176 (1984).

³³*Id.* at 177.

³⁴*Id.* at 176.

³⁵*Id.*

³⁶*Id.* at 176 n.1.

³⁷*Id.* at 177 (Zimmerman, Member, dissenting).

noted that the record clearly evidenced the employer's knowledge of the concerted nature of Frie's conduct. Zimmerman would have concluded that the company's horseplay contention was merely a pretext for unlawful discrimination.³⁸

Both *Jefferson Electric* and *Mannington Mills* suggest that the current Board will require strong evidence of other employee support before finding an individual's action concerted. That support will have to be current, unequivocal, and specifically related to the conduct at issue. Any doubts about whether the employee's actions are based on the authority given him by others to act on their behalves may well be resolved against a finding of concerted activity. As demonstrated by the facts of these two cases, this approach may, in some instances, tend to overlook the realities of the workplace. For seldom, in the absence of a union, will one employee give another clear and direct authority to take a particular action at a particular time on the former's behalf.

E. Collins Refractories

In 1978, the NLRB held in *Self-Cycle & Marine Distributor Co.*³⁹ that an employee filing an unemployment compensation claim was engaged in a concerted activity and that the employer's failure to recall an employee for doing so violates section 8(a)(1). This position was based on the reasoning that such claims arise out of the employment relationship, are one aspect of national labor policy, and are matters of common interest to other employees.⁴⁰

With its decision in *Collins Refractories*,⁴¹ however, the Board has now taken the position that *Self-Cycle* is incompatible with the standard for concerted activity enunciated in *Meyers*: "Clearly, the filing for benefits is an individual act undertaken by the individual solely on his own behalf and for his own benefit rather than for the mutual aid and benefit of other employees. . . ."⁴²

Significant in *Collins Refractories* is that the Board was not simply considering an isolated incident of company refusal to recall one employee (Addis) who had filed an unemployment claim, but was also considering a general company policy prohibiting the filing of unemployment compensation claims.⁴³ This distinction was noted in a dissent by Member Zimmerman, who maintained that determination of the legality of the company's general rule was not controlled by *Meyers*.⁴⁴ He said,

³⁸*Id.* at 178.

³⁹237 N.L.R.B. 75 (1978).

⁴⁰*Id.* at 75-76.

⁴¹272 N.L.R.B. 931 (1984).

⁴²*Id.* at 932 n.2.

⁴³*Id.* at 931.

⁴⁴*Id.* at 933 (Zimmerman, Member, dissenting).

Under the majority view in *Meyers Industries*, Addis' filing of the unemployment claim is not a form of concerted activity and the Respondent's action toward Addis, standing alone, is perfectly lawful. However, the Respondent's refusal to recall Addis does not stand alone. It occurs against the background of a general rule proscribing unemployment claims. In this context, the refusal to recall may interfere with the exercise of protected rights, even though Addis, himself, was not engaged in protected activity.⁴⁵

In support of this proposition, Zimmerman relied on *City Disposal* reasoning.⁴⁶ There, the Court explained, in the context of an individual's attempt to enforce a right grounded in a collective bargaining agreement, that even though the individual's action may not be concerted, his action may be protected if permitting the employer to discipline him would chill the legitimate exercise of concerted activity by other employees.⁴⁷ The majority's summary rejection of Zimmerman's argument suggests the present Board's inclination to apply not only the holding, but also the rationale, of *City Disposal* narrowly, in favor of a broad application of *Meyers Industries*:

That case [*City Disposal*] is inapposite to the instant case which does not involve the invocation of a right rooted in a collective-bargaining agreement. Our finding that the Respondent's policy does not affect, let alone restrain, any concerted activity is based on the clear meaning of the statutory language and is squarely within *Meyers Industries*.⁴⁸

F. A Word of Caution

Any conclusions based on *Meyers Industries* regarding whether various employee actions may be deemed "concerted" should be reached with a degree of caution. Not only did the D.C. Circuit deny (with strong language) enforcement of the Board's order in *Meyers*,⁴⁹ but also every other circuit court ruling on *Meyers*-related Board orders to date has been reluctant to adopt the *Meyers* test expressly.⁵⁰ Furthermore, the Supreme

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷104 S. Ct. at 1505 n.10.

⁴⁸272 N.L.R.B. at 932 n.2.

⁴⁹755 F.2d 941 (D.C. Cir. 1985).

⁵⁰See *JMC Transport, Inc. v. NLRB*, Nos. 84-8960 and 84-6060 (6th Cir. Nov. 12, 1985) (available on LEXIS, Genfed library, Usapp file) (court found activity concerted even under *Meyers* test and declined to rule on whether *Meyers* was an appropriate interpretation of section seven); *Ewing v. NLRB*, 768 F.2d 51 (2d Cir. 1985) (court declined to review *Meyers*, relying more on *City Disposal's* more "liberal view of concerted activity," but

Court's reference to *Meyers in City Disposal*⁵¹ suggests that the Court may limit the scope of *Meyers* if faced with the issue.⁵²

III. THE RIGHT TO STRIKE (AND NOT TO STRIKE)

A. Sympathy Strikes

In *Butterworth-Manning-Ashmore Mortuary*,⁵³ the Board considered a collective bargaining agreement provision stipulating:

It shall not be a violation of this agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind any picket line at the place of business of any employer party to this Agreement.⁵⁴

The mortuary's employees were divided into two bargaining units: the embalmers and the clerical workers. When the embalmers went on strike, several clerical workers refused to cross the embalmers' picket line. The employer then permanently replaced one of the clerical workers and put her name on a preferential hiring list.⁵⁵

From these facts, the Board determined that the language contained in the collective bargaining agreement did not constitute a waiver of the employer's right to replace permanently a sympathy striker.⁵⁶ In so holding, the Board overruled in part *Torrington Construction Co.*,⁵⁷ which had held that an almost identical provision in a collective bargaining agreement did constitute a waiver of the right to discharge a sympathy striker under similar circumstances.⁵⁸

The Board also distinguished *Butterworth* from *Torrington* on the basis of the difference between discharging an employee and permanently replacing him.⁵⁹ In *Butterworth*, the Board recognized that sympathy strikes are protected activity, but likened them to economic strikes, thereby permitting the employer to replace the sympathy striker permanently.⁶⁰ The

indicated it was in accord with the D.C. Circuit's reasoning in the denial of enforcement of *Meyers*); *NLRB v. Esco Elevators, Inc.*, 736 F.2d 295 (5th Cir. 1984) (court relied on other precedent to find absence of concerted activity and did not find it necessary to determine if *Meyers* test should be applied).

⁵¹104 S. Ct. at 1510 n.6.

⁵²See *supra* text accompanying notes 25-26.

⁵³270 N.L.R.B. 1014 (1984).

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Id.* at 1015.

⁵⁷235 N.L.R.B. 1540 (1978).

⁵⁸*Id.* at 1541.

⁵⁹270 N.L.R.B. at 1015.

⁶⁰*Id.* at 1014.

Board held that the contractual language at issue did not constitute the required clear and unmistakable waiver of the right to replace permanently.⁶¹

That portion of *Torrington* providing sympathy strikers protection under the Act clearly survives *Butterworth*. In *Business Services*,⁶² decided after *Butterworth*, the Board relied on *Torrington* to affirm an employee's right to honor "stranger" picket lines.⁶³ *Business Services* involved Manpower temporary employees who had been sent to work for two days for one of Manpower's customers. When the Manpower employees refused to cross the picket at the facility, Manpower discharged them. The Board, with Chairman Dotson dissenting, held that the employer had violated the Act because the sympathy strikers had engaged in concerted activity. The Board reasoned that honoring pickets was a "longstanding tactic of the American trade union movement, rooted in cardinal union principles."⁶⁴ The majority strongly rejected Chairman Dotson's contention that Manpower's "business considerations" outweighed the employees' section seven rights and found it immaterial whether the employees were familiar with the issues involved in the dispute or were merely exercising a general refusal to cross picket lines.⁶⁵

In *Indianapolis Power & Light Co.*,⁶⁶ the Board narrowed the language needed in a collective bargaining agreement to constitute union waiver of the right to engage in sympathy strikes. There, the union had agreed not to "take part in any strike."⁶⁷ The Board held that the employer had the right to rely on this language in suspending and threatening with discharge an employee who refused to cross a stranger picket line. The Board explained that a broad no-strike clause will now be interpreted as a prohibition against sympathy strikes, as well as primary strikes, unless there is extrinsic evidence or the contract demonstrates that the parties intended to exempt sympathy strikes from the general proscription.⁶⁸ The Board thereby overruled *United States Steel Corp.*⁶⁹ and *W-I Canteen Service*⁷⁰ to the extent inconsistent with its holding in *Indianapolis Power & Light*. The former decisions required the no-strike provision to men-

⁶¹*Id.* at 1015.

⁶²272 N.L.R.B. 827 (1984).

⁶³"Stranger" picket lines are picket lines established at facilities other than that of the employee's own employer and which were not established as the result of a dispute with the primary employer.

⁶⁴272 N.L.R.B. at 828.

⁶⁵*Id.*

⁶⁶273 N.L.R.B. No. 211 (Jan. 31, 1985), 118 L.R.R.M. (BNA) 1201 (1985).

⁶⁷*Id.* slip op. at 2, 118 L.R.R.M. at 1201.

⁶⁸*Id.* slip op. at 2, 118 L.R.R.M. at 1202.

⁶⁹264 N.L.R.B. 76 (1982), *enforcement denied*, 711 F.2d 772 (7th Cir. 1983).

⁷⁰238 N.L.R.B. 609 (1978), *enforcement denied*, 606 F.2d 738 (7th Cir. 1979).

tion sympathy strikes specifically before that activity could be included in the prohibition.⁷¹

B. *The Right To Resign During a Strike*

In June of 1985, the United States Supreme Court considered the other side of the strike coin—the right of an employee not to strike. Specifically at issue in *Pattern Makers' League of North America v. NLRB*⁷² was a provision in a union constitution prohibiting members from resigning from the union during a strike or when a strike was imminent.⁷³ The union fined ten members who resigned from the union in violation of the provision and returned to work. The Board ruled that the union's action was a violation of section 8(b)(1)(A) of the National Labor Relations Act.⁷⁴ The Seventh Circuit affirmed,⁷⁵ and the Supreme Court granted certiorari⁷⁶ to resolve the conflict thus created between the Seventh and the Ninth Circuits. The latter court had earlier held that unions may impose restrictions on their members' right to resign.⁷⁷

Despite the Court's 1967 holding in *NLRB v. Allis-Chalmers*⁷⁸ that section 8(b)(1)(A) does not prohibit labor unions from fining present members, the Court concluded in *Pattern Makers'* that the Board had reasonably construed this section of the Act to prohibit a union from fining members who have tendered resignations invalid under the union's constitution. Limiting *Allis-Chalmers* to a recognition that Congress never intended section 8(b)(1)(A) to interfere with the internal affairs or organization of unions,⁷⁹ the Court agreed with the Board's view that an interference with the right to resign extends to external enforcement of union rules.⁸⁰ This extension, reasoned the Court, could not be countenanced by section seven of the Act, which grants employees the right to refrain from any or all concerted activities.⁸¹ By limiting a union member's right to resign, the Court concluded, the union has impinged upon these section 7 rights, as prohibited by section 8(b)(1)(A).⁸² Stated differently, restricting a union member's right to resign "impairs the policy of voluntary unionism."⁸³

⁷¹273 N.L.R.B. No. 211, slip op. at 2-3, 118 L.R.R.M. at 1202.

⁷²105 S. Ct 3064 (1985).

⁷³*Id.* at 3066.

⁷⁴*Pattern Makers' League of North America*, 265 N.L.R.B. 1332 (1982).

⁷⁵*Pattern Makers' League of North America v. NLRB*, 724 F.2d 57 (7th Cir. 1983).

⁷⁶*Pattern Makers' League of North America v. NLRB*, 105 S. Ct. 79 (1984).

⁷⁷*Machinists Local 1327 v. NLRB*, 725 F.2d 1212 (9th Cir. 1984).

⁷⁸388 U.S. 175 (1967).

⁷⁹105 S. Ct. at 3069.

⁸⁰*Id.*

⁸¹29 U.S.C. § 157 (1982).

⁸²*Id.* § 158(b)(1)(A).

⁸³105 S. Ct. at 3071.

IV. *Weingarten* RIGHT

In *NLRB v. J. Weingarten*,⁸⁴ the Supreme Court ruled that an employee is entitled to representation at an interview that he reasonably believes will result in disciplinary action against him.⁸⁵ Three NLRB decisions rendered during the survey period have limited the right and remedy afforded by *Weingarten*.

A. Prudential Insurance

One limitation placed on the *Weingarten* right was the Board's determination that the protection can be waived by a collective bargaining agreement. In *Prudential Insurance*,⁸⁶ the union had argued that the right is a fundamental individual employee concern not subject to waiver by a union.⁸⁷ The Board, however, relied on the Supreme Court's decision in *Metropolitan Edison*,⁸⁸ that a union can waive an employee's statutory rights, to find that the *Weingarten* right, like the right to strike, is subject to being waived by the union.⁸⁹ The Board went on to conclude, contrary to its initial decision in the case, that the contract provision in question constituted a clear and unmistakable waiver of the right.⁹⁰ The contract clause provided in pertinent part:

The Union further agrees that neither the Union nor its members shall interfere with the right of the Employer:

. . . .

(b) To interview any Agent with respect to any place of his work without the grievance committee being present.⁹¹

B. Sears, Roebuck & Co.

The Board also decided in 1985 that the *Weingarten* right applies only to unionized employees—that employees not represented by a union have no right to the presence of a fellow employee at a disciplinary interview. *Sears, Roebuck & Co.*⁹² therefore reversed the position the Board had taken in 1982 in *Materials Research Corp.*,⁹³ that the *Weingarten* right extends to unrepresented employees.

⁸⁴420 U.S. 251 (1975).

⁸⁵*Id.* at 262.

⁸⁶275 N.L.R.B. No. 30 (April 25, 1985), 119 L.R.R.M. (BNA) 1073 (1985).

⁸⁷*Id.*

⁸⁸460 U.S. 693 (1983).

⁸⁹275 N.L.R.B. No. 30, slip op. at 2, 119 L.R.R.M. at 1073.

⁹⁰*Id.*

⁹¹*Id.* slip op. at 3, 119 L.R.R.M. at 1074.

⁹²274 N.L.R.B. No. 55 (Feb. 22, 1985), 118 L.R.R.M. (BNA) 1329 (1985).

⁹³262 N.L.R.B. 1010 (1982).

In *Sears*, an employee requested that a fellow employee or a representative of the union conducting an organizational campaign be present at an interview. The Board determined that the employer had not violated the Act by denying the request. The Board reasoned that the *Materials Research* rule infringed on the employer's freedom to deal individually with employees, a right employers have in the absence of a union.⁹⁴

The Board rejected the argument that because the *Weingarten* right is rooted in section seven, which extends its protections to both represented and unrepresented employees, *Weingarten* should apply to unrepresented workers.⁹⁵ The Board maintained, "The scope of Section 7's protections may vary depending on whether employees are represented or unrepresented. . . ."⁹⁶ Further, the Board reasoned that placing a *Weingarten* representative in a nonunion setting would be contrary to the Act's exclusivity principle; it would require the employer to recognize and deal with the equivalent of a union representative.⁹⁷

C. Taracorp Industries

In addition to narrowing the class of employees entitled to *Weingarten* protection, the Board recently limited the remedy for an employer's violation of the right. In the Board's original decision in *Taracorp Industries*⁹⁸ in July of 1981, it concluded that the employer had violated the employee's *Weingarten* right and issued a cease and desist and make-whole order (reinstatement and back pay). However, before its action could be reviewed by the court of appeals, the Board reconsidered its decision and order.⁹⁹

Upon reconsideration in 1984, the Board did not disturb its conclusion that the employer had violated the Act by denying the employee's request for union representation at a disciplinary interview. However, the Board determined that a make-whole remedy in this situation was inappropriate,¹⁰⁰ thereby overruling *Kraft Foods*¹⁰¹ and its progeny.¹⁰²

Taracorp Industries involved an employee who refused to perform a task as directed by the plant foreman. The foreman immediately informed the employee that he was suspended and should report to the plant manager's office. While the employee was en route to the manager's office, the foreman telephoned the manager and described the incident. The manager replied, "[I]f [the employee] refuses to do the job, that's

⁹⁴274 N.L.R.B. No. 55, slip op. at 2, 118 L.R.R.M. at 1330.

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.* slip op. at 5, 118 L.R.R.M. at 1331.

⁹⁸257 N.L.R.B. 463 (1981).

⁹⁹273 N.L.R.B. No. 54 (Dec. 12, 1984), 117 L.R.R.M. (BNA) 1497 (1984).

¹⁰⁰*Id.* slip op. at 4, 117 L.R.R.M. at 1498.

¹⁰¹251 N.L.R.B. 598 (1980).

¹⁰²*See, e.g.,* Illinois Bell Telephone Co., 251 N.L.R.B. 932 (1980).

termination.” Upon reaching the manager’s office, the employee requested representation, which the manager refused. At the end of the interview, the employee was terminated.¹⁰³

Neither the administrative law judge nor the Board (at either stage) found that the employee had been discharged for asserting his *Weingarten* right; rather, they agreed that he had been fired for insubordination.¹⁰⁴ In this situation—where termination is for just cause and not for assertion of the right—the Board has now taken the position that it is without authority to order reinstatement and back pay.¹⁰⁵

In support of this conclusion, the Board cited the Supreme Court’s statement in *Fibreboard Corp.*¹⁰⁶ that the legislative history of section 10(c) of the Act indicates that it was designed to preclude the Board from reinstating an individual who has been discharged because of misconduct.¹⁰⁷ The Board also noted that the courts of appeals have repeatedly denied enforcement of make-whole orders in this context.¹⁰⁸ Finally, the Board criticized what it termed “the expansionist approach to *Weingarten*.”¹⁰⁹

Consequently, when termination is found to be for just cause, the Board will not order reinstatement and back pay, even though the employer has violated the employee’s right to representation at the interview. A make-whole remedy will be appropriate only if the employee was discharged or disciplined for asserting the right to representation.¹¹⁰

V. DUTY TO BARGAIN

A. Access to Employer’s Property

Section 8(a)(5) of the National Labor Relations Act imposes on the employer the duty to bargain regarding the terms and conditions of employment.¹¹¹ This duty to bargain also includes the duty to make certain information available to the union during the bargaining process.¹¹²

In *Holyoke Water Power Co.*,¹¹³ a union requested access to the employer’s property to survey potential health and safety hazards. Specifically, the union asked that the company permit the union’s industrial hygienist to inspect the noise level of a forced draft fan room used in

¹⁰³273 N.L.R.B. No. 54, slip op. at 3, 117 L.R.R.M. at 1497.

¹⁰⁴*Id.* slip op. at 3-4, 117 L.R.R.M. at 1498.

¹⁰⁵*Id.* slip op. at 9, 117 L.R.R.M. at 1500.

¹⁰⁶*Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964).

¹⁰⁷*Id.* at 217.

¹⁰⁸273 N.L.R.B. No. 54, slip op. at 6 n.11, 117 L.R.R.M. at 1499 n.11 (citing cases).

¹⁰⁹*Id.* slip op. at 8-9, 117 L.R.R.M. at 1499-1500.

¹¹⁰*Id.* slip op. at 7 n.12, 117 L.R.R.M. at 1499 n.12.

¹¹¹29 U.S.C. § 158(a)(5) (1982).

¹¹²*See, e.g., NLRB v. Realty Maintenance, Inc.*, 723 F.2d 746 (9th Cir. 1984); *General Motors Co., Inc. v. NLRB*, 700 F.2d 1083 (6th Cir. 1983).

¹¹³273 N.L.R.B. No. 168 (Jan. 11, 1985), 118 L.R.R.M. (BNA) 1179 (1985).

the combustion process. The administrative law judge had ruled that, under section 8(a)(5), the company had an obligation to provide the access requested.¹¹⁴ The judge, in reaching this conclusion, reasoned that the company had an obligation to provide information relevant and necessary to the union's performance of its representative duty, that the company had a duty to bargain regarding health and safety, and, most significantly, that a request for *access* to check for health and safety violations is the legal equivalent of a request for *information*. He relied on *Winona Industries*¹¹⁵ to support his final proposition.

The Board, however, overruled *Winona Industries* in this regard and determined that a request for access could not be equated with a request for information.¹¹⁶ (The company had offered the union test results rather than access, but the administrative law judge had ruled the test results inadequate.) Instead, the Board now takes the position that an employer's right to control its property is a factor that must be weighed against the employee's right to proper representation in determining whether an outside union representative should be afforded access to the employer's property.¹¹⁷

In applying this balancing test to the facts in *Holyoke*, the Board found that the company's property interest was outweighed by employee concerns.¹¹⁸ But in ordering the company to permit the union hygienist to enter its fan room to test for noise hazards, the Board, unlike the ALJ, limited access to a reasonable period sufficient for the union to fulfill its representation duties without undue interruption of the company's operations. The Board explained: "This limitation is in line with our resolve to accommodate the conflicting rights with as little destruction of one as is consistent with the maintenance of the other."¹¹⁹

B. Bargaining Orders

In 1969, when it decided *NLRB v. Gissel Packing Co.*,¹²⁰ the Supreme Court set out the guidelines for determining when issuance of a bargaining order would be a proper exercise of the Board's remedial power under section 10(c) of the Act.¹²¹ In what has become known as *Gissel* category one, the Court, in dictum, left open the possibility of imposing a bargaining order without inquiry into the majority status of the union in "excep-

¹¹⁴*Id.* slip op. at 2-3, 118 L.R.R.M. at 1180.

¹¹⁵257 N.L.R.B. 695 (1981).

¹¹⁶273 N.L.R.B. No. 168, slip op. at 4, 118 L.R.R.M. at 1180.

¹¹⁷*Id.*

¹¹⁸*Id.* slip op. at 5-6, 118 L.R.R.M. at 1180-81.

¹¹⁹*Id.* slip op. at 6, 118 L.R.R.M. at 1181.

¹²⁰395 U.S. 575 (1969).

¹²¹*Id.* at 613-15.

tional" cases marked by "outrageous" and "pervasive" unfair labor practices.¹²²

Following *Gissel*, the Board and the courts of appeals have struggled with the question of when, if ever, the Board has the power to issue a bargaining order when the union has never demonstrated majority status. The Court of Appeals for the District of Columbia presented the dilemma in the following terms:

[I]f the Board lacks authority to issue them, employers who offend the law most egregiously will escape the most stringent remedy in the NLRB's arsenal; if the Board has the authority and exercises it to sanction patent and incessant unfair labor practices, employees may be saddled for a prolonged period with a union not enjoying majority support.¹²³

In *Gourmet Foods, Inc.*,¹²⁴ the Board had occasion to reexamine the problem and, this time, resolved the question in favor of majority rule principles. After a thorough review of the Act, legislative history, court precedent, and legal commentary, the Board concluded that it had no authority to issue a nonmajority bargaining order.¹²⁵ In so ruling, the Board expressly overruled previous cases in which it had considered itself authorized to issue nonmajority bargaining orders and in which it had exercised that authority.¹²⁶

C. Successor Employer's Duty To Bargain

With *Harley-Davidson Transportation Co.*,¹²⁷ the Board has eased the burden imposed on successor employers to bargain with unions that may no longer enjoy majority status. In this case, the union had had a three-year collective bargaining agreement with the prior employer that expired on March 31, 1982. On April 1, 1982, the successor, Harley-Davidson, assumed control of the operation. A majority of the employees hired by Harley-Davidson had been employed by the prior employer, and these employees continued to comprise a majority of the bargaining unit at issue. On July 6, 1982, the union requested bargaining, and Harley-Davidson, recognizing that it might be a successor, agreed to bargain. After meeting three times, Harley-Davidson withdrew from bargaining after being

¹²²*Id.* at 613-14.

¹²³*Conair Corp. v. NLRB*, 721 F.2d 1355, 1378 (D.C. Cir. 1983).

¹²⁴270 N.L.R.B. 578 (1984).

¹²⁵*Id.* at 583.

¹²⁶*Id.* (citing *Conair Corp.*, 261 N.L.R.B. 1189 (1982), *enf'd in part and enforcement denied in part*, 721 F.2d 1355 (D.C. Cir. 1983)).

¹²⁷273 N.L.R.B. No. 192 (Jan. 22, 1985), 118 L.R.R.M. (BNA) 1204 (1985).

presented with a petition signed by a majority of its employees stating that they no longer wanted to be represented by the union.¹²⁸

At the hearing level, the judge found that by conceding it was a successor and agreeing to negotiate, Harley-Davidson had voluntarily recognized the union and had impliedly admitted that it had no reason to doubt majority status. The judge therefore concluded that Harley-Davidson assumed the obligation to bargain for a "reasonable time" regardless of a subsequent good-faith doubt regarding majority status.¹²⁹ He relied on *Landmark International Trucks*¹³⁰ and, alternatively, on *Holiday Inn of Niles Michigan*¹³¹ to reach this conclusion.

The Board disagreed with the judge's characterization of the successor's bargaining obligation and thus did not adopt his conclusion. Rather, the Board ruled that when a successor employer recognizes a union that has been in place for one year or more, the union enjoys only a rebuttable presumption of majority status. The successor employer can withdraw from negotiation *at any time* following recognition if it can show that the union has lost its majority status or that the refusal to bargain was "grounded on a good-faith doubt based on objective factors that the union continued to command majority support."¹³² In so holding, the Board expressly overruled *Landmark*, *Holiday Inn*, and similar cases to the extent they were inconsistent with the Board's new position. The Board also determined that the employee petition, even though the employer had not authenticated the signatures, constituted a sufficient objective basis to support the employer's good faith doubt of the union's continued majority status.¹³³

VI. STATUTE OF LIMITATIONS

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge."¹³⁴ In *United States Postal Service Marina Mail Processing Center*,¹³⁵ the Board adopted a new position with respect to the commencement of this six-month limitation period.

U.S. Postal Service involved an employee who received a letter on January 29, 1981, advising him that his employer intended to remove his name from its employment rolls no later than thirty days from receipt

¹²⁸*Id.* slip op. at 2, 118 L.R.R.M. at 1204.

¹²⁹*Id.* slip op. at 2-3, 118 L.R.R.M. at 1204-05.

¹³⁰257 N.L.R.B. 1375 (1981).

¹³¹241 N.L.R.B. 555 (1979).

¹³²273 N.L.R.B. No. 192, slip op. at 3, 118 L.R.R.M. at 1205.

¹³³*Id.* slip op. at 4, 118 L.R.R.M. at 1205.

¹³⁴29 U.S.C. § 160(d) (1982).

¹³⁵271 N.L.R.B. 397 (1984).

of the letter for misconduct and failure to follow instructions. Despite his denial of the allegations, the employee received another letter on February 27, 1981, informing him that the evidence supported the charges against him and that his removal would be effective March 2, 1981. It was not until the employee had exhausted his internal appeal rights unsuccessfully, however, on August 21, 1981, that his name was officially removed from the employment rolls. On January 6, 1982, he filed an unfair labor practice charge against his former employer.¹³⁶

The Board, breaking with established precedent, held that the six-month limitation period began to run on February 27, 1981, the day the employee received notice advising him of his removal, rather than on August 21, 1981, the date of his actual removal.¹³⁷ Several previous Board cases had held that the 10(b) period begins to run, not at the time the employee receives unequivocal notice of an adverse employment action, but at the time the action is actually taken.¹³⁸ The Board noted that appellate courts have not agreed with this interpretation of the statute.¹³⁹

In changing its position, the Board relied on two Supreme Court decisions,¹⁴⁰ in the Title VII¹⁴¹ and section 1983¹⁴² contexts, which hold that the pertinent statutes of limitations begin to run when communication of the adverse employment decision is made, rather than when the effect of the adverse decision is felt. In adopting the Court's rationale and applying it to unfair labor practice cases, the Board explained:

[T]he Board will henceforth focus on the date of the alleged unlawful act, rather than on the date its consequences become effective, in deciding whether the period for filing a charge under Section 10(b) has expired. Where a final adverse employment decision is made and communicated to an employee—whether the decision is nonrenewal of an employment contract, termination, or other alleged discrimination—the employee is in a position to file an unfair labor practice charge and must do so within 6 months of that time rather than wait until the consequences of the act become most painful.¹⁴³

¹³⁶*Id.* at 397-98.

¹³⁷*Id.* at 400.

¹³⁸See, e.g., Roman Catholic Diocese of Brooklyn, 222 N.L.R.B. 1052 (1976), *enforcement denied in relevant part sub nom.* Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977).

¹³⁹271 NLRB at 398 (citing cases).

¹⁴⁰*Delaware State College v. Ricks*, 449 U.S. 250 (1980) (Title VII action); *Chardon v. Fernandez*, 454 U.S. 6 (1981) (§ 1983 action).

¹⁴¹42 U.S.C. §§ 2000e-2000e-17 (1982).

¹⁴²42 U.S.C. § 1983 (1982).

¹⁴³271 N.L.R.B. at 399-400.

