

DEVELOPMENTS IN THE *WEINGARTEN* RIGHTS OF NONUNION EMPLOYEES

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In *NLRB v. J. Weingarten Inc.*, the U.S. Supreme Court held that an employee at a unionized workplace has a right under Section 7 of the National Labor Relations Act (NLRA) to insist on the presence of the union shop steward at an interview with the employer that the employee reasonably believes may result in discipline [1]. Justices Powell and Stewart filed a dissenting opinion in which they stated: “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 [1, at 270, f. 1; cf. 2].

In a prior article, I reviewed the National Labor Relations Board’s (NLRB) consideration of the issue raised by the dissenting Justices—the right of nonunion employees to insist on the presence of a co-worker at an investigatory interview [3]. As Justices Powell and Stewart predicted, the Board explicitly established the right of nonunion employees to insist on the presence of a co-worker in two decisions issued in 1982 [4]. The Board then reversed its position and held that there was no Section 7 right to the presence of a co-worker in 1985 [5]. In 2000, the Board again changed its position and held that nonunion employees have the right to insist on the presence of a co-worker at an investigatory interview, in *Epilepsy Foundation of Northeast Ohio* [6]. Although the Board’s decision in this case was enforced by the Court of Appeals for the District of Columbia [7], the issue continues to give rise to intense controversy at the Board as new Board members consider the issue. This article reviews the Board’s most recent consideration of the issue [8].

IBM CORP.

On June 16, 2004, the Board issued its decision in *IBM Corp.* [9]. Three Board members, Chairman Battista, Board Member Meisburg, and Board Member Schaumber voted to overrule *Epilepsy Foundation* and held that *Weingarten* rights do not extend to a workplace where there is no union representative. Board Members Walsh and Liebman voted to adhere to *Epilepsy Foundation* as enforced in the Court of Appeals. Board Member Schaumber wrote a concurring opinion stating that he rejects the portions of *Epilepsy Foundation* that suggest that an employee's request for the presence of a co-worker in a nonunion workplace is presumed to be concerted. In his view, however, if an employee can show *actual concert*, the insistence on the presence of a co-worker would be protected.

If Member Schaumber's views become Board law, it will narrow the right to the presence of a co-worker at an investigatory interview significantly. The employee asserting the right will have to show *in each case* that a co-worker is present and willing to attend the interview with the employee whose conduct is under investigation. Only time will tell how *IBM Corp.* will be interpreted in future cases [10].

IBM CORP.—AN ANALYSIS

The majority opinion in *IBM Corp.* is a vast improvement on *Sears Roebuck* [5], the Board's prior effort to provide a rationale for finding that nonunion employees do not have the right to the presence of a co-worker at an investigatory interview. In *IBM Corp.*, the Board majority does address the fundamental issues in the case. In *Sears Roebuck*, the Board merely stated that allowing a nonunion employee to insist on the presence of a co-worker "wreaks havoc with the fundamental provisions of the Act," [5, at 231], without discussing the impact of *NLRB v. Washington Aluminum* [2] on the issue presented. In the final analysis, however, I believe the Board's decision in *IBM Corp.* is problematic. I see two problems with the majority opinion in *IBM Corp.*, which I will refer to as the *Anchortank* problem and the Section 1 problem.

THE ANCHORTANK PROBLEM

In 1978, three years after the *Weingarten* decision, the Board decided *Anchortank* [11]. In that case, the Board expressly held that the *Weingarten* representative in a unionized workplace does *not* exercise the powers of the Section 9(a) representative. The Board stated that the union representative is not permitted to use the powers conferred upon the union by its designation as the collective bargaining agent [11, at 431]. The Board's holding in *Anchortank* is consistent with Justice Brennan's statement in *Weingarten* that "the employer

has no duty to bargain with any union representative who may be permitted to attend the investigatory interview” [1, at 259].

Administrative Law Judge Schlesinger relied heavily upon *Anchortank* in concluding that there was no reason to limit the application of *Weingarten* rights to unionized facilities in the original administrative law judge’s decision in *E. I. DuPont* [4]. The Board majority in *IBM Corp.* fails to address the holding in *Anchortank*. In *IBM Corp.*, the majority states that the union representative will have the full force of the bargaining unit behind him [9, at 5]. In *IBM Corp.*, the Board majority states that the union representative acting as a *Weingarten* representative will be subject to the obligations imposed by the duty of fair representation not to disclose any information obtained in the interview [9, at 6]. Both of these statements clearly indicate that the *Weingarten* representative may exercise the powers of the Section 9(a) representative at the investigatory interview. The duty of fair representation derives from the union’s status as the bargaining agent, the Section 9(a) representative [12]. *Anchortank* said that the *Weingarten* representative does not have the power of the 9(a) representative, but *IBM Corp.* held that the *Weingarten* representative is the Section 9(a) representative because s/he represents the entire unit and is subject to the duty of fair representation. The rationale of the majority opinion in *IBM Corp.* is inconsistent with the Board’s holding in *Anchortank*, which the Board majority made no effort to distinguish or overrule. I believe the fact that *IBM Corp.* is in conflict with existing Board law on the fundamental issue of the legal status of the *Weingarten* representative will create problems for the Board in enforcement proceedings in the Court of Appeals for the District of Columbia and other circuits.

THE SECTION 1 PROBLEM

At the beginning of the analysis section of the majority opinion in *IBM Corp.*, the Board stated that the issue of whether to apply *Weingarten* rights to a nonunion workplace requires the Board to choose between two permissible interpretations of the NLRA. When statutory language can be subject to multiple interpretations, basic principles of statutory interpretation require the decision maker to look to the fundamental objectives of the statute to determine which interpretation is consistent with the statutory intent. Significantly, Section 1 of the NLRA captioned-FINDINGS AND POLICIES—states as follows:

The inequality of bargaining power between employers and employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce.

As I have indicated, Justice Brennan made specific reference to the language of Section 1 in the decision in *Weingarten*. Brennan stated: “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 [1, at 251, 262]. In my prior article, I stated:

What could more clearly reflect the inequality of bargaining power between employees and employers than Walter Slaughter being summoned to an investigatory interview by officials of the E. I. DuPont Company inside the State of Delaware? The NLRA should be interpreted to redress that imbalance [3, p. 194].

One could certainly say the same thing about the charging parties in *IBM Corp.* being summoned to an investigatory interview by officials of the IBM Corporation anywhere in the world.

Significantly, however, the majority made only a glancing reference to the language of Section 1 in seeking to determine which interpretation to adopt in *IBM Corp.* The Board stated that a co-worker cannot redress the balance of power problem because s/he lacks the collective force of the bargaining unit. Based on the Board's holding in *Anchortank*, however, the *Weingarten* representative in a union facility does not speak for the bargaining unit, either. The Board's only reference to Section 1 again ignores the Board's holding in *Anchortank* and Justice Brennan's statement in *Weingarten* referred to above.

Given the *IBM Corp.* Board's statement that there are two permissible interpretations of the NLRA with respect to the *Weingarten* rights of the unrepresented employees, Section 1 of the Act setting forth the NLRAs basic findings and policies clearly supports the *DuPont/Epilepsy Foundation* interpretation rather than the Board's holding in *IBM Corp.*

CONCLUSION

Justice Oliver Wendell Holmes Jr. once wrote:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend [13, at 400-401].

I believe that *IBM Corp.* is a great case, in Justice Holmes's terms. The extension of *Weingarten* rights to nonunion employees was a significant expansion of the legal rights of nonunion employees in the workplace. Because approximately 89% of the industrial workforce is nonunion, any decision involving the rights of nonunion employees has a much greater impact on employee working conditions than the typical NLRB case involving the rights of unionized employees. The Board's decision in *Epilepsy Foundation* was reported on the first page of the *Wall Street Journal*, which is unusual for an NLRB decision.

I believe Holmes's dictum set forth above aptly describes the majority opinion in *IBM Corp.*

For more than 25 years, it was a well-settled principle of Board law that a *Weingarten* representative does not exercise the powers of the Section 9(a) representative. The principle was grounded in Justice Brennan's statement in *Weingarten* that there is no obligation to bargain with the *Weingarten* representative. It would appear, however, that if the *Weingarten* representative does not exercise the powers of the Section 9(a) representative, there is no reasoned basis to limit *Weingarten* rights to workplaces in which there is a Section 9(a) representative. Judge Schlesinger was able to reason very forcefully from the Board's holding in *Anchortank* to a finding that *Weingarten* rights exist in a nonunion workplace in *E. I. DuPont* [4]. The Board's holding in *Anchortank* almost compels a finding that *Weingarten* rights exist in a nonunion workplace. For whatever reason, the majority in *IBM Corp.* chose to ignore *Anchortank*. The majority opinion neither cited *Anchortank* nor made any effort to distinguish or overrule it. One can only speculate as to how the Board would seek to reconcile its opinion in *IBM Corp.* with *Anchortank*. Similarly, the majority opinion made no reference to Justice Brennan's statement that there is no obligation to bargain with the *Weingarten* representative.

The majority opinion in *IBM Corp.* is in conflict with its own precedent and the clear language of the Supreme Court. In Justice Holmes's terms, well-settled principles of law were bent or broken in the majority opinion in *IBM Corp.* It will be interesting to observe how the Board addresses the problems I have described in future decisions.

ENDNOTES

1. *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975).
2. *NLRB v. Washington Aluminum Co.*, 420 U.S. 9 (1962).
3. "The Weingarten Rights of Non-Union Employees: An Advocate's Perspective," *The Journal of Individual Employment Rights*, Vol. 9, No. 3, (2000-2001), pp. 187-196.
4. *Material s Research Corp.*, 262 NLRB 1010 (1982); *E. I. DuPont*, 262 NLRB 1028 (1982), enforced at 724 F.2d 1061 (3rd Cir. 1983) vacated at 733 F.2d 296 (3rd Cir. 1984) dismissed on remand 274 NLRB 1104 (1985) Review granted, case remanded in *Slaughter v. NLRB*, 794 F.2d 120 (3rd Cir. 1986). Complaint dismissed 289 NLRB 627 (1988). Review denied, *Slaughter v. NLRB*, 876 F.2d 11 (3rd Cir. 1989).
5. *Sears Roebuck Co.*, 274 NLRB 230 (1985).
6. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000).
7. *Epilepsy Foundation v. NLRB*, 268 F.3rd 985 (D.C. Cir. 2001).
8. The views set forth in this article are the views of the author alone. They do not reflect the views of the General Counsel, the Board or any of its members, or anyone else associated with the NLRB.
9. *IBM Corp.*, 341 NLRB No. 148 (2004).

10. *IBM Corp.*, as currently written, could still be useful to labor unions in organizing efforts. If a union could get a number of employees on each shift to agree to serve on an in-plant organizing committee at a nonunion plant, it could inform members of the bargaining unit that any member of the committee would be willing to participate in an investigatory interview. I believe a request for the presence of a member of the in-plant committee would then be in actual concert and protected by Section 7. The union could begin to represent unit employees without obtaining Section 9(a) status.
11. *Anchortank*, 239 NLRB 430, modified at 618 F.2d 1153 (5th Cir, 1980).
12. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Miranda Fuel Company*, 140 NLRB 181 (1962).
13. *Northern Securities v. United States*, 193 U.S. 197 (1904) (dissenting opinion).

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