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Union Rights, No Dues: In re Epilepsy Foundation and the NLRB's Extension of Weingarten Rights to Nonunion Employees

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UNION RIGHTS, NO DUES: *IN RE EPILEPSY FOUNDATION* AND THE NLRB'S EXTENSION OF *WEINGARTEN* RIGHTS TO NONUNION EMPLOYEES

Consider the following scenario: a nonunion employee is accused of pushing his supervisor after a heated exchange. The only parties present during the dispute are the supervisor, the accused and a coworker-witness of the accused. Both employees are known to be extremely hostile toward their supervisor because of recent departmental changes. To avoid collusion between the two friends, upper management wishes to interview each employee individually to ascertain the facts surrounding the incident. The accused refuses to meet with upper management alone and requests the presence of the coworker-witness at the meeting. When the accused continues to refuse meetings with upper management, he is discharged for gross insubordination.

Until the recent decision by the National Labor Relations Board (NLRB or Board) in *In re Epilepsy Foundation of Northeast Ohio*,[1] the company would have been on solid ground in refusing the employee's request. The Board's holding in *Epilepsy Foundation* now requires an employer to grant a nonunion employee's request for a coworker's presence at investigatory meetings where the employee reasonably believes that discipline may result.[2]

Few employee relations professionals in a union-free environment realize the protections of the National Labor Relations Act (NLRA or Act) extend to nonunion employees. For the past fifteen years, these protections have been almost exclusively in the area of union organizations.[3] The seed for extending

1. In re Epilepsy Foundation, Nos. 8-CA-28169 and 8-CA-28264, 2000 WL 967066 (N.L.R.B. Jul. 10, 2000).

2. *Id.*

3. This is not surprising considering the wording of the Act. The preamble of the Act states:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred 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.

29 U.S.C. § 151 (1994). *See also* John D. Canoni, *Non-Union Employees Are Entitled To Have A Coworker Present At Investigatory Interviews*, *at* http://www.lawmemo.com/emp/articles/nonunion.htm (last visited Sept. 24, 2000).

these protections to nonunion employees was planted in the Supreme Court's *NLRB v. J. Weingarten, Inc.* decision.[4] There, the Court held that an employee's request to have a union representative present during an interview must be granted if the employee reasonably believes the meeting will result in the imposition of discipline.[5] Basing its decision on Section 7 of the Act, which guarantees employees the right to "engage in concerted activity for the purpose of . . . mutual aid and protection,"[6] the Court noted that "*Weingarten* rights" would help to level the playing field between employers and employees.[7] To hold otherwise, the Court noted, would be a direct contradiction of the purpose of the NLRA.[8]

This Note will examine the rationale of previous Boards and the current Board in their interpretation and application of *Weingarten* rights in a nonunion setting. Part I focuses on pre-*Weingarten* decisions by the Board, outlines the provisions of the NLRA that are relevant to this Note and discusses the congressional intent surrounding those provisions. Part II details the Court's decision in *Weingarten* and the establishment of Weingarten rights. This section also examines the pivotal Board rulings after *Weingarten*, interpreting these rights as they pertain to nonunion employees. Part III analyzes the Board's decision in *Epilepsy Foundation*. Included in this section will be an examination of Members Bremer and Hurtgen's persuasive dissenting opinions. Part IV concludes that although a permissible interpretation of the Court's decision in *Weingarten*, the majority's holding in *Epilepsy Foundation* is not the most desirable. The Board's determination that nonunion employees have an unfettered right to have another employee present during an investigatory interview imposes upon the employer the duty to deal with nonunion employees as a collective unit, a result not supported by the NLRA.

I. PRE-WEINGARTEN

The Board has by no means been consistent in its interpretation of the NLRA with regards to union representation at investigatory meetings. The Board's first interpretation occurred in 1945 in *Ross Gear & Tool Co.*[9] *Ross Gear* involved a dispute between female nonunion, nonsmoking employees and their female union counterparts who had recently been given permission to

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

5. *Id.* at 267.

6. Section 7 provides that "[e]mployees 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 concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1994).

7. *Weingarten*, 420 U.S. at 262.

8. *Id.*

9. 63 N.L.R.B. 1012 (1945).

smoke on the shop floor like their male coworkers.[10] The female advocate of the extension of the smoking policy to females also served as recording secretary for the union.[11] As a result of her championing the smoking policy change, numerous altercations erupted between her and her nonunion coworkers.[12] Management and the union bargaining committee met with the employee and discussed the problems that were occurring on the shop floor.[13] The employee, fearful that she was going to be terminated, requested union representation at the meeting.[14] The employer refused and subsequently informed the employee that she would be terminated if she would not meet with him alone. The employee again refused to meet without union representation and was discharged for insubordination.[15]

The Board, while not deciding the specific issue of union representation at a disciplinary meeting, nonetheless held that the employer's actions in refusing to deal with the union violated the employee's rights guaranteed under Section 7 of the Act.[16] The Seventh Circuit refused to enforce the Board's order.[17] The court disagreed with the Board's finding that the employee had been discharged for anything other than insubordination for refusing to attend a meeting with her supervisor without the presence of the entire bargaining committee.[18] The court then went on to emphasize that the meeting between the employee and the company was merely investigatory and that no grievance had at that time been filed.[19] That being the case, the court determined that the employer's refusal in no way restrained or interfered with the employee's Section 7 rights.[20] Thus, under the court's analysis, the only meetings that would mandate union representation were those meetings held to discuss a formal grievance.[21]

The Board did not deal with the issue of union representation at disciplinary meetings until some twenty years later in *Dobbs House, Inc*.[22] This case involved the termination of an employee several job infractions after

10. *Id.* at 1022.
11. *Id.* at 1021-22.
12. *Id.* at 1023.
13. *Id.* This meeting was actually called in order to attempt to bargain a new labor agreement. The problems with the smoking policy were discussed at this meeting. *Id.*
14. 63 N.L.R.B. at 1025.
15. *Id.* at 1028.
16. *Id.* at 1034.
17. 158 F.2d 607 (7th Cir. 1947).
18. *Id.* at 613.
19. *Id.*
20. *Id.*
21. *Id.*
22. 145 N.L.R.B. 1565 (1964).

being previously disciplined on numerous occasions.[23] The employee requested and was denied union representation when discussing the allegations with her supervisor.[24] The Board, in affirming the Administrative Law Judge's (ALJ's) findings that the employee was not entitled to union representation, stated that nothing in the Act obliges the company to grant an employee's request for union representation in every situation where an employee is subject to discipline.[25] The Board stated that this was especially true in the situation at hand because the conduct for which the employee was disciplined was not related to any protected union activity.[26]

The Board changed course three years later in *Texaco, Houston Producing Division*.[27] This case again presented an employee who was refused union representation at an interview held by the company to investigate an alleged theft by the employee.[28] The Board distinguished its decision in *Texaco,* weighing that the employer was not merely investigating the incident, but meeting to get information already adduced "on record" in the event that discipline was imposed.[29] Under these circumstances, the Board reasoned that the employer clearly intended to deal directly with the employee concerning his terms and conditions of employment.[30] As such, the Board found the employer's denial of the request that a union representative be present at the meeting concerning the suspension interfered with the employee's rights guaranteed by Section 7 of the Act. The Board held that the company had violated Sections 8(a)(1)[31] and 8(a)(5)[32] of the Act by its refusal to bargain collectively with the representatives of his employees.[33]

23. *Id.* at 1569. The case provides no information concerning the reason for the disciplinary actions taken against the employee.

24. *Id.* at 1570-71

25. *Id.* at 1571. The court stated, "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 exceptional circumstances should warrant any interference with this right."

26. *Id.*

27. 168 N.L.R.B. 361 (1967).

28. *Id.* at 361.

29. *Id.* at 362.

30. *Id.*

31. When an employer commits an unfair labor practice, it violates Section 8(a). Section 8(a)(1) prohibits an employer from interfering with the exercise of rights by employees which are guaranteed under Section 7. This provision is very broad and encompasses all Section 8 violations. Thus, whenever there is a violation of Sections 8(a)(2), (3), (4) or (5), a violation of Section 8(a)(1) is also committed. Section 8(b)(1) declares it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act. *See supra* note 6. A Section 8(a)(3) unfair labor practice is committed when an employer discriminates against employees regarding terms and conditions of employment in order to encourage or discourage union membership. Likewise, Section 8(a)(4) prohibits discrimination against an employee for filing a charge with the N.L.R.B. 29 U.S.C. § 158 (1994).

The Board's decision was based primarily on its finding that the employer's purpose in meeting with the employee was to complete its case against the employee to justify disciplinary action.[34] The Board's finding of an 8(a)(5) violation was grounded in this factual determination. It reasoned that the employer's intent in calling such a meeting was to deal directly with the employee concerning terms and conditions of his employment. Hence, the company's refusal to deal with the employee's selected union representative concerning his terms and conditions of employment was clearly a refusal to bargain collectively.[35]

The Fifth Circuit reversed the Board's decision in *Texaco*.[36] While the court relied primarily on a different interpretation of the facts, it also based its decision, in part, on a finding that whether a meeting requires the company to grant an employee's request for representation is determined by the purpose of the meeting.[37] The Fifth Circuit's decision differentiated between meetings with employees to investigate the employees misconduct and those meetings with the sole purpose of administering discipline.[38]

The court's reliance on the underlying purpose of the meeting as governing whether union representation requests must be granted was supported by two earlier Board decisions: *Chevron Oil Co.*[39] and *Jacobe-Pearson Ford*.[40] In *Chevron Oil*, the Board upheld the trial examiner's determination that the right to union representation at an employer-employee meeting did not arise until two things occured: (1) a management decision was made that would somehow adversely impact an employee's terms and conditions of employment; and (2) the management decision must be on the verge of implementation.[41] Finding that neither event had occurred, the Board held the

32. Section 8(a)(5) which makes it illegal for an employer to refuse to bargain collectively with representatives selected by the majority of employees over terms and conditions of employment. 29 U.S.C. § 158 (1994).

33. *Texaco*, 168 N.L.R.B. at 362.

34. *Id.*

35. *Id.* The Board stated that management's refusal to deal with the union in this instance "transgressed its statutory obligation to bargain with the union concerning the terms and conditions of employment it represents." As such, the Board found the employer's refusal of representation to be violative of Sections 8(a)(1) and 8(a)(5).

36. 408 F.2d 142 (5th Cir. 1969).

37. *Id.* at 144. The court's ruling upheld the Board's determination that an employer is not required to provide union representation for all dealings with employees that may ultimately affect terms and conditions of employment. *Id.*

38. *Id.* "[S]ince the interview dealt only with eliciting facts and not with the consequences of the facts revealed, its subject matter was not within the scope of compulsory collective bargaining." *Id.* at 145.

39. 168 N.L.R.B. 574 (1967).

40. 172 N.L.R.B. 594 (1968).

41. *Chevron Oil*, 168 N.L.R.B. at 578.

employer did not violate the Act when it met with the employee without a union representative.[42]

In *Jacobe-Pearson Ford*, the Board found that a meeting scheduled with an employee to discuss a potential insubordination incident was merely to elicit the employee's side of the story and did not require the employer to submit to the employee's request for union representation.[43] The Board found that the company had made no decision to discipline the employee at the time of the investigatory meeting and had promised the union that it would explain any determinations made as a result of information obtained at the meeting with the employee.[44] Echoing its decision in *Chevron Oil*, the Board stated, "in view of the absence of any definite adverse action taken . . . and [the company's] willingness to explain and bargain with the union any disciplinary decision made, [the company] did not breach any statutory obligation in denying union representation . . . at the fact-finding meeting."[45]

II. THE MODERN DOCTRINE

Following the Fifth Circuit's ruling in *Texaco* and the Board's decisions in *Chevron Oil* and *Jacobe-Pearson*, it appeared that the right to union

42. *Id.* at 579. Chevron Oil had a bifurcated review system. When an issue arose that was deemed to warrant discipline, a fact-finding meeting was scheduled with the employee whose alleged misconduct was at issue. The employee was told that he was not obligated to say anything at the meeting but it was understood that if the employee failed to explain his conduct that management was free to rely solely on the facts relayed by the foreman reporting the incident. The employee was also told that the purpose of the meeting was to gather information to enable management to make a determination as to whether discipline was appropriate. The management personnel in attendance at the fact-finding meetings had no authority to administer discipline. As such, union representation was not necessary at this step of the process.

Once the company reached the decision to take disciplinary action, the company scheduled a disciplinary meeting with the employee and his union representative. The company would lay out its case for the employee and the representative. Anyone in attendance at this meeting could comment, attempt to clarify or modify any facts relating to the case at hand. If persuaded by the union's arguments the company could forego punishment entirely or if unconvinced could proceed as planned and mete out the discipline. *Id.* at 577.

43. *Jacobe-Pearson*, 172 N.L.R.B. at 594-95. An employee in the automotive shop was found to have turned away an end-of-day job that would have potentially required the employee to remain at work past his quitting time. Instead, the employee left work fifteen-minutes early. The next day the employee came to work and found his timecard pulled. The employee testified that because of the pulled time card he feared that he was being discharged. As such, when management requested to meet with him to discuss the previous day's incident the employee asked that a union representative be present. The request was denied. *Id.*

44. *Id.* at 595.

45. *Id.* As the trial examiner pointed out, however, the true intent of the company in requesting the meeting is factually unknown. The meeting with the employee never took place and thus the question of "whether or not the proposed interview with [the employee] was an effort to deal with him concerning the terms and conditions of employment can never be established with any certainty." *Id.* at 599.

representation at employer interviews hinged upon the narrow distinction between investigatory and disciplinary interviews.[46] This standard led some commentators to the conclusion that the Board's distinction was illusory at best.[47]

A. An Evolving Standard

The trial examiner in *Texaco, Inc., Los Angeles Sales Terminal*, finding the Board's new standard unworkable, developed a new test for determining an employee's rights to union representation.[48] He proposed a test that shifted the focus from the employer's professed purpose for the meeting to the objective manifestation of that purpose.[49] In fashioning this new standard, the trial examiner noted the Board's recent use of an "either/or" classification system was flawed in that many situations would not fall into either category.[50] He proposed, and the Board endorsed, an objective test where the "statutory rights . . . vest or materialize when management's course of conduct . . . provides objective manifestations sufficient reasonably to justify the conclusion that a disciplinary reaction . . . will be forthcoming."[51]

Three years after *Los Angeles Sales Terminal*, *Mobile Oil Corp.* came before the Board.[52] *Mobile Oil* involved five employees who were suspected

46. *See* David L. Gregory, *The Employee's Right To Representation During Employer Investigatory Interviews: A Critical Analysis Of The Evolution Of Weingarten Principles*, 28 VILL. L. REV. 572, 581 (1983); Theodore C. Hirt, *Union Presence In Disciplinary Meetings*, 41 U. CHI. L. REV. 329, 332 (1973). The Board's distinction between investigatory and disciplinary meeting is ambiguous. Since the employer had not yet determined that discipline was appropriate, the meeting was necessarily investigatory. This subjective test will require a case-by-case review and will rely on the "behavior and intent of the employer, with conjectural inferences from ambiguous actions." Hirt, *supra*, at 332. It may also be surmised that the Board's attempt to limit an employee's right to representation to only disciplinary meetings demonstrates the Board's concern that to hold otherwise would allow representation in all run-of-the-mill meetings thus potentially disrupting the employer's operations. *Id.*; *see also* Joan Torzewski, *Employee Right To Union Representation During Employer Interrogations*, 7 U. TOL. L. REV. 298, 305-06 (1975) (noting that the Board's lack of a definitive standard leaves employees in a quandary in that they could never be certain that their assessment of the likelihood of discipline would be accepted).

47. *See* Torzewski, *supra* note 46, at 306-07. The Board's distinction was in many ways not meaningful in that the Board, in many cases, was turning a blind eye to the fact that many times the employer already had all the information needed for a disciplinary decision. As such, the interview was being conducted merely to confirm these facts. The Board also seemed uninterested in the fact that, although the employee was granted union representation in the disciplinary meeting, the employee was usually denied the benefits of a de novo meeting. *Id.* at 307.

48. *Los Angeles Sales Terminal*, 179 N.L.R.B. 976 (1969).

49. *Id.* at 983; *see also* Gregory, *supra* note 46, at 582.

50. *Los Angeles Sales Terminal*, 179 N.L.R.B. at 982-83.

51. *Id.* at 983.

52. 196 N.L.R.B. 1052 (1972).

of stealing company property.[53] The employees were interviewed by the company's security agents without benefit of union representation. Based on information gleaned from these interviews, the employees were discharged.[54]

The trial examiner found that the employer's refusal of union representation did not violate the Act because the interviews were not being conducted to support a predetermined disciplinary action.[55] As such, the trial examiner concluded that there could be no violation of sections 8(a)(1) and 8(a)(5) of the Act.[56]

The examiner's reliance on the *Chevron Oil* and *Jacobe-Pearson* distinction between investigatory and disciplinary interviews was rejected by the Board. It concluded that an employer's refusal of an employee's request to union representation when the employee reasonably believes that information solicited at the interview could have an adverse affect on his employment violates that Act.[57] An employee's request in such situations is premised on Section 7 of the Act which guarantees the right of employees to act in concert for mutual aid and protection.[58] Consequently, an employer who violates an employee's Section 7 right by refusing to provide union representation also violates sections 8(a)(1) of the Act.[59]

The Board did not, however, find a violation of 8(a)(5) as in the past.[60] The Board had previously held that under Section 8(a)(5), management had a duty to bargain with the union regarding disciplinary matters because such discussions implicated terms and conditions of employment.[61] Thus, the Board's refusal to find a violation of Section 8(a)(5) essentially eliminated the need to differentiate between investigatory and disciplinary meetings.[62]

The Seventh Circuit refused to enforce the Board's decision in *Mobil Oil*.[63] The court found the type of activity complained of, union representation at investigatory meetings, was not intended to be covered by Section 7.[64] The

53. *Id.* at 1059. The five employees consisted of four bargaining unit employees and one supervisor. *Id.*

54. *Id.*

55. *Id.* at 1060.

56. *Id.*

57. *Mobil Oil*, 196 N.L.R.B. at 1052. In so finding, the Board found that the four employees knew they were suspected of theft and it was therefore a reasonable assumption that the company's interviews could possibly lead to their termination. *Id.*

58. *Id.*

59. *See supra* note 31.

60. *See supra* note 35 and accompanying text.

61. *See supra* notes 27-35 and 39-45.

62. Gregory, *supra* note 46, at 585.

63. Mobil Oil Corp. v. N.L.R.B., 482 F.2d 842 (7th Cir. 1973).

64. *Id.* at 847. "A fair interpretation of the broad purpose and language of Section 7 persuades us that the novel 'right to representation' recognized by the Board in this case is not a 'concerted activity' within the meaning of the Act." *Id.*

protections intended by Section 7 of the Act were only intended to "enable employees to organize and to apply economic pressure against their employers in appropriate situations."[65]

B. The Supreme Court's Endorsement of a New Standard

In *International Ladies' Garment Workers' Union v. Quality Manufacturing Co.*[66] and *N.L.R.B. v. Weingarten*,[67] the Supreme Court was presented with the issue of whether an employer's discharge of an employee for refusing to meet alone with the employer violated the Act. The Court addressed and endorsed the test first set forth by the trial examiner in *Los Angeles Sales Terminal*.[68]

1. Quality Manufacturing Co.

In *Quality Manufacturing*,[69] an employee requested her union representative be present in a meeting with her employer to discuss a work stoppage she had instigated in protest of the employer's piece-rate wage system. After the employee refused to meet alone with the employer on numerous occasions, the employee was terminated.[70]

The Board began by distinguishing the issue presented in *Quality Manufacturing* from that of previously decided cases.[71] It noted that *Quality Manufacturing* represented the first case in which an employee had been discharged for insisting on union representation at an employer investigatory interview.[72] Further, the Board had never considered the Section 7 rights of individual employees to act in concert "for mutual aid and protection."[73]

The Board struck a balance between the employee's rights and the rights of the employers. Where an employee reasonably believes that the interview will have an adverse effect on his employment, participation in the interview is

65. *Id.* at 846-47. The court stated that had Congress intended Section 7 protections to extend to employees who fear reprisal from an employer meeting, that interpretation would have been recognized long ago. *Id.* at 848.

66. 420 U.S. 276 (1975).

67. 420 U.S. 251 (1975).

68. *See supra* notes 49-51.

69. 195 N.L.R.B. 197 (1972).

70. *Id.* at 197-98.

71. *Id.* at 198. *See also* Gregory, *supra* note 46, at 587 n.104 (noting that while the Board was correct in distinguishing the Board's previous decisions, it failed to address *Ross Gear*, a case in which the factual situation was the same). *See* Ross Gear, 63 N.L.R.B. 1012 (1945).

72. *Quality Mfg.*, 195 N.L.R.B. at 198.

73. *Id.*

voluntary, unless a union representative is permitted to be present.[74] Where not permitted, the employee may opt to forego the interview entirely.[75]

The Fourth Circuit disagreed with the Board's decision and refused enforcement.[76] In particular, the court took exception to the Board's view that this case was one of first impression.[77] The court noted that the Board had addressed the issue of Section 8(a)(1) in the context of the denial of representation at an employer-instigated interview,[78] stating "[b]y necessary implication, Section 7 rights have been at issue in each of these cases."[79] Nowhere in the litany of cases did the Board find that Section 7 mandates union representation in investigatory interviews where the employee fears his job might be in jeopardy.

Moreover, the circuit court found no legal support for the Board's conclusions.[80] The court pointed out that the Board's purpose is to determine whether the Act has been violated.[81] Since the Board had never held this to be a violation in the past, the court saw no reason to hold it as one in this case.[82]

2. N.L.R.B. v. Weingarten

Weingarten came before the Board while the Fourth Circuit was considering *Quality Manufacturing*.[83] In *Weingarten*, an employee suspected of theft was interrogated by her supervisor and store security.[84] Several times during the interview the employee requested, and was subseqently denied, union representation.[85]

The trial examiner relied on the Board's decisions in *Mobil Oil* and *Quality Manufacturing* to hold that Section 8(a)(1) of the Act had been violated.[86] In so determining, the trial examiner found the only real question that required

74. *Id.*

75. *Id.* at 199. As there can be no reasonable basis for the fear of adverse impact, the Board clarified that such protections are not intended to extend to "run-of-the-mill shop floor conversation." *Id.*

76. 481 F.2d 1018 (4th Cir. 1973).

77. *See supra* note 71 and accompanying text.

78. *Id.* at 1024. *See also* Ross Gear, 63 N.L.R.B. 1012 (1945); Dobbs House, 145 N.L.R.B. 1565 (1964); Texaco, Inc., Houston Producing Div., 168 N.L.R.B. 361 (1967).

79. *Quality Mfg.*, 195 N.L.R.B. at 1024.

80. In providing no statutory analysis the Board simply concluded, "[t]his seems to us to be the proper rule where, as here, the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses." *Id.* at 1025.

81. *Id.*

82. *Id.*

83. 202 N.L.R.B. 446 (1973).

84. *Id.* at 448. The facts of Weingarten differed from *Quality Manufacturing* in that the employer did not discharge the employee. *See supra* note 70 and accompanying text.

85. *Weingarten*, 202 N.L.R.B. at 448.

86. *Id.* at 449.

answering was whether the employee had a reasonable belief that her job was in danger.[87] Under the standard set forth in *Quality Manufacturing*, the trial examiner found the test easily met.[88]

The Fifth Circuit denied enforcement of the Board's order.[89] Relying on Board precedent and the decisions by the Fourth and Seventh Circuits in *Mobil Oil*[90] and *Quality Manufacturing*,[91] the court fell back on the investigatory/disciplinary differentiation and held the interview in *Weingarten* to be merely investigatory;[92] as such, no right to union representation attached.[93] Finally, the court flatly denied the Board's attempt to distinguish this case because none of the previous cases had dealt with an alleged violation of Section 8(a)(1) in the context of union representation in employer-employee interviews.[94] The court noted the Fourth Circuit decision in *Quality Manufacturing* which considered and rejected this contention.[95]

C. The Supreme Court's Weingarten *Decision*

The Supreme Court granted certiorari for *Weingarten* in 1974.[96] It was in this watershed case that the Supreme Court, in affirming the Board's decision, delineated what has come to be known as "*Weingarten* rights." In its decision, the Court began by summarizing the Board's holdings in *Quality*

87. *Id.*

88. *Id.*

89. N.L.R.B. v. Weingarten, 485 F.2d 1135 (5th Cir. 1973).

90. *See supra* note 63.

91. *See supra* note 76.

92. *Weingarten*, 485 F.2d at 1137. Concurring with its decision in *Texaco Houston Producing Division v. N.L.R.B.*, the court stated that since there was no evidence that the employer sought to deal with the employee concerning her conditions of employment there was no need for, or right to, union representation. *Id.*

93. *Id.* at 1138. Once the interview was deemed investigatory, the precedent is overwhelming that there is no right to union representation at the interview. *Id.* at 1137.

94. *Id.* at 1137. The court concluded by stating that without some showing that the purpose of the interview was not merely to gather information but to impose discipline action, no union representation should be afforded. *Id.* at 1138.

95. *Id.* at 1137.

> Every situation wherein an employee is directed by management to cooperate in an investigatory interview carries the implicit threat of discipline if such direction is not obeyed. And the statement that a particular Section 7 right [the right to act in concert for mutual aid and protection] . . . had not been previously considered is inaccurate . . . . [T]he Board has many times been confronted with an alleged violation of Section 8(a)(1) in the context of a denial of union representation at employer-employee interviews. By necessary implication, Section 7 rights have been at issue in each of these cases.

Id.

96. 420 U.S. 251 (1975). The Court also granted certiorari in *Quality Manufacturing*, 420 U.S. 276 (1975). The Court decided *Weingarten* and *Quality Manufacturing* jointly. The *Quality Mfg.* Court held that its decision in *Weingarten* mandated a reversal of the Fourth Circuit's finding that no violation had occurred. *Quality Mfg.*, 420 U.S. at 281.

Manufacturing and *Mobil Oil* which set forth the limits of an employee's Section 7 rights.[97]

First, the Board in *Mobil Oil* found that an employee has a Section 7 right to act in concert for mutual aid and protection.[98] Second, an employee must request representation if they so desire it.[99] Third, an employee's Section 7 right to representation at investigatory meetings applies only when the employee reasonably believes the investigation will likely result in disciplinary action.[100] Fourth, the exercise of an employee's rights may not interfere with "legitimate employer prerogatives."[101] Finally, the employer is under no obligation to bargain with the employee's union representative during the investigatory meeting.[102]

The Court stated that the Board's holding in *Weingarten* was a permissible construction of the Act that should have been upheld by the Fifth Circuit.[103] It noted that the goal of the NLRA is to protect a worker's right to organize and designate representatives for the purpose of mutual aid and protection.[104] The Board's finding reinforced this goal by attempting to create a more level playing field between the employer and employees. In doing so, the Court

97. *Weingarten*, 420 U.S. at 256.

98. *Id.* "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." *Id.* at 257.

99. *Id.* at 257. As such, the employee has the right to forego union representation and continue with the interview unassisted. *See also* Appalachian Power Co., 253 N.L.R.B. 931 (1980) (holding that the employee, not the union, must request union representation in order for *Weingarten* right to be affective); Kenneth L. Judd, *The Weingarten Right In A Nonunion Setting: A Permissible And Desirable Construction Of The National Labor Relations Act*, 19 MEM. ST. L. REV. 207, 211-12 (1989).

100. *Weingarten*, 420 U.S. at 257. The standard used to determine an employee's 'reasonable belief' is an objective standard that takes into consideration all the facts of the case. This standard was set out in the Board's decision in *Quality Manufacturing*, 195 N.L.R.B. 197, 198 n.3. *See also* Judd, *supra* note 99, at 212.

101. *Weingarten*, 420 U.S. at 257. The Court noted that the employer is not required to justify his refusal to allow union representation at an investigatory meeting. Further, the Court noted that the employer may continue with his investigation without the interview taking place. *Id.* at 259. This places the employee in the precarious position of choosing between foregoing the interview and the possible benefits thereof and submitting to the interview without representation. *Id.*

102. *Id.* at 259. The representative is there to offer assistance in clearing up disputed or missing facts and to offer alternatives suggestions for finding needed information. *Id.* at 260.

103. *Id.* at 261. The Court further stated that such a finding was not required by the Act, but that it was clearly an acceptable interpretation. *Id.* at 266.

104. *Id.* at 261-62. *See also* Beth Ann Sabbath, *The Right To Representation At Investigatory Interviews After Weingarten*, 7 J. CORP. L. 851, 856 (1989).

found that to require an employee to confront his employer single-handedly would "perpetuate the inequity the Act was designed to eliminate."[105]

The presence of an employee's union representative serves to protect not only the individual employee, but also the interests of the entire bargaining unit. Therefore, it benefits the bargaining unit as a whole to ensure that the employer administers punishment in a just and fair manner.[106] The Court rejected the contention that representation prior to the filing of a formal grievance is premature.[107] Allowing representation only after discipline has been imposed makes it difficult for the employee to defend himself because at this stage of the process the employer is likely more concerned with justifying its actions rather than listening to the employee's justification.[108] Indeed, the Court recognized that a knowledgeable union representative could assist in the investigatory process by eliciting pertinent facts thus allowing the employer to "get to the bottom of the incident occasioning the interview."[109]

The Court accepted the Board's argument that although some if its previous findings may have been contrary to its holding in *Weingarten*, those previous findings should not forestall the Board from making decisions in

105. *Weingarten*, 420 U.S. at 262.

106. *Id.* at 260.

107. *Id.* at 263.

108. *Id.* at 264. The Court quoted from its opinion in *Independent Lock Co.*: "[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 . . . ." *Id.* (quoting *Independent Lock Co.*, 30 Lab. Arb. 744, 746 (1958)).

109. *Id.* While a union representative is permitted to take part in investigatory meetings with the employer, there are several information-gathering incidents that do not always give rise to *Weingarten* rights. *See e.g.*, U.S. Postal Service, 252 N.L.R.B. 61 (1980) (stating that a company mandated medical examination for an employee returning on recall after being off work more than three months does not constitute "investigatory" for the purposes of Weingarten rights); E.I. du Pont de Nemours & Co., 100 L.R.R.M. 1633 (Advice Memorandum 1981) (holding that a search of an employee's car, by itself, does not constitute an investigatory interview for purposes of *Weingarten* rights); Walnut Hill Convalescent Home, 114 L.R.R.M. 1255 (Advice Memorandum 1983) (finding that a handbag search, alone, does not rise to the level of an investigatory interview for purposes of imposing *Weingarten* rights); TCC Ctr. Companies, 275 N.L.R.B. 604 (1985) (holding that an employee is only entitled to be represented by a union representative thus the employee was precluded from being represented by an attorney at an investigatory meeting). *But see* Consol. Casinos Corp., 266 N.L.R.B. 988 (1983) (holding that an employee has the right to union representation during a polygraph test); Pacific Southwest Airlines, 242 N.L.R.B. 1169 (1979) (finding that *Weingarten* rights apply to telephone interviews).

accordance with current trends.[110] The Court rejected the Fifth Circuit's holding that the Board was bound by its own precedent, stating "to hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking."[111]

The Court affirmed that it is the responsibility of the Board to respond to changes between labor and management and adapt the Act to meet those changes.[112] As a result, any decision altering the field of labor-management relations should be afforded limited judicial review. Finding that the circuit court overstepped its authority, the Court held that the Board's determination that union representation at an employer-instigated interview was a plausible interpretation of the Act and it was within the Board's power to so hold.[113]

Justices Powell, Stewart, and Burger dissented in the *Weingarten* opinion.[114] Chief Justice Burger took issue with the Board's apparent lack of reasoning in overturning long-standing precedent,[115] stating "[t]he tortured history and inconsistency of the Board's efforts in this difficult area suggest the need for an explanation by the Board of why the new rule was adopted."[116] The Chief Justice explained that for an administrative agency to maintain its integrity it must "disclose the basis of its order" and "give clear indications that it has exercised the discretion with which Congress has empowered it."[117]

110. *Weingarten*, 420 U.S. at 265.

111. *Id.* at 265-66. "[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." *Id.* (quoting Electrical Workers v. N.L.R.B., 366 U.S. 667 (1961)). *See also* Sabbath, *supra* note 104, at 855-56.

112. *Weingarten*, 420 U.S. at 266. The Board has the "special function of applying the general provisions of the Act to the complexities of industrial life." *Id.* (quoting Republic Aviation, 324 U.S. 793, 798 (1945)).

113. *Weingarten*, 420 U.S. at 266. The Court did not address nonunion employees' right to assistance in investigatory meetings. *See* Steve Carlin, *Extending Weingarten Rights to Nonunion Employees*, 86 COLUM. L. REV. 618, 620 (1986) (noting that the Court's silence is not surprising since the Court stated that the *Weingarten* right should be examined through an "evolutionary process," responding to differing scenarios *as they arise*) (emphasis added).

114. *Weingarten*, 420 U.S. at 269. Justice Burger's dissent is filed separately. *See* N.L.R.B. v. Weingarten, 420 U.S. 268 (1975).

115. *Weingarten*, 420 U.S. at 269.

116. *Id*. *See also* Gregory, *supra* note 46, at 593.

117. *Weingarten*, 420 U.S. at 269 (quoting Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 197 (1941), and N.L.R.B. v. Metro. Ins. Co., 380 U.S. 438, 443 (1965)). While conceding that there may be very good reasons for overturning thirty years of precedent, Chief Justice Burger would have remanded the case back to the Fourth Circuit with a directive to "enlighten us as to the reasons for this marked change in policy." *Id.*

Justices Powell and Stewart saw the majority's decision as an encroachment on the bargaining process.[118] "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. It was not this type of activity exercised by individual employees that Congress sought to protect."[119]

The right to discipline and discharge employees is a management right barring specific statutory limitations or limitations set forth in a collective bargaining agreement.[120] As such, Justices Powell and Stewart found that union representation at investigatory interviews should be a subject of collective bargaining, not a Board mandate imposed under the guise of a Section 7 right.[121]

Weingarten and the rights it delineated have been subject to a wide range of interpretations. As is clearly demonstrated in the case history, *Weingarten* left many questions unanswered, thus leading the Board to a myriad of different interpretations.[122]

*D. Post-*Weingarten *Interpretations*

Cases following *Weingarten* addressed several different scenarios where the *Weingarten* principles were to be applied.[123] For the most part, the cases have addressed only those employees represented by a union.[124] The subject of

118. *Id.*

119. *Id.* at 272-73.

120. *Id.* at 273-74.

121. *Id.* at 275.

122. *See* Gregory, *supra* note 46, at 582. *See also infra* notes 294-297.

123. *See* Jill D. Flack, *Limiting the Weingarten Right in the Nonunion Setting: The Implications of Sears, Roebuck and Co*., 35 CATH. U. L. REV. 1033, 1046 (1986). In *Certified Grocers*, the Board found that *Weingarten* applies to both investigatory and disciplinary interviews. 227 N.L.R.B. 1211, 1213-14 (1977), *enforcement denied*, 587 F.2d 436 (9th Cir. 1978). The Board reversed part of its *Certified Grocers* decision in *Baton Rouge Water Works Co*., where it held that an employee does not have a Section 7 right to representation at a meeting strictly called to impose a predetermined discipline. 246 N.L.R.B. 995, 997 (1979). In *Texaco*, the Board expanded on its decision in *Baton Rouge* to state that an employer's offer to give an employee the chance to explain their actions after the employer has imposed discipline did not warrant *Weingarten* representation. 246 N.L.R.B. 1021, 1022 (1979).

124. *See* Flack, *supra* note 123, at 1047. *See, e.g.*, Gulf States Mfg. v. N.L.R.B., 704 F.2d 1390 (5th Cir. 1983) (finding that the employer violated an employee's *Weingarten* rights when it refused to allow union representation at a meeting held solely to impose discipline where a fact-finding question was asked); N.L.R.B. v. Texaco, Inc., 659 F.2d 124 (9th Cir. 1981) (stating that an employer violated *Weingarten* by allowing union representation but not allowing the representative to speak during the meeting); Lennox Indus. v. N.L.R.B., 637 F.2d 340 (5th Cir.), *cert. denied*, 452 U.S. 963 (1981) (finding a *Weingarten* violation where an employee was denied representation when the person conducting the meeting had no knowledge of the employee's request, but the supervisor to whom the employee made the request was present at the meeting);

representation in a nonunion setting was addressed only indirectly, with most circuits finding that representation was appropriate.[125]

For instance, in *ITT Lighting Fixtures v. NLRB*,[126] the Sixth Circuit found that an employer's denial of an employee's request that a coworker be present during an investigatory meeting violated *Weingarten* despite the fact that the would-be representative could not have been a union representative due to the fact that the union had not yet been certified.[127] Likewise, in *Anchortank v. N.L.R.B.*, the Fifth Circuit held that an employee is entitled to *Weingarten* representation regardless of the employer's challenge of a recent certification election.[128]

1. Materials Research Corp.

In 1982, the Board first extended *Weingarten* rights in a nonunion setting in *Materials Research Corp.*[129] The ALJ found that the company had not violated Section 8(a)(1) of the Act when it conducted an investigatory meeting without allowing an employee representative to be present as requested by the disciplined employee.[130] The ALJ's determination was premised on the fact that the employees were not represented by a union.[131] As such, the *Weingarten* doctrine was not applicable.[132]

Good Hope Refineries, Inc. v. N.L.R.B., 620 F.2d 57 (5th Cir.), *cert. denied*, 449 U.S. 1012 (1980) (holding that an employer violated the Act by denying an employee union representation at a meeting to discuss an absenteeism issue).

125. *Id. See e.g.*, Crown Cork & Seal Co., 255 N.L.R. B. 14, 48-49 (1981), *enforced without opinion*, 691 F.2d 506 (9th Cir. 1982) (holding that despite the employer's refusal to recognize the union, an employee is still entitled to representation at investigatory meetings).

126. 719 F.2d 851 (6th Cir. 1983).

127. *Id.* at 854.

128. 618 F.2d 1153, 1165 (5th Cir. 1980).

129. 262 N.L.R.B. 1010 (1982). Employees in the precious metal department ("PDM") of the Materials Research Corp. were told by their supervisor that effective the following day they would all be placed on new work schedules. Annoyed with the sudden change, one employee, Hochman, attempted to arrange a meeting with management and a group of employees to express their displeasure with the new schedule but was refused. After several attempts, Hochman was told to come to his supervisor's office. Hochman informed his supervisor that under federal law he was entitled to have another employee present at any meeting that may lead to disciplinary action. The supervisor responded that there was no such right and ordered Hochman to sit down for the interview. At that time, Hochman was given a written reprimand for organizing the group meeting. Hochman subsequently filed an unfair labor practice charge alleging that Materials Research had violated his rights by refusing to allow a coworker to be present during the meeting. *Id.* at 1010-11.

130. *Id.* at 1025-27.

131. *Id.* at 1027.

132. *Id.*

The Board's conclusion "that the right enunciated in *Weingarten* applies equally to represented and unrepresented employees"[133] was based on the Board's opinion that the right to representation at investigatory meetings stems not from Section 9 of the Act[134] but from Section 7 rights which are not dependent upon union organization.[135] The Board reasoned that had the Court intended to extend *Weingarten* rights to union represented employees only, the Court's decision would have been based on Section 9 of the Act.[136] The *Materials Research* Board ignored the fact that the Supreme Court had specifically held that union employees were entitled to representation at investigatory interviews.[137] The use of the term "union representative" in the Court's *Weingarten* decision, the *Materials Research* Board reasoned, was merely a result of the fact pattern presented in that case.[138]

The *Materials Research* Board further stated that the Court's underlying purpose in developing *Weingarten* rights was to put the employer and employee on more equal footing.[139] Even if the nonunion individual present at the meeting does nothing more than act as a witness, the mere presence of a coworker at the meeting advances that purpose of the Act.[140] Indeed, the Board reasoned that representation at an investigatory meeting may be more important in the nonunion setting because those employees do not have access to a grievance-arbitration procedure as do union represented employees.[141]

133. *Id.* at 1016.

134. The relevant portion of Section 9 states: "Representatives 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." 29 U.S.C. § 159(a) (1994).

135. *Materials Research*, 262 N.L.R.B. at 1012. The Board did recognize that in limited instances, Section 7 rights have been curtailed based on an employee's membership in a labor organization. *See* Emporium Capwell, 420 U.S. 50 (1975) (holding that union represented employee's attempt to deal with their employer directly thus circumventing the union was not protected activity under the Act); N.L.R.B. v. Washington Aluminum Co., 370 U.S. 50 (1975) (finding that the protections of Section 7 should extend to nonunion employees who walked off the job due to substandard working conditions).

136. *Materials Research*, 262 N.L.R.B. at 1012 n.9. Section 9(a) gives the union the exclusive right to bargain on behalf of its member. Thus, the Board stated that were *Weingarten* rights a function solely of a union's status as a collective-bargaining representative the rights could be invoked by the union, regardless of the wishes of the employee. Such is not the case as *Weingarten* rights may only be invoked by the employee facing the investigatory interview. NLRB v. Weingarten, 420 U.S. 251, 257 (1975).

137. *Materials Research*, 262 N.L.R.B. at 1012.

138. *Id.*

139. *Id.* at 1015. *See also* Judd, *supra* note 99, at 215.

140. *Materials Research*, 262 N.L.R.B. at 1012.

141. *Id.*

To further support its position, the Board turned to its decision in *Glomac Plastics, Inc.*,[142] where it held, "Section 7 rights are enjoyed by all employees and are in no way dependent on union representation for implementation."[143] The Board in *Glomac* found its position bolstered by Justices Powell and Stewart's dissenting opinion in *Weingarten*: "While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the Section 7 right today recognized affording employees the right to act 'in concert' in employer interviews, also exists in the absence of a recognized union."[144]

Chairman Van De Water dissented in the *Materials Research* decision.[145] In his view, *Weingarten* applied in only unionized settings where the employer was obligated to deal with union representatives.[146] In the absence of a union, the employer is under no duty to deal with its employees over terms and conditions of employment.[147] Once the employees have elected a bargaining representative, the employer is no longer permitted to deal with its employees on an individual basis.[148] Relying on the Board's pre-*Weingarten* decision in *Texaco, Houston Producing Division*,[149] Van De Water noted the *Texaco* Board's determination that a collective bargaining relationship was an essential element in the determination of an employee's right to representation at investigatory meetings.[150]

Although purporting to extend *Weingarten* rights to nonunion employees, the *Materials Research* decision was nonetheless subject to varying interpretations. In *E.I. du Pont de Nemours* (*Du Pont I*),[151] the Board found that E.I. du Pont, a nonunion company, had violated the Act by refusing to allow a nonunion employee to have a witness present at a disciplinary meeting.[152] The Ninth Circuit thereafter refused enforcement of the Board's

142. 234 N.L.R.B. 1309 (1978).

143. *Id.* at 1310.

144. *Id.* at 1311 (citing *Weingarten*, 420 U.S. at 270).

145. *Materials Research*, 262 N.L.R.B. at 1016.

146. John R. Van De Water, *New Trends In N.L.R.B. Law*, 33 LAB. L. J. 635 (1982). "In my view, an employer cannot be compelled (absent certification or recognition) to recognize any individual or group as a representative of its employees . . . . While the Board majority may feel that nonunion employees need representatives, they ought not disrupt the statutory scheme to achieve their view of equality." *Id.* at 640.

147. *Materials Research*, 262 N.L.R.B. at 1016.

148. *Id.* at 1016-17.

149. *See supra* note 27.

150. *Materials Research*, 262 N.L.R.B. at 1017.

151. 262 N.L.R.B. 1040 (1982).

152. *Id.* at 1045 (1982). In this case, the employer docked an employee's pay in response to the employee's unauthorized visit to his doctor. The following day the employer presented the employee with a list of his work deficiencies and a document containing the conditions necessary for his continued employment. The employee refused to sign the forms unless a coworker was

order.[153] The court stated that the *Du Pont I* case lacked any showing that the employee in question was acting on behalf of other employees and was therefore not acting in "concert for mutual aid and protection."[154] While noting that unionization is not the only indicator of concertedness, the court stated that there must be a showing that the requesting employee acts as part of a group.[155]

2. Sears Roebuck and DuPont II

Materials Research remained controlling for only three years. A change in Board membership[156] brought about the reversal of *Materials Research* with the Board's decision in *Sears Roebuck*.[157] The *Sears* Board found erroneous the *Materials Research* Board's determination that *Weingarten* was decided based solely on Section 7.[158] The Board looked to its decision in *Emporium Capwell* for guidance.[159]

In *Emporium Capwell*, the Supreme Court upheld the Board's finding that seven union-represented employees were legitimately discharged for picketing their employer.[160] Despite the fact that the employees were clearly engaged in concerted activity, the Court found the employee's conduct circumvented the union in their efforts to deal directly with the company, which contravened the exclusivity provisions of Section 9.[161] Although the employees were engaged in concerted activity that would have been protected by Section 7, even in the absence of a union, the exercise of those rights could not act to displace "the orderly collective-bargaining process contemplated by the NLRA."[162] As such, the *Sears* Board reasoned that Section 7 rights can vary depending on an

present to act as a witness. The employer denied the employee's request and subsequently discharged him. *Id.*

153. E.I. Du Pont de Nemours and Co. v. N.L.R.B., 707 F.2d 1076, 1078 (9th Cir. 1983).

154. *Id.* at 1078. The *Weingarten* Court's assumption of concertedness is supported by the fact that a bargaining unit had been organized through concerted activity. As such, an employee's request for representation would be an extension of that concerted activity. *Id.*

155. *Id.* at 1079. *See also* Meyers Indus., Inc., 268 N.L.R.B. 493, 497 (1984) (holding that for an activity to be 'concerted' it must be engaged in with or on the authority of other employees, not for one individual).

156. *See* Judd, *supra* note 99, at 216 n.52. The five members of the N.L.R.B. are appointed by the President for staggered terms of five years. As a result, the make-up of the Board changes on a yearly basis, often resulting in conflicting conclusions, as was the case here. *See infra* note 249 for further discussion regarding the appointment of Board members.

157. 274 N.L.R.B. 230 (1985).

158. *Id.* at 231.

159. Emporium Capwell Co. v. Western Addition Cmty. Org., 420 U.S. 50 (1975).

160. *Id.* at 70.

161. *Id.* at 71-72. "Even assuming that [Title VII] protects employees' picketing and instituting a consumer boycott of their employer, the same conduct is not necessarily entitled to affirmative protection from the NLRA." *Id. See also* Flack, *supra* note 123, at 1052.

162. *Emporium Capwell*, 420 U.S. at 69.

employee's union status: "Section 7 rights of one group [of non-represented employees] cannot be mechanically transplanted to the other group [of represented employees] at the expense of important statutory policies."[163]

The *Sears* Board also found fault with the *Materials Research* Board's argument that because a *Weingarten* representative has no authority to bargain with the employer during an interview, the *Weingarten* principles easily extend to nonunion employers.[164] While such representatives have no authority to bargain with the employer during the interview, the representative still maintains the right to be heard at the meeting and make suggestions.[165]

Moreover, the Supreme Court's decision in *Weingarten* found that a union representative represents not only the employee being interviewed, but also all other employees in the unit.[166] Such a notion, the *Sears* Board ruled, does not exist in nonunion settings and to hold otherwise would give nonunion employees the benefit of union representation without the burden of certifying a union. This, the Board stated, contravenes the Act's exclusivity provision.[167]

Not long after the *Sears* decision, the Board's decision in *E.I. du Pont de Nemours v. N.L.R.B.* (*Du Pont II*) came before the Third Circuit.[168] In *Du Pont II*, an employee was discharged from a nonunion workplace for refusing to attend an employer interview without a coworker present. After a lengthy review process,[169] the Board held that a nonunion employee does not have a Section 7 right to the presence of a coworker in an investigatory interview.[170]

163. *Sears*, 274 N.L.R.B. at 231.

164. *Id.* at 231-32.

165. *See* Southwestern Bell, 251 N.L.R.B. 612 (1980). The Board affirmed an ALJ's determination that the Company had violated Section 8(a)(1) of the Act when it required the union steward to remain silent during an investigatory interview. *Id.* at 620. *See also supra* note 31.

166. NLRB v. Weingarten, 420 U.S. 251, 260 (1975). Member Van De Water, in his dissenting opinion in *Materials Research*, pointed out that a representative's ability to speak and offer alternative discipline constitutes "dealing with" the employer. Such dealings, Van De Water suggested, are tantamount to a labor union's status as the elected representative of the employees. *Materials Research*, 262 N.L.R.B. at 1016 n.30, 1019 n.40.

167. *Sears*, 274 N.L.R.B. at 232. Section 9 of the Act states that "[r]epresentatives 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." 29 U.S.C. § 159(a) (1994).

168. 724 F.2d 1061 (3rd Cir. 1983).

169. *E.I. Du Pont* (also known as *Slaughter*) was first decided in 1982. E.I. Du Pont de Nemours and Slaughter, 262 N.L.R.B. 1028 (1982). In that case, the Board affirmed the ALJ's determination that Du Pont had violated Section 8(a)(1) of the Act by discharging an employee for refusing to submit to a management investigatory interview without the presence of another employee as a witness. *Id.* at 1029. Du Pont filed a petition with the Third Circuit for review of the Board's decision, and the Board filed a cross-application for enforcement of its Decision and Order. The Third Circuit panel enforced the Board's Order. *Du Pont II*, 724 F.2d at 1063. Du Pont filed a motion for panel rehearing and rehearing en banc. Two weeks after Du Pont's

The *Du Pont II* Board reiterated the Supreme Court's observation that the question of whether an employee is entitled to representation at employer/employee meetings in which discipline is the likely result involves the "difficult task of 'reconciling conflicting interests of labor and management.'"[171] In concluding that the Weingarten rights should not be extended to unrepresented employees, the *Du Pont II* Board stated that the Supreme Court's decision in *Weingarten* did not comport to a nonunion setting.[172] The Board noted that *Weingarten* relied on the fact that representation would safeguard not only the accused employee, but the entire bargaining unit as well.[173] In this regard, the *Du Pont II* Board found that a coworker representative would have little, if any, of the same interests as a union representative and would possess no duty to represent all similarly situated employees.[174]

motion, the Board requested that the circuit court vacate its decision and remand the case back to the Board for consideration. The Third Circuit granted the rehearing, vacated its previous opinion and remanded the case back to the Board. E.I. Du Pont de Nemours & Co. (Chestnut Run) v. N.L.R.B., 733 F.2d 296, 298 (3rd Cir. 1984).

After reviewing the record, as well as position statements filed by both parties, the Board issued a supplemental Decision and Order reversing the ALJ's findings and held that the Company did not violate the Act when it terminated an employee for refusing to meet without another employee present. E.I. Du Pont de Nemours and Slaughter, 274 N.L.R.B. 1104 (1985). In so finding, the Board relied on its decision in *Sears Roebuck* which had been decided by the time *Du Pont II* came to the Board. *Sears*, 274 N.L.R.B. 230 (1985). Specifically, the Du Pont Board relied on the *Sears* Board's determination that the Act compelled a finding that nonunion employees are not entitled to union representation at investigatory interviews. *Du Pont*, 274 N.L.R.B. at 1104. The charging party filed a petition with the Third Circuit for review of the Board's supplemental Order. The court again remanded the case back to the Board, stating that the Board's reliance on the *Sears* mandate was erroneous. Specifically, the Board was wrong in finding that the Act compels a finding that nonunion employees have no right to coworker presence at disciplinary meetings. Slaughter v. N.L.R.B., 794 F.2d 120 (3rd Cir. 1986). The Board was directed to consider whether the Act precluded an alternative interpretation, for instance, that nonrepresented employees are entitled to the assistance of a coworker at investigatory meetings. *Id.* at 128.

On its third review, the Board held that the Act does not proscribe an interpretation that nonunion employees are entitled to a coworker's presence at employer/employee meetings where discipline is at issue. E.I. Du Pont de Nemours and Slaughter, 289 N.L.R.B. 627, 628 n.8 (1988).

170. *E.I. Du Pont de Nemours*, 289 N.L.R.B. at 630-31.

171. *Id.* at 628 (quoting *Weingarten*, 420 U.S. at 267).

172. *Id.* at 629.

173. *Id.* at 628 (citing *Weingarten*, 420 U.S. at 261).

174. *Id.* at 629. The Board also noted that the coworker representative in a nonunion setting would be less likely, if not completely unable, to vigorously represent an employee in the same fashion as a union representative. *Id.* The union representative will usually have the benefit of an established framework, namely a grievance and arbitration procedure, in which to work. *Id.* The unrepresented coworker representative could act as nothing more than a witness and would have little power to redress any concerns of the employees. *Id.* at 629-30.

The *Du Pont II* Board recognized that in *Weingarten* the Supreme Court held that union representatives at disciplinary interviews could also be a benefit to the employer. It was the Court's position that having a union representative present would likely help the employer get to the root of the problem more efficiently.[175] Moreover, the union representative, while unable to negotiate with the employer on behalf of the employee, can offer suggestions or alternative disciplinary measures.[176] Finding these factors lacking in a nonunion shop, the *Du Pont II* Board refused to extend *Weingarten* beyond a union setting.[177]

The Board also held that the employer's ability to forego an interview when an employee requests a representative's presence weighed heavily in favor of not extending *Weingarten* to a nonunion setting.[178] Unlike a union environment where the employer's conduct could eventually be challenged through the grievance procedure, a nonunion employee may likely lose his only chance to tell his side of the story if the employer opts to forego the interview.[179]

Du Pont II upheld the *Sears* Board's determination that the interests of labor and management were not served by the extension of *Weingarten* to nonunion employees. In so holding, however, the *Du Pont II* Board specifically rejected the *Sears* Board's finding that its interpretation was the only one permissible under the Act.[180] While acknowledging that the statute may be amenable to other interpretations, the *Du Pont II* Board refused to revert to the findings of *Materials Research*.[181]

175. *Weingarten*, 420 U.S. at 263.

176. *Du Pont*, 289 N.L.R.B. at 629-30.

177. *Id.* at 630. "Examining the foregoing considerations in a non-union setting, we conclude that many of the useful objectives listed by the Court [in *Weingarten*] are much less likely to be achieved or are irrelevant." Specifically, the Board stated that a nonunion representative has no obligation to represent the interests of the entire workgroup. Further, the Board noted that a nonunion advocate would be much less versed in his role as an employee representative, thus providing little benefit to either employee or employer. *Id.* at 629-30. *See also* Charles J. Morris, *N.L.R.B. Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1735 (1989).

178. *Du Pont*, 289 N.L.R.B. at 630.

179. *Id.* at 630.

180. *Id.* at 628 n.8. "In so concluding, we overrule the Board's finding in Sears . . . that the Act compels a finding that unrepresented employees are not entitled to the presence of a fellow employee during an investigatory interview." *Id.*

181. *See supra* notes 129-144 and accompanying text.

III. IN RE EPILEPSY FOUNDATION

The Board's recent ruling in *In re Epilepsy Foundation* tipped the scales in favor of employees once again.[182] In overruling *Sears* and *DuPont II*, the Board reverted to its short-lived decision in *Materials Research*.[183]

A. Epilepsy Foundation Facts

Employees Borgs and Hasan were employed with the Epilepsy Foundation of Northeast Ohio in a school-to-work research program for teenagers with epilepsy.[184] On January 17, 1996, Borgs and Hasan sent a memo to Rick Berger, their supervisor on the school-to-work project, stating that his assistance was no longer needed.[185] A copy of the memo was given to the Foundation's Executive Director, Christine Loehrke.[186] On January 29, 1996, upon learning of Loehrke's displeasure with their memo, Borgs and Hasan wrote another memo addressed to Loehrke, wherein they attempted to explain the contentions made in the initial correspondence.[187] This memo criticized Berger's contribution to the program and listed specific incidents where, in the opinions of Borgs and Hasan, Berger had acted inappropriately.[188]

Two days later, Loehrke approached Borgs and instructed him to meet with her and Berger.[189] Borgs told Loehrke that he was not comfortable meeting alone with Loehrke and Berger.[190] Borgs asked if he could meet with just Loehrke; she declined.[191] He then asked if Hasan could be present at the

182. In re Epilepsy Foundation, Nos. 8-CA-28169 and 8-CA-28264, 2000 WL 967066 (N.L.R.B. Jul. 10, 2000).

183. *See supra* note 181 and accompanying text.

184. *Epilepsy Foundation*, 2000 WL 967066, at *1

185. *Id.* The memo read:

> Mr. Jim Troxell and Dr. Bob Fraser have continued to provide supervisory input pertaining to service delivery and the research component of the study. During the past several months, Ms. Christine Loehrke has also provided input and assistance to the NIDRR School-to-Work Project.
>
> As mentioned during earlier discussions (albeit brief) with you, both Dr. Ashraful Hasan and Mr. Arnis Borgs reiterate that your supervision of the program operations performed by them is not required.
>
> Your input to the NIDRR project in the past is appreciated. At this stage, the major area which has to be addressed deals with outreach. Only support staff assistance is needed in this regard.

Id. at *1 n.7.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Epilepsy Foundation*, 2000 WL 967066, at *2.

190. Contributing also to his uneasiness was the fact that in 1995 Borgs had been interrogated and disciplined for discussing salary information with other employees. *Id.* at *2 n.10.

191. *Id.*

meeting; Loehrke again declined.[192] When Borgs continued to refuse to meet, he was discharged.[193]

Loehrke later wrote in Borgs' subsequent termination letter that his refusal to attend the meeting constituted gross insubordination.[194]

B. The Discharge of Borgs[195]

The ALJ found that under the holding in *DuPont II*, the employer was under no obligation to grant Borgs' request that Hasan be present at the meeting with Loehrke,[196] and as such, the ALJ found that the Company's discharge of Borgs did not violate Section 8(a)(1) of the Act.[197] Although the Board acknowledged that the ALJ's determination was correctly construed from relevant Board precedent, the Board found the precedent to be inconsistent with the Supreme Court's *Weingarten* decision, and with the underlying purposes of the Act.[198]

The Board's analysis started with an examination of the Supreme Court's decision in *Weingarten*.[199] The Board specifically noted that the Court's decision found that an employee's actions in seeking representation in situations of employer investigatory interviews falls under the literal wording of Section 7.[200] Thus, an employee in such a situation has the right to "engage in concerted activities for the purpose of . . . mutual aid or protection."[201]

Moreover, the Board noted the Court's reasoning that representation at investigatory interviews helps safeguard all employees against unjust punishment.[202] The Board found this notion, when coupled with the Court's

192. *Id.*

193. *Id.*

194. *Epilepsy Foundation*, 2000 WL 967066, at *2. The letter also made reference to the January 17 memo, as well as to a "'failure to build constructive work relationships with management personnel,'" and a "'resistance to accept responsibility for attempting to attain articulated performance goals.'" The letter did not refer to these other acts as examples of gross insubordination. *Id.* at *2 n.6.

195. Hasan was terminated a few months after Borgs for an incident unrelated to Borgs' termination. This Note addresses only the discharge of Borgs and his request that Hasan be present during the meeting with his supervisors.

196. *Epilepsy Foundation*, 2000 WL 967066, at *2. While noting that unionized employees enjoy the right to have a representative present at investigatory interviews, the Board noted that the ALJ held, "under current Board precedent, employees in nonunionized workplaces do not have the right to have a coworker present in similar circumstances." *Id.*

197. *Id.*

198. *Id.* "After careful consideration, however, we find that precedent to be inconsistent with the rationale articulated in the Supreme Court's *Weingarten* decision, and with the purposes of the Act." *Id.*

199. *Id.*

200. *Epilepsy Foundation*, 2000 WL 967066, at *2.

201. *Id. See also supra* note 6.

202. *Epilepsy Foundation*, 2000 WL 967066, at *3.

literal reading of the Act, illustrated that the right to representation is based on a finding that the Act affords all employees the ability to band together to address the imposition of unjust punishment.[203]

In finding that an employee's right to representation is settled in Section 7, the Board stated that the holdings in both *Sears* and *DuPont II* erroneously limited the applicability of *Weingarten* to union represented employees.[204] In reverting to the *Materials Research* holding, the Board stated: "In our view, the Board was correct in *Materials Research* to attach much significance to the fact that the Court's *Weingarten* decision found that the right was grounded in the language of Section 7 of the Act, specifically the right to engage in 'concerted activities for the purpose of mutual aid or protection.'"[205] The Board found this reasoning is equally applicable in circumstances where there is no bargaining unit. It rationalized that a coworker's presence during an investigatory interview better equips the employees to act in concert to ensure that the employer does not impose discipline unjustly.[206]

The Board in *Epilepsy Foundation* rejected the contention that their ruling would "wreak havoc" with the provisions of the Act that guarantee nonunion employers the right to deal individually with their employees.[207] While it is true that an employer is generally free to deal with nonrepresented employees on an individual basis, the Board concluded that in doing so, an employer may not interfere with an employee's efforts to exercise their Section 7 rights.[208]

Dissenting Member Brame argued that extending *Weingarten* beyond the union shop would essentially force employer's to "deal with" what is in essence a labor organization. The *Epilepsy Foundation* Board disagreed and discounted the contention that allowing this would conflict with the exclusivity principles of Section 9 of the Act.[209] Ultimately, the Board stated that this issue had been addressed by the Third Circuit in *Slaughter v. N.L.R.B.*[210]

203. *Id.*

204. *Id.*

205. *Id.* at *4. *See also supra* note 6.

206. *Epilepsy Foundation*, 2000 WL 967066, at *4. The Board found its holding effectuates the policy that "Section 7 rights are enjoyed by all employees and are in no wise [sic] dependent on union representation for their implementation." *Id*. at *4 (*quoting* Glomac Plastics, Inc., 234 N.L.R.B. 1309, 1311 (1978)).

207. *Id* at *4.

208. *Id.* (relying on Ontario Knife Co. v. N.L.R.B., 637 F.2d 840, 844-50 (2nd Cir. 1980) (holding that while an employer is generally free to deal with employees on an individual basis in the absence of a union, an employer may not interfere with the efforts of the employee to exercise his Section 7 rights by asserting a right to deal with him on an individual basis)).

209. *Id. See infra* note 232 and accompanying text. *See also supra* note 134.

210. Slaughter v. N.L.R.B., 794 F.2d 120 (3rd Cir. 1986). In *Du Pont II*, the Board rejected the argument that 'dealing with' an employer is the equivalent of 'bargaining with' the employer. *Id.* at 127 (1986). *See supra* note 169 for the *DuPont II* chronology.

The Board noted that in *Slaughter* the court found misplaced the concerns regarding the extension of *Weingarten* to nonunion settings being violative of Section 9 of the Act.[211] The *Slaughter* Board held that although the employee had a right to the presence of a coworker at the interview, the employer had no duty to bargain with the employee representative. In other words, the employer must "deal with" the employee representative but has no duty to "bargain with" the representative. As such, the fact that an employer must merely "deal with" a representative cannot be a violation of Section 9, which addresses only the issue of representation for the purpose of collective bargaining.[212]

The Board also soundly rejected the *DuPont II* Board's assertion that a coworker in a nonunion setting has no obligation or incentive to represent the interests of fellow employees and will likely not have the necessary skills with which to adequately represent employees.[213] The Board stated that such contentions were speculative at best and ignored the fact that an employee may opt to forego representation altogether when he or she believes that representation will not be helpful.[214] Further, Section 7 rights do not turn on the abilities or on the motivations of the employee representatives and should therefore not preclude employees from exercising these rights.[215]

Additionally, the *Epilepsy Foundation* Board found no merit in the *Du Pont II* conclusion that extending these rights to nonunion employees may cause these employees to lose their one and only opportunity to tell their side of the story in that the employers can opt to forego the interview completely.[216] Finding this scenario based "wholly on speculation," the Board found no reason to assume that employers would act purposefully to the detriment of the employee.[217] The Board again pointed out that the employee is not required to request coworker representation and may therefore weigh his or her options of doing so.[218]

Finally, the Board found unpersuasive the dissent's concerns that the Board's ruling would place an "unknown trip wire" on employers who are justifiably investigating employee conduct ignorant of the holding in

211. *Epilepsy Foundation*, 2000 WL 967066, at *5 (citing *Slaughter*, 794 F.2d at 128).

212. *Id.* (quoting NLRB v. Weingarten, 420 U.S. 251, 259 (1975)).

213. *Id.* at 5. *See supra* notes 177 and accompanying text.

214. *Epilepsy Foundation*, 2000 WL 967066, at *5.

215. *Id.* The Board stated that the import of Section 7 lies not with the sophistication of the representation provided but with the fact that the employee was able to exercise his Section 7 rights in requesting that representation. *Id.* at *6 n.12.

216. *Id.* at *6. *See supra* note 180 and accompanying text.

217. *Epilepsy Foundation*, 2000 WL 967066, at *6. This begs the question that if the Board firmly believes that the employer would not purposefully act to the detriment of the employee then why would an employee need representation in an investigatory interview at all?

218. *Id.*

Weingarten.[219] In addressing this concern, the Board again stated that such a contention is speculative and that regardless, an employer's ignorance of an employee's rights cannot be a justification for denying those rights to the employee.[220]

C. Dissenting Opinions

1. Member Hurtgen

The dissenting opinions by Members Hurtgen and Brame took up where Van De Water's dissent in *Materials Research* left off.[221] Member Hurtgen stated that Section 7 of the Act protects an employee's right to request representation at an investigatory interview, but the Act does not require the employer to grant the request.[222] Phrasing the issue in *Epilepsy Foundation* as whether federal law forbids a nonunion employer from dealing individually with an employee during an interview with the employer, Member Hurtgen argued this question had been answered in the negative in *DuPont II*.[223]

Relying on the Court's rationale in *Weingarten*, that a union representative safeguards the interests of the entire unit, Hurtgen found as implausible the majority's extension of this right to unrepresented employees:[224] "[I]n a nonunion setting, there is no 'union representative', and there is no 'bargaining unit.' Thus, it is plain that the Court in *Weingarten* did not envisage rights to representation in a nonunion setting."[225]

219. *Id.*

220. *Id.* In reversing the trial examiner's decision, the court went a step further and retroactively applied its holding in *Epilepsy Foundation*. "We agree . . . that the Board should not reverse important legal doctrine absent compelling considerations for doing so . . . . [W]e find that such compelling considerations are present here because . . . the doctrine infringes upon the exercise of Sec. 7 rights and is inconsistent both with Supreme Court precedent and the policies of the Act." *Id.* at *4 n.8. Dissenting Member Hurtgen disagreed characterizing the Board's imposition of retribution on an employer who acted in accordance with the rules in place at the time "manifestly unjust."

221. *Id.* at *12. *See also supra* notes 145-150 and accompanying text.

222. *Epilepsy Foundation*, 2000 WL 967066, at *12.

223. *Id. See supra* notes 168-180.

224. *Epilepsy Foundation*, 2000 WL 967066, at *13. The majority refuted Hurtgen's contention that the Court's opinion in *Weingarten* speaks for itself in that it refers specifically to "the union representative whose participation [the employee] seeks" in safeguarding the interests of the "bargaining unit." The majority held that the Court's wording was representative of the facts before the Court in *Weingarten* and should not be read to mean that *Weingarten* rights extend only to unionized employees. *Id.* at *4 n.9.

225. *Id.* The difference between represented and unrepresented employees is unambiguous. Unrepresented employees may be dealt with individually with regards to terms of employment while employees represented by a union may not. The majority's decision, Hurtgen argued, eliminated this bright line. *Id.*

Hurtgen found that the employer has the unequivocal right to weigh the benefit of having a coworker present at an investigatory interview.[226] If an employer decides that the coworker's presence will not help the interview process, he is not legally obligated to grant the request.[227] Likewise, an employer has the unfettered right to dispense with the interview entirely. If that determination is made, Hurtgen argued the government has no business contradicting that decision.[228] By doing so in *Epilepsy Foundation*, the Board set forth an obstacle whereby "employers who are legitimately pursuing investigations of employee conduct will face an unknown trip-wire . . . ."[229] Further, because this evolution of the law will likely be unknown to most nonunion employers, the resulting violations will likely result in a wealth of litigation.[230]

2. Member Brame

In the same vein, Member Brame argued that the majority's interpretation of the Act will alter the well-established relationship between management and labor, a relationship that is grounded in the Board's case history.[231] He argued that the majority's interpretation extended representation rights to nonunion employees who were not due such rights since no bargaining unit had been elected by the employees.[232] Such an interpretation of the Act is, in Brame's view, incorrect because the scope of Section 7 rights depends on the employee's union status.[233]

Reiterating Member Hurtgen's dissenting opinion, Brame stated that nonunion employees have the right to request, but not insist upon, representation.[234] Brame, however, went further to question the majority's rationale for allowing representation in this sole situation when no right of

226. *Id.* at *14.

227. *Id.*

228. *Id*.

229. *Epilepsy Foundation*, 2000 WL 967066, at *14.

230. *Id.* Hurtgen prolifically stated, "The workplace has become a garden of litigation and the Board is adding another cause of action to flower therein, but hiding in the weeds." *Id. See also* Susan J. McGolrick, *Employee Rights: Attorneys Disagree About Wisdom of N.L.R.B. Extending Weingarten*, Daily Lab. Rep. (BNA) No. 152, at C-1 (Aug. 7, 2000) (stating that the extension of these rights to nonunion employees is more of a concern for smaller employers who do have regular legal counsel and could be "tripped up" not knowing they are violating the statute).

231. *Epilepsy Foundation*, 2000 WL 967066, at *16. Brame, in a customarily lengthy dissent, offers an extensive recitation of Board precedent on the issue of extending *Weingarten* rights to nonunion employees. *Id.* at *16-19.

232. *Id.* at *16.

233. *Id. See also supra* notes 159-163.

234. *Epilepsy Foundation*, 2000 WL 967066, at *28.

representation attaches to meetings held to discuss other terms and conditions of employment.[235]

The majority responded to this concern by stating that in *Weingarten*, the Court addressed only the specific right of representation in investigatory interviews.[236] As such, other employment situations were not "encompassed within the *Weingarten* rationale" and not before the Board.[237] Brame asserted that the majority avoided this issue because there is no rational reason to extend Weingarten rights to nonunion employees for one type of meeting and not another.[238]

Assuming, *arguendo*, that the majority's interpretation was found to be a permissible one, Brame posited that its holding is not the best alternative.[239] Like Member Hurtgen, Member Brame placed significant reliance on the effectiveness of coworker representation in the absence of a certified union.[240] While a union representative can assist both the employer and the employee at an investigatory interview, a coworker representative will not likely provide much assistance.[241] Brame attributes this to the fact that union representatives are usually accustomed to attending fact-finding meetings and may, in some cases, have formal training in advocacy, whereas a coworker representative will likely have no experience at all.[242]

The majority discounted Hurtgen and Brame's concerns regarding the adequacy of representation by a coworker representative as being "wholly speculative."[243] Brame countered this contention by alleging that "it seems more speculative . . . to assume that a lone individual, selected on the spur of the moment, will advance the interests of the unit."[244] Indeed, Brame points out that under the majority's holding an employee is free to choose any coworker to act as a representative, including someone involved in the dispute.[245]

235. *Id.*

236. *Id.* at *4 n.11.

237. *Id.* at *28 n.94. It is clear from Brame's opinion that he views this response as an artful dodge. "[The majority's] argument does not even begin to answer the question posed." *Id.*

238. *Id.* Van De Water noted as much when he observed that the Board's holding in *Materials Research* would not require the employer the grant an employee's request for a coworker's presence when the employer wished to discuss such matters as pay or workings hours. *Id.* at 23.

239. *Epilepsy Foundation*, 2000 WL 967066, at *29.

240. *Id. See also* Materials Research, 262 N.L.R.B. 1010, 1021 (1982).

241. *Epilepsy Foundation*, 2000 WL 967066, at *29.

242. *Id.*

243. *Id.* at *5.

244. *Id.*

245. Such was the case in *Epilepsy Foundation*, where employee Borgs requested the presence of Hasan, the co-author of the letter for which the meeting was being called to discuss. *Id.* at *2.

In conclusion, Brame summarized his position by stating that the factors relied upon to support the Court's decision in *Weingarten* are not present in a nonunion environment. As such, nonunion employers should not be burdened with the presence of an employee representative that will add little, if anything, to the process.[246] Further, Brame maintained that "the NLRB [sic] itself forbids this result" in that it burdens the nonunion employer with the responsibility to "recognize a representative in a specific, limited, and apparently arbitrary situation on an employer that is otherwise free to deal with employees individually."[247]

IV. WHERE THE BOARD WAS COMING FROM AND WHERE IT MAY BE GOING

The 1990s were a difficult time for the Board. High member turnover, long vacancies and budget cuts resulted in enormous backlogs and delays in decision-making.[248] In total, there were fourteen members during the Clinton Administration making up eight Clinton Boards.[249] Added to the Board's high turnover rate is the fact that with the exception of eleven months between November 1997 and December 1999, the Board did not function with five confirmed members.[250]

A. Overruling Precedent

The revolving door at the N.L.R.B. makes any attempt at analyzing the Board's decisional record onerous. One statistic more conspicuous than others, however, is the fact that the Board overturned long-standing precedent in twenty-three cases since Truesdale became Chairman in December 1998.[251] Reversals are not new to the Board. Truesdale was quick to point out that the Board's record in 1998 was substantially lower than the Board's all-time high of forty reversals that occurred in 1984-85.[252] Understandably, Truesdale's

246. *Epilepsy Foundation*, 2000 WL 967066, at *30.

247. *Id.*

248. *See* Wilma B. Liebman & Peter J. Hurtgen, *The Clinton Board(s): A Partial Look From Within*, 16 LAB. LAW. 43, 44 (2000); *see also* Susan J. McGolrick, *N.L.R.B.: Fox, Hurtgen Discuss Board Turnover, Backlog, Changes in Modern Workplace*, 1999 Daily Lab. Rep. (BNA) No. 100, at C-1 (May 25, 1999).

249. National Labor Relations Board Members, *available at* www.nlrb.gov/members.html (last visited Jan. 10, 2001). The full term of an N.L.R.B. member is five years. An individual may be chosen mid-term, but only for the remainder of the predecessor's remaining term. A member may also serve a recess appointment holding membership on the Board only until the end of the next session of the Senate. *See* 29 U.S.C. § 153(a) (1994). *See also* Liebman & Hurtgen, *supra* note 248, at 43.

250. *See* Andrew M. Kramer, *The Clinton Labor Board: Difficult Times For A Management Representative*, 16 LAB. LAW. 75, 75 (2000).

251. Susan J. McGolrick, *Chairman Truesdale Plans to Keep Working Until Senate Confirms New President's Choice*, 2000 Daily Lab. Rep. (BNA) No. 222, at AA-1 (Nov. 16, 2000).

252. *Id.*

record of twenty-three is a concern.[253] Those who rely on the Board's interpretation of the Act to either administer daily labor relations or to advocate for their clients who do, are left in a minefield of ever-changing rules.[254]

The Board's willingness to overturn longstanding rules seriously undermines the credibility of the agency that is charged with proffering rules, usually through adjudication rather than traditional rulemaking.[255] The need for reasoned opinions communicating clear standards is critical if the Board is to be effective.[256] Troubling, as well, is the fact that a number of cases have resulted in split decisions.[257] The Board's failure to demonstrate a unified front on several issues leaves the door open on those issues for future reversals, or possibly judicial review.

While the general makeup of the Board can often be the cause of such an occurrence, such a convenient justification does not seem as likely, given the Board's membership at the time.[258] Indeed, the Truesdale Board, which was

253. Rep. John Boehner (R-Ohio) said as much at a hearing to discuss recent decisions by the N.L.R.B.: "One cannot look at the Board's increasing tendency to ignore long-standing labor law and fail to be concerned." *See* Susan McGolrick, *House Subcommittee Chair Questions Board Decisions Overturning Precedent*, 2000 Daily Lab. Rep. (BNA) No. 183, at A-9 (Sept. 20, 2000).

254. What seems even more troubling is the Board's inclination to impose these new rules retroactively, as was the case in *Epilepsy Foundation*. *See supra* note 220.

255. *See* National Labor Relations Board Publications, *available at* www.nlrb.gov/publications/first60yrs_entirepub.html (last visited Jan. 11, 2001).

256. *See*, Kramer *supra* note 250, at 100.

257. *See, e.g.*, Jefferson Smurfit, 331 N.L.R.B. No. 80 (2000) (Members Fox, Hurtgen, Brame participating, Member Fox dissenting) (holding that an employer has no obligation to accept a card count as proof of majority status, unless there is a clear agreement between the parties to do so); SOS Staffing Services, 331 N.L.R.B. No. 97 (2000) (Members Fox, Hurtgen, Brame participating, Member Hurtgen dissenting) (ruling that the employer violated the Act by threatening not to hire union members and terminating a union organizer); Hacienda Hotel, Inc. Gaming Corp., 331 N.L.R.B. No. 89 (2000) (Chairman Truesdale, Members Fox, Liebman, Hurtgen, Brame participating, Members Fox and Liebman dissenting) (holding that the employer did not violate the Act when it unilaterally ceased checking off union dues after the expiration of the collective bargaining agreement); Lockheed Martin Corp., 331 N.L.R.B. No. 104 (2000) (Members Hurtgen, Brame, Liebman participating, Member Liebman dissenting) (overruling the union's objections to the employer's use of e-mails in a decertification election the union lost); Family Services Agency, 331 N.L.R.B. No. 103 (2000) (Chairman Truesdale, Hurtgen, Brame, Fox, Liebman participating, Chairman Truesdale dissenting) (finding that the potential for undue influence that exists with an employer's use of a supervisor as an election observer does not arise when the supervisor serves as an observer for the union).

258. One might assume that the vast amount of reversals occurred during Gould's tumultuous chairmanship. Such was not the case. *See generally*, Joan Flynn, *"Expertness for what?": The Gould Years at the N.L.R.B. and the Irrepressible Myth of the "Independent" Agency*, 52 ADMIN. L. REV. 465 (2000). *But see* Charles B. Craver, *The Clinton Labor Board: Continuing A Tradition Of Moderation And Excellence*, 16 LAB. LAW. 123, 124 (2000) (suggesting that Gould

touted as the "most balanced Board in years,"[259] was comprised of two former union attorneys, two former management attorneys, and a long-time N.L.R.B. professional.[260] Despite the lack of obvious motive, several may nonetheless be adduced.

1. Declining Union Membership

Although the number of employees represented by unions remained relatively constant in 1999 at 16.5 million (up from 16.2 million the year before),[261] there is no question that union membership as a percentage of the number of workers has drastically declined. In 1946, 14,322,000 workers were members of labor unions; by 1956, this number had exceeded 17,000,000.[262] This represented 35% of the workforce in both 1946 and 1956.[263] In the 1960s, labor unions' growth started to slow. Many large industries that were traditionally unionized were no longer expanding or were relocating their facilities to non-union states.[264] By 1999, private sector unions represented only 9.4% of employees.[265]

was neither a radical union supporter nor management supporter, but rather an "unequivocal supporter of employee rights.").

259. *See* Rick Valliere, *N.L.R.B.: N.L.R.B. Has the Balance Required For Deciding Emerging Workplace Issues, Panel Agrees*, 2000 Daily Lab. Rep. (BNA) No. 05 at C-1 (Jan. 7, 2000).

260. Member Peter J. Hurtgen and J. Robert Brame came to the Board after careers as management advocates. Members Sarah M. Fox and Wilma B. Liebman were former union attorneys. Chairman John Truesdale has spent a majority of his career with the N.L.R.B. This balanced representation, in and of itself, is a marked change in that Board members are usually cut from two cloths, labor lawyers from management practices and government careerists. *See* Flynn, *supra* note 258, at 471. Of the twenty-six Board members appointed since 1970, eleven came from labor law private practice on the management side with twelve coming from career government employment. *Id.* at 471 n.28. Only Member Margaret Browning, who served from 1994 until her death in 1997, was appointed to the Board directly from union-side practice. *Id.* at 471 n.30. *See also N.L.R.B.: Member Margaret A. Browning Dies of Cancer at Age 46*, 1997 Daily Lab. Rep. (BNA) No. 41 at A-10 (Mar. 3, 1997). Betty Murphy, appointed in 1975, had an unusual background with a firm that represented international unions as well as management clients. Members Sarah Fox and Wilma Liebman, as previously stated, spent much of their careers as union lawyers but were working in the public sector at the time of their appointments. *Id.*

261. *See* Daniel J. Roy, *Unions: Number of Union Members Rose Slightly in 1999, but Percentage Remained Constant*, 2000 Daily Lab. Rep. (BNA) No. 13 at AA-1 (Jan. 20, 2000).

262. *See also* Charles B. Craver, *Mandatory Worker Participation is Required in a Declining Union Environment to Provide Employees With Meaningful Industrial Democracy*, 66 GEO. WASH. L. REV. 135, 136-37 (1997).

263. *Id.*

264. *Id.* at 137 (noting that many companies were migrating from the Snow Belt states to the Sun Belt areas of the South and Southwest).

265. *See* Roy, *supra* note 261.

While shrinking union percentages can be attributed to several things, the most notable is the shift in the workforce from blue to white collar.[266] The new global economy, which is powered by technology, is not as conducive to collective bargaining as were the traditional, labor-intensive manufacturing and production industries.[267] Modern employees are highly trained and highly skilled and not as inclined to become union members.[268] In addition, many employers are providing personnel rules and human resource policies similar to those found in unionized environments, thus reducing further the desire of employees to join labor unions.

Market trends and employment practices are evolving significantly faster than labor laws.[269] Employers are experimenting with new workplace concepts such as telecommuting and flexible schedules. These are concepts that the framers of the Act could not have fathomed. This changing work environment may have contributed, in part, to the Board's decision to uproot existing labor policies in several decisions.

In *Boston Medical Center. Corp.*,[270] the Board reversed a twenty-three-year precedent to hold that interns and residents at the Medical Center constituted covered "employees" rather than unprotected "students."[271] The Board stated that changes in health care have made interns and residents a more critical component of providing health care in hospitals.[272] While vast changes in the medical field cannot be denied, Hurtgen's dissenting opinion

266. Jim Barlow, *Blue Collars Fading to White*, HOUSTON CHRONICLE, Mar. 8, 1992, at 1. By the year 2010, it is estimated that only 10%, and possibly as little as 5%, of the workforce will be blue collar.

267. *See* Liebman & Hurtgen, *supra* note 248, at 46.

268. *Id. See also* Barlow, *supra* note 266 (stating: "[W]orker's don't cotton to union contracts, which reward everyone in a particular job with the same salary and raises, regardless of individual effort.").

269. *See* Susan J. McGolrick, *Chairman Truesdale Plans to Keep Working Until Senate Confirms New President's Choice*, 2000 Daily Lab. Rep. (BNA) No. 222, at AA-1 (Nov. 16, 2000) (noting Member Fox's statement that in all but a few cases where precedent was overruled the Board was presented with new issues and developments). *See also* Liebman & Hurtgen, *supra* note 248, at 47 (stating that traditional notion of labor "no longer fits many of the employment relationships of the 21st century.").

270. 330 N.L.R.B. No. 30 (1999). The majority consisted of Chairman Truesdale and Members Liebman and Fox. Hurtgen and Brame dissented.

271. This decision has the potential to affect some 90,000 individuals who worked for private hospitals. *See* Michelle Amber, *Health Care Employees: N.L.R.B. Rules That Interns and Residents at Boston Medical Center are Employees*, 1999 Daily Lab. Rep. (BNA) No. 229 at AA-1 (Nov. 30, 1999).

272. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. No. 30 at *15. The Board noting that 80% of intern's time is spent caring for patients. The fact that residents and intern learn on the job does not exempt them from the Act's definition of "employee."

noted that the only thing that has changed with regards to the status of interns and residents is the make-up of the Board.[273]

Similarly, the Board expanded the definition of employee in *New York University*.[274] In this case, a unanimous Board[275] overturned its previous holdings that graduate assistants were considered students and are therefore exempt under Section 2(3) of the Act.[276] The Board's holding makes New York University the first private university in the United States to have union-represented teaching assistants.[277]

In *M.B. Sturgis, Inc.*, the Board held that employees obtained from a labor supplier, (such as a temporary employment service), may be included in the same bargaining unit as the permanent employees of the employer to which they are assigned, without the consent of the employers.[278] In so holding, the Board overruled its 1990 decision in *Lee Hospital*[279] in which it held that bargaining units that include both regular employees and temporary workers

273. *Id*. at *30. Hurtgen condemned the majority's decision, stating that an agency has the power to change its rules and policies only if there are changes in circumstances. *See* In re Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968). *See also* N.L.R.B. v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966).

274. New York University, 332 N.L.R.B. No. 111 (2000).

275. Chairman Truesdale and Members Liebman and Hurtgen took part in this decision. Hurtgen, who dissented in *Boston Medical*, distinguished the graduate teaching assistants from hospital residents and interns by noting that unlike graduate assistants, the work performed by medical residents and interns is a "necessary and fundamental part of their education." *New York University*, 332 N.L.R.B. No. 111, at *8. *See also*, Susan J. McGolrick, *Representation Elections: N.L.R.B. Adopts Regional Director's Ruling That NYU Graduate Assistants May Organize*, 2000 Daily Lab. Rep. (BNA) No. 213 at AA-1 (Nov. 2, 2000).

276. *New York University*, 332 N.L.R.B. No. 11, at *3. Section 2(3) states in relevant part: "The term 'employee' shall include any employee . . . [unless the Act explicitly states otherwise] . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual employed as an independent contractor . . . ." 29 U.S.C. § 152 (1994). The *New York University* Board held that ample evidence existed to find that graduate assistants plainly and literally fall within the meaning of "employee" as defined in Section 2(3).

277. *See* Susan J. McGolrick, *Representation Elections: N.L.R.B. Adopts Regional Director's Ruling That NYU Graduate Assistants May Organize*, 2000 Daily Lab. Rep. (BNA) No. 213 at AA-1 (Nov. 2, 2000).

278. 331 N.L.R.B. No. 173 (2000). The majority was comprised of Chairman Truesdale and Members Fox and Liebman. Brame was the lone dissenter with Hurtgen recusing himself from this case. *See* Susan J. McGolrick, *Contingent Workers: N.L.R.B. 3-1 Allows Certain Bargaining Units Including Both Temporary, Regular Workers*, 2000 Daily Lab. Rep. (BNA) No. 170 at AA-1 (Aug. 31, 2000).

279. Nos. 14-RC-11572 and 9-UC-406, 2000 WL 1274024 (N.L.R.B. Aug. 25, 2000).

are multiemployer bargaining units and require the consent of the employers.[280]

In all three of the aforementioned cases, employee's rights to organize were significantly expanded. This sudden expansion has left many commentators perplexed, if not hostile.[281] Union expansion may not be the only concern being addressed by the Board.

2. An Unresponsive Legislature

The Board's sudden propensity for disregarding its own precedent may also be in response to federal and state legislatures' failure to enact measures safeguarding employee's rights. The first such proposal was the Model Employment Termination Act (META) of 1991.[282] Drafted by Uniform Law Commissioners, META was designed to protect workers from arbitrary discharge by amending the "at will" doctrine to require discharge only for just cause.[283] The measure, which provides a definition of just cause[284] and mandates the use of arbitration for disputes,[285] has not been adopted by any state.[286]

280. In his dissent, Brame argued that such bargaining units constitute multiemployer units under Section 9(b) of the Act in that although these employees are all performing work for the same employer, they do not have the same employer. *Id.* at *32.

281. *See* Perkins Coie, *N.L.R.B. Goes On Rampage Against It's Own Precedent*, 6 OR. EMPLOYMENT L. LETTER, 7 (2000) ("Because the composition of the N.L.R.B. changes with the incumbent administration, reversals of precedent are not uncommon. Those cases illustrate the perspective of the current Board majority and how it is willing to change the rules to help unions organize. The bottom line: beware. The rules are subject to change, and the only thing that is certain is that they are likely to change in favor of unions rather than you."). *See also generally* Kramer, *supra* note 250.

282. *See* The National Conference of Commissioners on Uniform State Laws, *available at* www.nccusl.org/uniformact_summaries/uniformacts-s-meta.htm (last visited January 12, 2001).

283. *See Wrongful Discharge: Adoption of Model Termination Act 'Win-Win' Proposition, A.C.L.U. Director Says*, 1995 Daily Lab. Rep. (BNA) No. 20 at D-12 (Jan. 31, 1995) (stating that META would guarantee minimum rights against wrongful discharge while reducing potential liability for employers). For a history of the At-Will Doctrine *see* Jeanne Duquette Gorr, *The Model Employment Termination Act: Fruitful Seed or Noxious Weed?*, 31 DUQ. L. REV. 111, 112 (1992); *see also* Dawn S. Perry, *Deterring Egregious Violations Of Public Policy: A Proposed Amendment To The Model Employment Termination Act*, 66 WASH. L. REV. 915 (1992).

284. "Good cause" is defined in META as one of two things: one, the employee's inadequate or improper conduct in the performance of the job; and two, if economic or institutional goals of the employer mandate a reduction in force. *See supra* note 282.

285. *Id. See also* Perry, *supra* note 283, at 922-23.

286. *See* Perry, *supra* note 283, at 915 n.4 (noting that while not adopting META, Montana became the first and only state to legislatively prohibit wrongful discharge).

Another legislative initiative that was met with resistance was the Teamwork for Employees and Managers Act (TEAM) of 1997,[287] which would have amended Section 8(a)(2) of the Act.[288] The proposal would have given employers the ability to establish what labor opponents termed labor-management cooperative programs and what labor advocates viewed as company-dominated labor unions.[289]

President Clinton vetoed the bill,[290] saying that "rather than promoting genuine teamwork, [the bill] would undermine the system of collective bargaining that has served this country so well for many decades."[291] Clinton noted that today's labor laws allow for cooperative workplace initiatives such as the creation of quality circles, work teams and programs designed to solicit employee suggestions and criticisms regarding a variety of workplace issues.[292]

The failure of any state to pass META, and the Presidential veto of the TEAM Act may serve to reinforce the conviction that if nonunion workers are to be protected, the responsibility to do so lies with the Board.[293] Such a notion may perhaps explain the expansions of the Act promulgated by the Board.

B. The Implications of Epilepsy Foundation

1. Who, What, When and Why?

In deciding to extend *Weingarten* beyond the union sector, the *Epilepsy* Board left many questions unanswered, including who is entitled to this added protection. The Board held that any employee fearful that a meeting with management will likely result in discipline may request a coworker's presence. What about a meeting to discuss absenteeism when the employee is not subject

287. *See Employee Participation, Senate Panel Hears From Labor, Business On Passage of TEAM Act*, 1997 Daily Lab. Rep. (BNA) No. 30 at E-1 (Feb. 13, 1997); S. 295, 104th Cong. (1996).

288. Section 8(a)(2) makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization." 29 U.S.C. § 158 (1994).

289. *See Clinton Vetoes TEAM Act Despite Please For Passage*, 152 LAB. REL. REP. (BNA) 417 at D-19 (Aug. 5 1996).

290. H.R. 743, 104th Cong. (1996); S. 295, 105th Cong. (1997).

291. *Id.* The legislation had narrowly passed the House by a vote of 221-202 and by 53-43 in the Senate. This narrow margin of support was insufficient to override President Clinton's veto. *Id.*

292. *Id.* Clinton also recognized that 96% of all large employers have employee involvement teams. *Id. See also* Craver, *supra* note 262, at 142.

293. *See* Morris, *supra* note 177, at 1676 (contending that because so many more nonunion companies exist today compared to union companies, the Board's presence is more important to nonunion establishments and their employees than ever before).

to discipline at that time but may be in the future if the problem persists? Consider also a meeting to discuss a mediocre job evaluation where the employee is not going to be disciplined at that time but may be subject to disciplinary action down the line. Would these employees be within their statutory rights to refuse to meet with the employer without a coworker present?

The Board's failure to state how an employee representative is to be chosen implies that the employee is free to choose whomever they want.[294] How does an employer protect the privacy of the alleged victim and alleged harasser if one or the other demands a coworker's presence in the meeting? How is an employer to handle situations such as sexual harassment where it may be the employer's desire to interview employees separately to avoid collusion?[295] Under Title VII, the employer can be held liable for not addressing a sexual harassment complaint,[296] but under *Epilepsy Foundation*, the employer may be precluded from taking the necessary steps to remedy the problem because it cannot discover all the facts.

Other questions seemingly left open concern employer obligations. For example, is an employer required to grant paid time off to employees acting as employee representatives?[297] Should an employer have a policy for notifying their employees about these newfound rights?[298] What are the employer's obligations with regards to notifying the employee in advance that the meeting may lead to disciplinary action? Do employer's have an obligation to

294. *See* Susan J. McGolrick, *Employee Rights: Attorneys Disagree About Wisdom of N.L.R.B. Extending Weingarten*, Daily Lab. Rep. (BNA) No. 152, at C-1 (Aug. 7, 2000) (assuming that extending *Weingarten* rights to nonunion employees also means extending the same limitations. For example, employees do not have the right to insist on a coworker representative who is not present at work at the time of the meeting, they cannot bring in an attorney or any other non-employee as a representative). *See also supra* note 46 and accompanying text.

295. McGolrick, *supra* note 294, at C-1.

296. *See, e.g.*, Burlington Indus., Inc., 524 U.S. 742, 756 (1998) (noting that an employer may be liable for the existence of a hostile sexual work environment caused by another employee).

297. *See* Torzewski, *supra* note 46. The author, analyzing the dissenting opinions in *Weingarten*, notes many of these same concerns. For instance, noting that Justices Powell and Stewart's position that the majority's opinion would undoubtedly extend to nonunion settings, the author propounded a concern as to how a representative would be selected by a nonunion employee seeking representation. Employers, the author contended, would likely be required to provide new rules governing an employee's ability to leave his job area in order to provide employee representation. *Id.* at 324.

298. At this time there is no requirement that employers notify their employees of their *Weingarten* rights. *See supra* note 294 and accompanying text. *See also* ROBERT M. SCHWARTZ, THE LEGAL RIGHTS OF UNION STEWARDS 79-80 (1994) "Employers have no obligations to inform employees of their rights to union representation. *This is the union's job.*" *But see* McGolrick, *supra* note 294 (encouraging employers to notify employees of these new rights through employee handbooks or meetings as a sign of good faith on the part of the employer).

"Weingartenize" employees prior to an investigatory meeting? These questions will likely remain unanswered until the Board is presented with these issues.

2. The Board's Case Load—Here We Go Again

The failure to delineate clear guidelines in *Epilepsy Foundation* governing these types of situations will necessitate a case-by-case handling of these issues, likely resulting in future challenges reaching the Board. One must question the prudence of the Board making decisions that expand their jurisdiction even further.

"As the Board moves into 21st century, it is still trying to finish the work of the 20th century."[299] The N.L.R.B.'s backlog reached its pinnacle in 1984 when the Board had 1647 cases awaiting review.[300] As of February 1999 that number had dropped to 733 with many cases waiting over two years to be heard.[301] Member Hurtgen noted that ideally all cases should be decided within one year, barring excessively lengthy records.[302]

As an agency of limited means with a large pending backlog, it seems that the Board may be spreading itself even thinner. A valid argument may be made that the lack of Board resources does not justify denying employees their rights under the Act. It may also be argued, however, that the Board overturning long-standing precedent that results in the expansion of the Board's jurisdiction is unjust to the employees, the unions and the employers involved in the 700 cases awaiting attention by the Board.

V. CONCLUSION

The *Epilepsy Foundation* decision has the potential to extend traditional, albeit limited, union type coverage to millions of employees who have not certified a labor organization. While there is no question that Section 7 of the Act safeguards an employee's right to act in concert for mutual aid and protection, the analysis does not stop there for nonunion employees.

If these employees wish to be afforded the benefits of unionism, they may do so by certifying a union. In the absence of a union, the employer is free to deal with employees on an individual basis. These bright-line rules should not

299. Susan McGolrick, *N.L.R.B.: Fox, Hurtgen Discuss Board Turnover, Backlog, Changes in Modern Workplace*, Daily Lab. Rep. (BNA) No. 100, at C-1 (May 25, 1999).

300. John C. Truesdale, *Battling Case Backlogs at the N.L.R.B.: The Continuing Problem of Delays In Decision Making and the Clinton Board's Response*, 16 LAB. LAW. 1 (2000).

301. *Id.* at 2. An audit conducted by the executive secretary in March 1999 revealed that 74 representation cases had been pending for over two years and 72 unfair labor practice cases would be three years old by the end of 1999.

302. *See. e.g.*, Avondale Indus., 329 N.L.R.B. No. 93 (1999). *Avondale's* hearing transcript was more than 40,000 pages long, with an ALJ decision comprised of 650 pages. Truesdale, *supra* note 300, at 3.

be clouded by the Board's extension of a traditional union right to nonunion employees. By doing so, the Board has unquestionably opened a Pandora's box of arguments that other rights historically enjoyed by union members exclusively should now be extended to nonunion employees.

While it is likely that the Sixth Circuit will uphold the *Epilepsy Foundation* decision as a permissible interpretation of the Act,[303] the wisdom of doing so should be considered. Whether intentionally or not, the Board has spread its protective mantle over an enlarged population and the likely result will be an increased caseload addressing not only violations of the *Epilepsy Foundation* decision, but also numerous issues left unanswered by the *Epilepsy* Board. At a time when the Board is coming to grips with its case backlog, it seems ill-advised for the Board to take on more than it can handle.

In its sixty-fifth year, the Board has its hands full trying to apply the Act to the workplace of the new millennium. While overturning precedent may be necessary, the Board's penchant for reversing long-standing authority weakens their reputation as a cohesive agency expert in the area of labor law. This begs the question as to what extent the Board should be given deference by courts. When the only thing constant at the Board is change, both management and labor will find little guidance from Board rulings and feel little comfort relying on what may become known as "*decisions de jour*."

LADAWN L. OSTMANN*

303. Reversal on appeal may be unlikely since the Board's decision will likely be found to have drawn its essence from the Act.

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