SECTION 5

1-23-77

102
9C
24.1C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Climax Molybdenum Company
A Dvision of Amax, Inc. 1/
(Climax, Colo.)

and

Oil, Chemical And Atomic
Workers International Union,
Local 2--24420

[Case 27--CA-4270
227 NLRB No. 154
January 23, 1977]

DECISION AND ORDER

The Administrative Law Judge found that Respondent did not violate Section 8(a)(1) of the Act by refusing to permit a union representative to consult with or to interview two employees on company time prior to an investigatory meeting which the employees reasonably believed would result in disciplinary action. We do not agree.

Respondent is engaged in the mining and processing of Molybdenum at its mine in Climax, Colorado. The Union has been the collective-bargaining representative of Respondent's employees for a number of years. During this period, the Union and Respondent have entered into several collective-bargaining agreements. The most recent agreements contained provisions which provide for union representatives to be present whenever an employee is subject to an action which may affect this permanent record, or which may result in disciplinary action or discharge.

The instant proceeding arose as a result of an altercation during the afternoon of August 27, 1975, between two miners, Max Salazar and Patrick Harrison, while they were working in Respondent's Climax mine. That evening, Harrison was notified by one of the supervisors that the matter would be "straightened out" in the morning. When Salazar reported for work the following morning, he was informed by Shop Steward Dave Lewis that there was going to be an investigation into his altercation with Harrison and that the miners could get fired for what had happened. That same morning, George Egglezos, union grievance representative, had been notified by Lee Walker, foreman in charge, to come to the office by 7:30 a.m. for an investigation involving the two miners. Before the investigation started, Egglezos asked Walker if he could speak with the two miners. Walker denied the request, stating that both he and Egglezos could talk to the miners during the investigation. As a result of the meeting, the company representatives delivered an oral warning to both Harrison and Salazar.

Respondent contends that under the Supreme Court's holding in N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251 (1975), it is not required to grant a union's request to consult with an employee prior to an investigatory interview which may result in disciplinary action. Respondent also contends that

or inarticulate employee would be more prone to discuss the incident fully and accurately with his union representative without the presence of an interviewer contemplating the possibility of disciplinary action. These considerations indicate that the representative's aid in eliciting the facts can be performed better, and perhaps only, if he can consult with the employee beforehand. To preclude such advance discussion, as our colleagues would, seems to us to thwart one of the purposes approved in Weingarten. Nothing in the rationale of Weingarten suggests that, in its endorsement of the role of a "knowledgeable union representative," the Supreme Court meant to put blinders on the union representative by denying him the opportunity of learning the facts by consultation with the employee prior to the investigatory-disciplinary interview. Knowledgeability implies the very opposite. The right to representation clearly embraces the right to prior consultation.

Our colleagues argue that advance union consultation with the employees threatened with discipline may result in unions regarding "all such interviews as adversarial," contrary to this quoted admonitory language in Weingarten. Our colleagues' reliance on this language capsizes the meaning. The Court stated that "Certainly" his ["a knowledgeable union representative's"] presence need not transform the interview into an adversary contest." The greater knowledgeability acquired by prior consultation obviously does not alter the nature of the interview but only advances the factfinding process. Nor will prior consultation, as the dissent suggests, cause unions to bring "pressures to bear on an employee to withhold the facts." Apart from the wholly speculative attribution of such conduct to unions, the fact remains that a union representative so included could engage in such conduct about as effectively at the interview as in talks with the employee prior to the interview. If we had to speculate, we would guess that lack of prior consultation would strongly incline an employee representative to those obstructionist tactics as a precautionary means of protecting employees from unknown possibilities. Perhaps, all we are really suggesting is that knowlege is a better basis than ignorance for the successful carrying on of labor-management relations.

Our dissenting colleagues' final argument is that no violation of Section 8 (a) (1) occurred here, even if employees have a right to prior consultation, because the employees did not request an opportunity to confer with union representatives prior to the interview. This argument lacks merit because the collective-bargaining agreement between the parties provided for union representation at such an interview. Even if it did not, the Union must have the right to preinterview consultation with the employee in order to advise him of his rights to representation if that right is in reality to have any substance, for it is the knowledgeable representative who as a practical matter would be informed on such matters. Thus, since, in our view, the right to representation includes the right to prior consultation, the denial of this right upon the Union's request, is a denial of representation.

We find, therefore, that Respondent's refusal to permit a union representative to consult with Salazar and Harrison prior to the interview which the employees reasonably believed might result, and in fact did result, in disciplinary action, violated Section 8(a)(1) of the Act.

BNA's Labor Reporter System
DAILY LABOR REPORT
1-24-77

1-23-77

FULL TEXT
SECTION T 102

(No. 16) D : 1

DECISION OF NLRB IN CASE OF CLIMAX MOLYBDENUM COMPANY
(TEXT)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Climax Molybdenum Company
A Division Of Amax, Inc. 1/
[Climax, Colo.]

and

Oil, Chemical And Atomic
Workers International Union,
Local 2--24420

[Case 27--CA-4270
227 NLRB No. 154
January 23, 1977]

DECISION AND ORDER

On March 11, 1976, Administrative Law Judge James S. Jenson issued the attached Decision of this proceeding. Thereafter, both Respondent and General Counsel filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs 2/ and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge dismissed for lack of supporting evidence an allegation that Respondent threatened to discharge an employee if he discussed a grievance with fellow employees. We agree. 3/

The Administrative Law Judge found that Respondent did not violate Section 8(a)(1) of the Act by refusing to permit a union representative to consult with or to interview two employees on company time prior to an investigatory meeting which the employees reasonably believed would result in disciplinary action. We do not agree.

Respondent is engaged in the mining and processing of Molybdenum at its mine in Climax, Colorado. The Union has been the collective-bargaining representative of Respondent's employees for a number of years. During this period, the Union and Respondent have entered into several collective-bargaining agreements. The most recent agreements contained provisions which provide for union representatives to be present whenever an employee is subject to an action which may affect this permanent record, or which may result in disciplinary action or discharge.

- - - - -

1/ The name of the Respondent appears as amended at the hearing.

2/ Respondent requests that the General Counsel be directed to adopt discovery rules in conformity with the requirements of the Federal Rules of Civil Procedure and the Freedom of Information Act. In this instance, Respondent makes this request after related proceedings in the United States District Court for the District of Colorado were dismissed. This request is no longer material to this proceeding because the documents relative to Respondent's request were made a part of the instant proceedings. We therefore find it unnecessary to rule upon the request.

3/ There is some evidence, however, that Respondent may have threatened disciplinary action against union representatives should they successfully advise employees not to cooperate in company investigations. Since this threat was not alleged in the complaint, we do not pass on whether or not this is lawful employer conduct.

The instant proceeding arose as a result of an altercation during the afternoon of August 27, 1975, between two miners, Max Salazar and Patrick Harrison, while they were working in Respondent's Climax mine. That evening, Harrison was notified by one of the supervisors that the matter would be "straightened out" in the morning. When Salazar reported for work the following morning, he was informed by Shop Steward Dave Lewis that there was going to be an investigation into his altercation with Harrison and that the miners could get fired for what had happened. That same morning, George Egglezos, union grievance representative, had been notified by Lee Walker, foreman in charge, to come to the office by 7:30 a.m. for an investigation involving the two miners. Before the investigation started, Egglezos asked Walker if he could speak with the two miners. Walker denied the request, stating that both he and Egglezos could talk to the miners during the investigation. As a result of the meeting, the company representatives delivered an oral warning to both Harrison and Salazar.

Respondent contends that under the Supreme Court's holding in N. L. R. B. v. J. Weingarten, Inc., 420 U.S. 251 (1975), it is not required to grant a union's request to consult with an employee prior to an investigatory interview which may result in disciplinary action. Respondent also contends that Weingarten's objective was to equalize the positions of the parties in disciplinary investigations, and that to permit union consultation prior to investigatory interviews would seriously undermine that objective.

General Counsel contends that Weingarten's provision for union representation at investigatory interviews which may result in disciplinary action logically permits prior consultation with the union's representative before the representative appears. We find merit in this argument. In the instant case, the parties stipulated, and the Administrative Law Judge found, that the meeting in question was a "subsequent formal investigation" within the meaning of the third sentence in article 6 of the current collective-bargaining agreement between the parties, which reads: "A Vice-President or his designee shall be present during any subsequent formal investigation which might result in discipline or discharge." Additionally, the Respondent conceded, and the Administrative Law Judge found, that both Salazar and Harrison had reason to believe that the meeting in question might result in discipline or discharge. Further, discipline was, in fact, imposed immediately following the meeting; Respondent's representatives met immediately, decided on the discipline, and promptly recalled the other participants to inform them what it was. At that time, Salazar and Harrison received an oral warning from the company representatives.

In Weingarten, the Supreme Court upheld the Board's determination that Section 7 of the Act gives an employee the right to insist on the presence of his union representative at an interview which he reasonably believes will result in disciplinary action. The only question here is whether the employee's right to representation at an investigatory-disciplinary interview which was sustained in Weingarten includes the right of the employee to confer with the union representative before the interview.

The dissent here argues that a union representative need not be conversant with an employee's particular version of the events to represent him adequately at such a meeting, but concludes that the union representative

need only be generally knowledgeable about grievance resolution. However, the Supreme Court in Weingarten noted:

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

Surely, if a union representative is to represent effectively an employee "too fearful or inarticulate to relate accurately the incident being investigated" and is to be "knowledgeable" so that he can "assist the employer by eliciting favorable facts, and . . . getting to the bottom of the incident," these objectives can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of the events and to gain a familiarity with the facts. Additionally, a fearful or inarticulate employee would be more prone to discuss the incident fully and accurately with his union representative without the presence of an interviewer contemplating the possibility of disciplinary action. These considerations indicate that the representative's aid in eliciting the facts can be performed better, and perhaps only, if he can consult with the employee beforehand. To preclude such advance discussion, as our colleagues would, seems to us to thwart one of the purposes approved in Weingarten. Nothing in the rationale of Weingarten suggests that, in its endorsement of the role of a "knowledgeable union representative," the Supreme Court meant to put blinders on the union representative by denying him the opportunity of learning the facts by consultation with the employee prior to the investigatory-disciplinary interview. Knowledgeability implies the very opposite. The right to representation clearly embraces the right to prior consultation.

Our colleagues argue that advance union consultation with the employees threatened with discipline may result in unions regarding "all such interviews as adversarial," contrary to this quoted admonitory language in Weingarten. Our colleagues' reliance on this language capsizes the meaning. The Court stated that "Certainly, his ["a knowledgeable union representative's"] presence need not transform the interview into an adversary contest." The greater knowledgeability acquired by prior consultation obviously does not alter the nature of the interview but only advances the factfinding process. Nor will prior consultation, as the dissent suggests, cause unions to bring "pressures to bear on an employee to withhold the facts." Apart from the wholly speculative attribution of such conduct to unions, the fact remains that a union representative so included could engage in such conduct about as effectively at the interview as in talks with the employee prior to the interview. If we had to speculate, we would guess that lack of prior consultation would strongly incline an employee representative to those obstructionist tactics as a precautionary means of protecting employees from unkown possibilities. Perhaps, all we are really suggesting is that knowledge is a better basis than ignorance for the successful carrying on of labor-management relations.

Our dissenting colleagues' final argument is that no violation of Section 8 (a) (1) occurred here, even if employees have a right to prior consultation, because the employees did not request an opportunity to confer with union representatives prior to the interview. This argument lacks merit because the collective-bargaining agreement between the parties provided for union representation at such an interview. Even if it did not, the Union must have the right to preinterview consultation with the employee in order to advise him of his rights to representation if that right is in reality to have any substance, for it is the knowledgeable representative who as a practical matter would be informed on such matters. Thus, since, in our view, the right to representation includes the right to prior consultation, the denial of this right upon the Union's request, is a denial of representation.

We find, therefore, that Respondent's refusal to permit a union representative to consult with Salazar and Harrison prior to the interview which the employees reasonably believed might result, and in fact did result, in disciplinary action, violated Section 8(a) (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Climax Molybdenum Company, a Division of Amax, Inc., Climax, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to permit union representatives to consult with or interview employees prior to investigatory interviews which the employees reasonably believe will result in disciplinary action.

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

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

(a) Post at bulletin boards maintained by Respondent for dissemination of information relating to its employees copies of the attached notice marked "Appendix." 4/ Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. January 18, 1977

Betty Southard Murphy, Chairman
Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

MEMBER FANNING, concurring:

I join Chairman Murphy and Member Jenkins in finding that Respondent, by refusing to allow a union representative to consult with two employees prior to representing them at a company investigation of their work restrained and interfered with the employees' exercise of Section 7 rights in violation of Section 8(a) (1) of the Act. I do so in part for the reasons stated by them and in part for certain additional reasons which,

---

4/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

though perhaps implicit in their rationale, are, I believe, necessary to the result.

I agree with the Chairman and Member Jenkins that the right to representation which employees may claim for their mutual aid and protection when faced with an investigatory interview which they reasonably believe may result in discipline normally includes the right to prior consultation with the chosen representative so that effective representation may result.

I do not view that holding as an extension of the right recognized by the Board in the Quality Mfg., 5/ Weingarten, 6/ and Mobil 7/ decisions and affirmed by the Supreme Court in N. L. R. B. v. J. Weingarten, Inc., 420 U.S. 251 (1975); and International Ladies' Garment Workers' Union, Upper South Department, AFL-CIO v. Quality Manufacturing Company, 420 U.S. 276 (1975). The right recognized in those cases as inhering in Section 7's guarantee of the right of employees to act in concert for their mutual aid and protection was the right "to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." 8/ A representative's representation of another's interests normally requires prior consultation between them if the representative is to be able to discharge his representative function in an intelligent and effective manner. Thus, "prior consultation" is not something different than, nor superior to, the act of representation itself; it is simply an aspect of that function which enables the representative to fulfill his role.

Nor do I believe the dissenters are correct in their charge that recognition of the role that prior consultation plays in the representative function will create an imbalance in the relationships of those participating in the investigatory interview.

Instead, I believe that prior consultation will normally facilitate expeditious and equitable resolution of the matter under investigation. Aside from that consideration, however, inclusion of the right to prior consultation with the representative as part of the right to act in concert does not place the employer at a disadvantage vis-a-vis the union or the employee. For, just as the employer is free to refuse the employee's request for representation, he may refuse the request for prior consultation and allow the employee to determine whether he will participate or refrain from participating in the investigatory interview without such representation. If the employee refrains, the employer is then free to determine his course of action on the basis of other information. He is not entitled to discipline the employee or to compel him to attend the investigatory interview without such representation. 9/ Moreover, it makes no difference whether the request for prior consultation comes from the employee requesting representation or from the union representative furnishing the representation requested. In either case, denial of the request is a denial of the right of employees to engage in concerted action for mutual aid and protection, as is clear from a reading of the Supreme Court's decision in Quality Manufacturing Co., supra. There, the Court affirmed, as in accordance with the principles of its Weingarten decision, the Board's finding that union chairladies insisting on their right to be present at an investigatory interview at the request of an employee were themselves engaging in a protected concerted activity. Accordingly, the Court held that discipline visited upon them for so insisting violated Section 8(a)(1). Here, although no discipline was imposed upon the union agents or the employees for requesting prior consultation, Respondent denied the request and insisted that the meeting go forward without it, thereby interfering with its employees' exercise of Section 7 rights.

Dated, Washington, D.C. January 18, 1977

John H. Fanning, Member
NATIONAL LABOR RELATIONS BOARD

MEMBERS PENELLO AND WALTHER, dissenting:

We disagree with the majority's finding that Respondent violated Section 8(a)(1) of the Act by refusing to permit a union representative to consult with two employees, on company time, prior to an investigatory interview which the employees reasonably believed would result in discipline. In our judgment our colleagues, in reversing the Administrative Law Judge, have unwarrantedly expanded the Supreme Court's holding in N. L. R. B. v. J. Weingarten, Inc., 420 U.S. 251 (1975).

On August 27, 1974, 10/ two miners employed by Respondent had an altercation in one of Respondent's mines. The employees, Salazar and Harrison, were subsequently informed by Shift Supervisor German that an investigation would be conducted on the following day. The next morning, pursuant to the collective-bargaining agreement between Respondent and the Union, 11/ Respondent notified Union Vice President Designee Egglezos and Shop Steward Lewis that an investigation was to be held in Respondent's office prior to the start of the shift. While the men, including Salazar, Harrison, Egglezos, and Lewis waited to proceed to the office, Egglezos asked Respondent's foreman, Walker, if he could talk to Salazar and Harrison prior to the meeting. Walker replied, "No way. I haven't talked to these two people. We can both talk to them together in the investigation. We will have ample opportunity."

At the meeting one of the company representatives stated that the purpose of the meeting was to investigate the facts surrounding the altercation. Egglezos then objected to the meeting stating that it was "illegal." He then told Salazar and Harrison that "they didn't have to say anything if they didn't want to." However, both employees chose to relate their versions of what had happened the previous day. While Egglezos declined to ask questions, he interjected several times to rephrase Salazar's and Harrison's answers and to tell the two men that they did not have to

---

5/ Quality Manufacturing Company, 195 NLRB 197 (1972).

6/ J. Weingarten, Inc., 202 NLRB 446 (1973).

7/ Mobil Oil Corporation, 196 NLRB 1052 (1972).

8/ N. L. R. B. v. Weingarten, Inc. supra at 256.

9/ Respondent was not free to reject the request for prior consultation in this case because the parties' collective-bargaining agreement provided for representation by union representatives at "formal investigations" held prior to imposition of discipline. Whether those provisions be read as memorializing the employees' Sec. 7 rights to refuse to participate in such investigation without representation or as recognizing the obligation of the Union to furnish employees the representation it owes them as their exclusive representative, the denial of the right of prior consultation in the circumstances of this case constituted a denial of the representation the employees were entitled to claim and the Union obligated to give.

10/ All dates hereafter are in 1974 unless otherwise stated.

11/ The current contract contains a "Discharge and Discipline" section which reads, in pertinent part:

> 1. Union Representative present. When an employee is to be discharged or subjected to disciplinary action which will affect the permanent record of the employee, a Union representative or Shop Steward shall be present when the action is taken. The Union agrees that a Shop Steward or Union representative will be available for each crew. A Vice-President or his designee shall be present during any subsequent formal investigation which might result in discipline or discharge.

answer specific questions. 12/ After everyone had given his version of what had transpired on the previous day between Salazar and Harrison, the company representatives held a brief caucus to determine the appropriate action. Shortly thereafter, the company representatives delivered verbal warnings to the two men. Both men were apparently pleased to have received only such disciplinary action. No grievances were filed concerning the matter.

Our colleagues, relying on Weingarten, supra, conclude that Respondent's refusal to permit Egglezos to consult with Salazar and Harrison prior to the meeting was violative of Section 8 (a) (1). In so finding, however, the majority has misapplied the Court's holding in that case.

In Weingarten, the Court with great particularity enumerated what it considered the "contours and limits" as "shaped" by the Board, of the right of an employee to refuse to submit, without union representation, to an interview which he reasonably fears may result in discipline:

> First, the right inheres in §7's guarantee of the right of employees to act in concert for mutual aid and protection.
>
> * * *
>
> Second, the right arises only in situations where the employee requests representation. In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.
>
> Third, the employee's right to request representation . . . in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. . .
>
> * * *
>
> Fourth, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his reprsentative, or having no interview and forgoing any benefits that might be derived from one . . .
>
> * * *
>
> Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. . . "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who have knowledge of them . . . The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." . . . 13/

In approving the Board's construction of Section 7 rights in this area, the Court at no time indicated that encompassed within such rights was a right to consultation between an employee and his union representative prior to an investigatory interview. Our colleagues, however, extrapolate from the Court's opinion and find that such prior consultation is "logically" included in the right to union representation at the interview itself. It is clear to us that logic dictates the opposite conclusion. In the first place, the majority relies entirely on the Court's finding that in order for an employee to be fairly examined at an investigatory interview, "a knowledgeable union representative" must be present. The majority contends that in order for a union representative to be "knowledgeable" at the interview he must be provided with an opportunity to consult with the employee beforehand. We submit that the majority's definition of "a knowledgeable union representative" differs from that of the Court. Citing Independent Lock Co., 30 LA 744 (1958), the Court gave its definition of "a knowledgeable union representative".

> [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. [Emphasis supplied.] 14/

Thus, a union representative who is generally knowledgeable about grievance resolution--not necessarily one who is completely versed with the employee's particular version of the events which caused the investigation--is the type of representative which the employee has a right to during the interview.

Furthermore, as a matter of policy, the majority's extension of Weingarten to include a right to prior consultation with union representatives strikes us as unsound. Thus, we note, as did the Administrative Law Judge, that the Court in Weingarten contemplated the purpose of an investigatory interview as developing the facts fully and that the Court's holding was designed to establish a balance between employee rights to assure that such an interview would not be used by an employer as a vehicle to create a one-sided case in support of imposing disciplinary action. In this regard, the Court, in discussing the benefits to be derived from the presence of a union representative at an investigatory interview, perceived the representative's role as follows:

> A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. [Emphasis supplied.] 15/

Our colleagues, in creating a right to prior consultation with union representatives, now establish an imbalance in favor, not of the employee, but of the union which, as is the case here, may view all such interviews as adversarial and which may be bent on bringing pressures to bear on an employee to withhold the facts. While that is not to say that all unions may seize upon the opportunity for prior consultation with such designs, the fact remains that the Union here had such an avowed purpose, thereby exposing the potential for abuse of such a right. It seems evident to us that the majority's holding today fosters such abuse and, ultimately, will lead to the disuse of investigatory interviews.

12/ Egglezos admitted that it is union policy to encourage employees to refuse to cooperate in providing information or answering questions during company investigations and that the Union believes that an employee should not talk about a fellow union member or tell what happened and then be disciplined for it. He also acknowledged that a union representative had recently walked out of an investigatory meeting when an employee insisted on telling her story. Further, Shop Steward Lewis stated that he felt that an investigatory interview was similar to a criminal proceeding.

13/ 420 U.S. at 256-260.

14/ Id. at 262.

15/ Id. at 263.

Finally, even assuming arguendo that a statutory right to prior consultation may be fairly inferred from Weingarten, we would not find a violation of such a right in the circumstances of the instant case. Thus, the Court in Weingarten held that the Section 7 right to have a union representative present during an investigatory interview is not absolute and unqualified. In this regard, the Court stressed that the right is vested in the employee, as distinguished from his union representative, holding that before a union representative may intervene, the employee must request his presence and the employer must consent to the request. It further emphasized that the employee may choose to forgo his right and proceed with the interview without a union representative present.

Significantly, in the instant case neither Salazar nor Harrison requested an opportunity to confer with union representatives prior to the scheduled interview, nor did they at any time during and after the interview indicate that they considered such prior consultation desirable or necessary. Rather, it was only the Union which sought such prior consultation. Our colleagues merely gloss over the Court's express holding that the Section 7 rights in this area are of a qualified nature. By so doing, they have created a right in a union which, should it be found to exist, clearly belongs to employees and which the employees themselves, as here, may choose to forgo. We cannot, as our colleagues so readily do, infer the existence of a Section 7 right from the Court's Weingarten opinion, while simultaneously disregarding the Court's express limitations on such rights set forth in that same case. Accordingly, we would find, contrary to our colleagues, that Respondent has not violated any Section 7 rights of the employees herein by denying the Union's request for prior consultation, and we would dismiss the complaint in its entirety.

Dated, Washington, D.C. January 18, 1977

John A. Penello, Member
Peter D. Walther, Member
NATIONAL LABOR RELATIONS BOARD

-- End of Text --

-- End of Section D --