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NLRB v. WEINGARTEN, INC.

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD v. J. WEINGARTEN, INC., No. 73-1363, February 19, 1975.

LABOR MANAGEMENT RELATIONS ACT

--Union representation at investigatory interview - 50.728 - 52.2537

NLRB properly found that employer violated Section 8(a) (1) of LMRA by denying employee's request that union representative be present at investigatory interview which employee reasonably believed might result in disciplinary action. (1) NLRB's holding is permissible construction of Section 7 of Act, since action of employee seeking assistance of union representative in confrontation with employer "clearly falls within literal wording" of Section 7 that employees have right to engage in "concerted activities for . . . mutual aid or protection"; (2) this is true even though employee alone may have immediate stake in outcome, since employee seeks "aid or protection" against perceived threat to his employment security, and union representative is safeguarding interests of entire bargaining unit by exercising vigilence to insure that employer does not engage in practice of imposing punishment unjustly; (3) requiring lone employee to attend such an interview perpetuates inequality Act was designed to eliminate and bars recourse to safeguards of Act provided to redress imbalance of economic power between labor and management; (4) it is immaterial that earlier Board decisions might be interpreted as not requiring union representation in such situations; (5) it is within province of NLRB, rather than courts, to determine if "need" exists for such representation in light of changing industrial practices and Board's experience in dealing with labor relations; (6) Board's construction is in full harmony with actual industrial practice.

* * * * *

On writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit (84 LRRM 2436, 485 F.2d 1135). Reversed.

Patrick Hardin, Associate General Counsel (Robert H. Bork, Solicitor General, Peter G. Nash, General Counsel, John S. Irving, Deputy General Counsel, Norton J. Come, Deputy Associate General Counsel, and Linda Sher, with him on brief), for petitioner.

Neil Martin, Houston, Tex. (Fulbright & Crooker, Houston, Tex., of counsel), for respondent.

Milton Smith and Richard Berman, Washington, D.C., and Jerry Kronenberg (Borovsky, Ehrlich & Kronenberg), Chicago, Ill. (Cole, Zylstra & Raywid, Washington, D.C., of counsel) filed brief for Chamber of Commerce of the United States, as amicus curlae, seeking affirmance.

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Full Text of Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

The National Labor Relations Board held in this case that respondent employer's denial of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of § 8(a) (1) of the National Labor Relations Act, because it interfered with, restrained and coerced the individual right of the employee, protected by § 7 of the Act, "to engage in . . . concerted activities for . . . mutual aid or protection. . . ." 202 NLRB 446, 82 LRRM 1559 (1973). The Court of Appeals for the Fifth Circuit held that this was an impermissible construction of § 7 and refused to enforce the Board's order that directed respondent to cease and desist from requiring any employee to take part in an investigatory interview without union representation if the employee requests representation and resonably fears disciplinary action. 485 F.2d 1135, 84 LRRM 2436 (1973). We granted certiorari and set the case for oral argument with No. 73-765, ILGWU v. Quality Mfg. Co. et al., post, p. _____, 88 LRRM 2698, 416 U.S. 969 (1974). We reverse.

I. Respondent operates a chain of some 100 retail stores with lunch counters at some, and so-called lobby food operations at others, dispensing food to takeout or eat on the premises. Respondent's sales personnel are represented for collective-bargaining purposes by Retail Clerks Union, Local 455. Leura Collins, one of the sales personnel, worked at the lunch counter at Store No. 2 from 1961 to 1970 when she was transferred to the lobby operation at Store No. 98. Respondent maintains a companywide security department staffed by "Loss Prevention Specialists" who work undercover in all stores to guard against loss from shoplifting and employee dishonesty. In June 1972, "Spcialist" Hardy, without the knowledge of the Store Manager, spent two days observing the lobby operation at Store No. 98 investigating a report that Collins was taking money from a cash register. When Hardy's surveillance of Collins at work turned up no evidence to support the report, Hardy disclosed his presence to the Store Manager and reported that he could find nothing wrong. The Store Manager then told him that a fellow lobby employee of Collins had just reported that Collins had purchased a box of chicken that sold for $2.98, but had placed only $1.00 in the cash register. Collins was summoned to an interview with Specialist Hardy and the Store Manager, and Hardy questioned her. The Board found that several times during the questioning she asked the Store Manager to call the union shop steward or some other union representative to the interview, and that her requests were denied. Collins admitted that she had purchased some chicken, a loaf of bread and some cake which she said she paid for and donated to her church for a church dinner. She explained that she purchased four pieces of chicken for which the price was $1.00, but that because the lobby department was out of the small size boxes in which such purchases were usually packaged she put the chicken into a larger box normally used for packaging larger quantities. Specialist Hardy left the interview to check Collins' explanation with the fellow employee who had reported Collins. This employee confirmed that the lobby department had run out of small boxes

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and also said that she did not know how many peices of chicken Collins had put in the larger box. Specialist Hardy returned to the interview, told Collins that her explanation had checked out, that he was sorry if he had inconvenienced her, and that the matter was closed.

Collins thereupon burst into tears and blurted out that the only thing she had ever gotten from the store without paying for it was her free lunch. This revelation surprised the Store Manager and Hardy because, although free lunches had been provided at Store No. 2 when Collins worked at the lunch counter there, company policy was not to provide free lunches at stores operating lobby departments. In consequence, the Store Manager and Specialist Hardy closely interrogated Collins about violations of the policy in the lobby department at Store No. 98. Collins again asked that shop steward be called to the interview, but the Store Manager denied her request. Based on her answers to his questions, Specialist Hardy prepared a written statement which included a computation that Collins owed the store approximately $160 for lunches. Collins refused to sign the statement. The Board found that Collins, as well as most, if not all, employees in the lobby department of Store No. 98, including the manager of that department, took lunch from the lobby without paying for it, apparently because no contrary policy was ever made known to them. Indeed, when Company headquarters advised Specialist Hardy by telephone during the interview that headquarters itself was uncertain whether the policy against providing free lunches at lobby departments was in effect at Store No. 98, he terminated his interrogation of Collins. The Store Manager asked Collins not to discuss the matter with anyone because he considered it a private matter between her and the Company, of no concern to others. Collins, however, reported the details of the interview fully to her shop steward and other union representatives, and this unfair labor practice proceeding resulted.

II. The Board's construction that § 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline was announced in its Decision and Order of January 28, 1972, in Quality Mfg. Co., 195 NLRB 195, 79 LRRM 1269, considered in No. 73-765, ILGWU v. Quality Mfg. Co. et al., post, p. _____, 88 LRRM 2698. In its opinions in that case and in Mobil Oil Corp., 196 NLRB 1052, 80 LRRM 1188, decided May 12, 1972, three months later, the Board shaped the contours and limits of the statutory right.

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

"An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for 'mutual aid and protection.' The denial of this right has a reasonable tendency to interfere with, restrain and coerce employees in violation of Section 8(a) (1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act

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collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action." 196 NLRB, supra, at 1052, 80 LRRM, at 119.

Second, the right arises only in situations where the employee requests representation. In other words, the employee may forego his guaranteed right and, if he prefers participate in an interview unaccompanied by his union representative.

Third, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. Thus the Board stated in Quality:

"We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative." 195 NLRB, supra, at 199, 79 LRRM, at 1271.

Fourth, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one. As stated in Mobil Oil:

"The employer may, if he wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources." 196 NLRB, supra, at 1052, 80 LRRM, at 1191.

The Board explain in Quality

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

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such additional facts as might have been gleaned through the interview." 195 NLRB, supra, at 198-199, 79 LRRM, at 1271.

Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. The Board said in Mobil, "we are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations." 196 NLRB, supra, at 1052 n. 3, 80 LRRM, at 1191. The Board thus adhered to its decisions distinguishing between disciplinary and investigatory interviews, imposing a mandatory affirmative obligation to meet with the union representative only in the case of the disciplinary interview. Texaco, Inc., 168 NLRB 361, 66 LRRM 1296 (1967); Chevron Oil Co., 168 NLRB 574, 66 LRRM 1353 (1967); Jacobe-Pearson Ford, 172 NLRB 594, 68 LRRM 1305 (1968). The employer has no duty to bargain with the Union representative at an investigatory interview. "The representative is present to assist the employee and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." Board's Brief, at 22.

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

The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" Mobil Oil Corp. v. NLRB, 487 F.2d 842, 846, 83 LRRM 2823, 2827 (1973). This is true even through the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The Union representative whose participation he seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.[6] The representative's presence is an assurance to other employees in the bargaining unit that they too can obtain his aid and protection if called upon to attend a like interview. Concerted activity for mutual aid or protection is therefore as present here as it was held to be in NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505-506, 10 LRRM 852 (1942), cited with approval by this Court in Houston Insulation Contractors Assn. v. NLRB, 386 U.S. 664, 668-669, 64 LRRM 2821 (1967):

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

The Board's construction plainly effectuates the most fundamental purposes of the Act. In § 1, 29 U.S.C. § 151, the Act declares that it is a goal of national labor policy to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection." To that end the Act is designed to eliminate the "inequality of bargaining power between employees . . . and employers." Ibid. Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." American Ship Building Co. v. NLRB, 380 U.S 300, 316, 58 LRRM 2672 (1965). Viewed in this light, the Board's recognition that § 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section "read in light of the mischief to be corrected and the end to be attained." NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124, 14 LRRM 614 (1944).

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

IV. The Court of Appeals rejected the Board's construction as foreclosed by that Court's decision four years earlier in Texaco, Inc. Houston Producing Division v. NLRB, 408 F.2d 142, 70 LRRM 3045 (1969), and by "a long line of Board decisions, each of which indicates--either directly or indirectly--that no union representative need be present" at an investigatory interview. 485 F.2d, at 1137, 84 LRRM, at 2438.

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

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In respect of its own precedents, the Board asserts that even though some "may be read as reaching a contrary conclusion," they should not be treated as impairing the validity of the Board's construction, because "[t]hese decisions do not reflect a considered analysis of the issue." Board's Brief, at 25. In that circumstance, and in the light of significant developments in industrial life believed by the Board to have warranted a reappraisal of the question, the Board argues that the case is one where "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed is standards on the basis of accumulating experience." IUEW v. NLRB, 366 U.S. 667, 674, 48 LRRM 2210 (1961).

We agree that its earlier precedents do not impair the validity of the Board's construction. That construction in no wise exceeds the reach of § 7, but falls well within the scope of the rights created by that section. The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making. "'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349, 31 LRRM 2237 (1953).

The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no "need" for union assistance at an investigatory interview. "While a basic purpose of section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview." 485 F.2d, supra, at 1138, 84 LRRM, at 2438-2439. It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. For the Board has the "special function of applying the general provisions of the Act to the complexities of industrial life." NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 53 LRRM 2121 (1963); Republic Aviation Corp. v. NLRB, 324, U.S. 793, 798, 16 LRRM 620 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 196-197, 8 LRRM 439 (1941), and its special competence in this field is the justification for the deference accorded its determination. American Ship Building Co. v. NLRB, 380 U.S., supra, at 316, 58 LRRM 2672. Reviewing Courts are of course not "to stand aside and rubber stamp" Board determinations that run contrary to the language or tenor of the Act, NLRB v. Brown, 380 U.S. 278, 291, 58 LRRM 2663 (1965). But the Board's construction here, while it may not be required by the Act, is at least permissible under it, and insofar as the Board's application of that meaning engages in the "difficult and delicate responsibility" of reconciling conflicting interests of labor and management, the balance struck by the Board is "subject to limited judicial review." NLRB v. Truck Driver's Union, 353, U.S. 87, 96, 39 LRRM 2603 (1957). See also

Brown, supra; Republic Aviation Corp. v. NLRB, supra. In sum, the Board has reached a fair and reasoned balance upon a question within its special competence, its newly arrived at construction of § 7 does not exceed the reach of that section, and the Board has adequately explicated the basis of its interpretation.

The statutory right confirmed today is in full harmony with acutal industrial practice. Many important collective-bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews. Even where such a right is not explicitly provided in the agreement a "well established current of arbitral authority" sustains the right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him. Chevron Chemical Co., 60 LA 1066, 1071 (1973).

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

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