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Russ Building
San Francisco

February 19, 1965

Mr. L. L. Mitchell
I.B.E.W. Local 1245
1918 Grove Street
Oakland 12, California

Dear Mitch:

This is in reply to your letter of February 17, 1965, requesting guidance with respect to the procedure to be followed when employees are called in by supervisors for questioning.

First, let me say I agree wholeheartedly with the manner in which the union handled the interrogation situation which gave rise to the present inquiry. You are quite correct that neither the N.L.R.B. nor an arbitrator could afford an effective remedy for the company's conduct. The most either could do (and then only after prolonged proceedings) would be to order the company to cease and desist from violations of the federal Act or the contract, and such an order would be of little practical value. Moreover, it is not at all clear that such an order would be forthcoming, since the law on this subject is far from clear, and since the conduct, if held to be unlawful, might be regarded as a technical violation not warranting an order. Under the circumstances, a voluntary commitment by the company should be viewed as a substantial gain.

I wish I could be as positive about the procedure to be followed by union stewards and employees in the future, but unfortunately this is an area in which legal rules are for the most part either ambiguous or non-existent, and in which the answers would have to depend upon the particular circumstances of each case. I will, however, attempt to set forth some of the guiding principles:

1. It is an unfair labor practice under federal law for an employer to question employees about concerted activities which are protected by the Act, where the questioning has a coercive purpose or where there is a background of other employer unfair labor practices. Protected activities include activities directed toward improvement of working conditions. Thus, it may have been an unfair labor practice for P.G.&E. supervisors to question an employee as to the identity of other employees who reportedly took complaints to the Division of Industrial Safety, if the purpose of the questioning was to obtain information for use in intimidating or coercing such employees, or if the circumstances of the questioning were coercive in nature.

2. Under federal law, a certified union is the exclusive bargaining representative for the unit of employees in which it is certified. This means that an employer may not bargain with individual

employees regarding terms and conditions of employment generally. It also means that, although an employer may deal with employees individually in the adjustment of individual grievances, so long as the adjustment is not inconsistent with the terms of an existing collective contract, a representative of the certified union must be given an opportunity to be present when the grievance is being adjusted. This is true whether or not the employee desires the union to be present, though if an employee refuses to proceed with the adjustment of a grievance in the absence of a union representative, he cannot lawfully be disciplined for such refusal.

On the other hand, an employer is not required by statute to admit a union representative to discussion before a grievance has arisen or before it is in the process of adjustment. The determination of what constitutes a grievance, and when it is being adjusted, is obviously a difficult matter. Following are some examples from the cases:

(a) A foreman announced, in the presence of a union steward, that certain employees would be laid off but could apply for transfer to other specified classifications. Later, without the union steward being present, two of the employees expressed dissatisfaction to the foreman with the transfer arrangements, and the foreman arranged for transfer to different classifications for them. Held: the foreman "adjusted a grievance" without giving the Union opportunity to be present. Bethlehem Steel Co., 89 NLRB 341.

(b) An employee was given the choice by his foreman of accepting reclassification with a reduction in pay or transferring to another yard. The employee declined at first to answer, saying the Union would handle the matter for him, but when the foreman pressed for an answer he elected to accept the reclassification. Held: this was adjustment of a grievance. (same case)

(c) An employee was ordered by his leadman to remove some pipe from a ship and he refused, saying it was an incentive job and he wanted to talk to his shop steward. The leadman insisted that he perform the work, and refused the request. The employee appealed to the foreman, who sustained the leadman. Held: when the foreman overruled the employee's protest he was "adjusting a grievance", and his failure to give the Union an opportunity to be present was a violation. (same case)

(d) An employee was reclassified by his foreman into a lower job grade without notice to the Union. Held: since the reclassification was not "pursuant to a complaint from the employee", the incident did not involve the adjustment of a grievance, though it may have produced a grievance. (same case)

(e) In a number of cases the General Counsel has refused to issue a complaint where employees are questioned about matters which could lead to disciplinary action, but before any disciplinary action had been taken, on the ground that no grievance had yet arisen. For example: An employee reported sick on Friday; a foreman visited his home but was refused admittance; later the foreman phoned and said

the employee might not be paid for the day; when the employee returned to work he was told to see the supervisor; the employee asked that the union steward be allowed to accompany him; the supervisor refused, saying he merely wanted to verify that the employee had been ill and to determine whether disciplinary action was warranted; later that day, the employee was told that he would be paid for Friday. Held: no complaint issued. Case No. SR-2382, 52 LRRM 1181 (1962).

Similarly, the General Counsel refused to issue a complaint where an employee refused to see his foreman after failure to sign a warning slip concerning his work unless his union steward was present, because no disciplinary action was taken. Case No. K-71 (1955).

Again, a discussion between a supervisor and employees as to how work should be performed was deemed not to be a grievance conference requiring the presence of the union. Case No. 35 (1951).

Because there are so few cases in this area, and all comparatively old, they provide no clear basis for predicting action by the present General Counsel or the Board in a particular situation. We would contend for a rule which requires the presence of a union representative at any interrogation of an employee in which he is, in effect, the subject of accusation and possible disciplinary action, and certainly at any meeting at which the employee is asked to agree to some arrangement concerning his employment.

3. Apart from statutory requirements, a collective bargaining agreement may give rise to an obligation on the part of an employer to allow an accused employee the opportunity for union representation at any interrogation.

In a recent case, an employee was directed by his foreman to clean out a pit filled with stagnant water and waste metal chips, and the employee refused on the ground that such work was outside his classification. When he reported for work the next day, he found that his time card had been pulled from the rack, and he started to look for the union steward to advise as to his next step. Before he could find the steward, he was told that the superintendent wanted to see him in his office. The employee refused to see the superintendent without the union steward being present, and for that refusal he was given a disciplinary lay-off. The collective bargaining agreement provided that the first step of the grievance procedure should be a discussion between the employee, the union steward, and the appropriate departmental foreman. The arbitrator held that "whenever a grievance has been filed, or whenever an employee has reasonable grounds for believing that the Company is considering disciplinary action, the employee has the right of Union representation before consenting to a conference with management." Under the circumstances, the employee was held justified in assuming that the conference had a disciplinary purpose, and therefore in refusing to attend without a union representative present. He was ordered reinstated with back pay. Valley Iron Works, 33 LA 769.

This is only one arbitrator's position, but we believe the position to be a valid one. The Local 1245 - P.G.&E. contract (Section 102.7(a)) contains language almost identical with the contract in the above case, and we would urge the same result in arbitration.

4. Since your contract calls for a first step discussion at the foreman-steward level, an employee could not insist upon a Business Representative being present for discussion with the foreman. If, however, the employee is called before a supervisor, I would think that representation by a Business Representative at that level would be appropriate.

Because the principles discussed above are so general in nature, and because so much depends upon the facts of a particular case, it would be advisable whenever time permits to check with this office before a position is taken. It may be desirable to develop test cases in order to establish what we believe to be the correct principles.

Very truly yours,

/s/ Joseph R. Grodin
Joseph R. Grodin

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