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NON-UNION WORKERS LOSE RIGHT TO REPRESENTATION IN MEETINGS WITH BOSS

by Steve Diamond

Non-union workers no longer have the right to the presence of a union representative or fellow employee in a meeting with management. This right, popularly known as the *Weingarten* right, after a 1975 U.S. Supreme Court decision, was taken away from non-union workers in a recent decision by the National Labor Relations Board. In *Sears, Roebuck and Co. and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* (274 NLRB 55), the Board held "that *Weingarten* rights are inapplicable where, as in the case before us there is no certified or recognized union." Only three years ago the Board had ruled in *Materials Research Corporation* [262 NLRB 1010 (1982)] that such employees did have the right to representation. This most recent decision, issued on February 22, 1985, is consistent with a general tendency by the Board to "whittle away at the ability of workers to organize," according to Robert Friedman, general counsel for the IUE.

The *Sears* case grew out of a complex set of unfair labor practice charges filed against the corporation by the IUE during an organizing drive at its Oklahoma City, Oklahoma Service Center in the late 1970s. Larry Ward, a service technician and a union organizer, was discharged for alleged absentee problems. During a discussion of these problems with his supervisor, Ward requested the presence of a union representative or a fellow employee as a witness. His supervisor denied the request stating that the company did not have a union and that the matter was "strictly between the Company and Ward." After a lengthy discussion of Ward's personnel record, Ward was fired. An Administrative Law Judge for the NLRB and then the Board itself sustained the firing.

Origin of Weingarten Right—The right to representation at a meeting with management where discipline may result was originally established by the U.S. Supreme Court in *NLRB v. J. Weingarten* [420 U.S. 251 (1975)] The Court argued that such a right extended from the basic provisions of the National Labor Relations Act. The Court pointed, in particular, to Section 7 of the Act which states that "Employees 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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." The Court then held that "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 Section 7."

In a logical extension of this argument, the NLRB held in 1982 that "the need of unrepresented employees to support each other through this type of conduct may well be greater than that of represented employees. . . . Correcting the relative imbalance between unrepresented employees and their employer is not achieved by forcing an employee to attend a disciplinary interview alone. To counter this imbalance, employees in a unrepresented unit must look to each other for whatever mutual aid or protection they can muster in the face of unjust or arbitrary employer action." (See *Materials Research Corporation*, 110 LRRM 1401, 1405.)

The NLRB's new *Sears* decision, made by members recently appointed by President Reagan, sidesteps the arguments made in *Materials Research*. The new Board contends, instead, that "when no union is present, the imposition of *Weingarten* rights upon employee interviews wrecks havoc with fundamental provisions of the Act. This is so because the converse of the rule that forbids individual dealing when a union is present is the rule that, when no union is present, an employer is entirely free to deal with its employees on an individual, group, or wholesale basis." The positive role of a union representative or fellow employee in a disciplinary interview is seen by the Board as an "imposition" on the rights of employers. The fundamental basis of the NLRA, originally to offer protection for workers, is now seen as offering added protection to the employers.

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The IUE has not yet decided whether to appeal the Board decision in *Sears* to the Federal Courts. If the decision stands, though, it could have a chilling effect on union organizing. Instead of allowing union activists inside a workplace to build up an organization which can begin to assist fellow workers immediately, both to defend them and to demonstrate the need for a union organization to carry out that defense effectively, the pre-election period appears frozen. All potentially disciplinary matters are to be controlled by the employer who is "free" to deal with employees as he wishes. Contrary to the argument of the Board, however, havoc may result because of this new situation. Employees will no longer be able to make a gradual transition from the initial steps of "concerted activity" to the full exercise of their collective bargaining rights during a union election and contract negotiations. Under this new situation, grievances could potentially build up without effective resolution, with employee frustration and low morale the result. The "purpose and policy" of the NLRA "to promote the full flow of commerce" may be further away than ever.

At a minimum, the Board's decision in *Sears* reverses the original intent of the Supreme Court in *Weingarten* to achieve a reasonable resolution of conflict between management and workers. The Court noted then: "The representative is present to assist the employee, and he may attempt to clarify the facts or suggest other employees who may have knowledge of them." In a follow-up decision to *Weingarten*, the Fifth Circuit Court of Appeals noted that "the *Weingarten* rule is designed to protect such 'fearful' or 'inarticulate' employees from the inadvertent results of their answers during work-related interviews." [*Lennox Industries*, 106 LRRM 2607, 2610 (1981)].

A Further Weakening of the *Weingarten* Right—In another reversal of an earlier Board decision, the NLRB declared in its December 12, 1984, *Taracorp Industries* case [273 NLRB 54 (1984)] that an employee who is denied *Weingarten* representation and is then fired for just cause is no longer entitled to a "make-whole" remedy, i.e., reinstatement with back pay. The Board contended that such a remedy is "bad policy" and that their reversal "will serve the interests of the entire labor-management community." The pre-Reagan Board had held precisely the opposite in *Kraft Foods* [251 NLRB 598 (1980)]. There the Board found that a "make-whole" remedy was appropriate even where management fired an employee for just cause. The current Board still agrees, however, that if an employee can prove that he was fired for exercising his *Weingarten* right and not for just cause that he is entitled to a "make-whole" remedy.

-- Steve Diamond

A detailed discussion of the original Weingarten decision and follow-up decisions by federal courts is the subject of a pocket-sized pamphlet by this author, entitled "Hey, the Boss Just Called Me Into the Office. . . ." It outlines the case and discusses tactics which union representatives can use in making effective use of this right to representation. Copies are available from the Labor Center, 2521 Channing Way, University of California, Berkeley CA 94720. Single copies are 75 cents, 10 or more copies are 50 cents each. For further information call 415/642-0323.

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