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The Differing Nature of the *Weingarten* Right to Union Representation in the NLRB and Arbitral Forums

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The Differing Nature of the *Weingarten* Right to Union Representation in the NLRB and Arbitral Forums

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I. INTRODUCTION

In *NLRB v. J. Weingarten, Inc.*,¹ the United States Supreme Court recognized² an employee's right to union representation during an investigatory interview conducted by management when the employee reasonably believes that the interview might result in disciplinary action.³ The Court reasoned that a right to union representa-

1. 420 U.S. 251 (1975).

2. The Supreme Court enforced the NLRB's decision in *J. Weingarten, Inc.*, 202 N.L.R.B. 446, *rev'd*, 485 F.2d 1135 (5th Cir. 1973), *enforced*, 420 U.S. 251 (1975).

3. *Weingarten*, 420 U.S. at 260. Specifically, the Supreme Court held that an employer restrained employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act when it denied an employee's request to have her union representative accompany her to an investigatory interview by management where the employee reasonably feared that discipline might ensue from the interview. *Id.* Interference with a worker's exercise of his Section 7 rights is a violation of Section 8(a)(1) of the NLRA, which provides that it is an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. National Labor Relations (Wagner) Act, ch. 372, § 8(a)(1), 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(1) (1982 & Supp. IV 1986)). Section 7 of the NLRA provides: "Employees shall have the right of 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" NLRA § 7, 29 U.S.C. § 157.

It bears note at the outset that the *Weingarten* right to union representation at investigatory interviews does not create a right to an investigatory interview. *Weingarten*, 420 U.S. at 258-59. This may be problematic. In *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), the United States Supreme Court made a cryptic reference to the illegality of a discharge (and therefore, by implication, any disciplinary action), when that discharge has a chilling effect on concerted activities for mutual aid or protection. Justice Brennan, writing for the majority, commented in a footnote:

tion at an investigatory interview flowed from Section 7 of the National Labor Relations Act ("NLRA" or "Act"), which grants employees the right to engage in activities for mutual aid or protection.⁴ The Court thus viewed the *Weingarten* right as a collective right, intended to benefit the entire bargaining unit by preventing an employer from unjustly penalizing members of the collective. Justice Brennan, writing for the majority, explained:

[T]hough 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.⁵

The Court's *Weingarten* decision, however, left three key ques-

[An] employer commits an unfair labor practice if he or she "interfere[s] with, [or] restrain[s]" concerted activity. It is possible, therefore, for an employer to commit an unfair labor practice by discharging an employee who is not himself involved in concerted activity, [or presumably and analogously, who is discharged for "cause,"] but whose actions are related to other employees' concerted activities in such a manner as to render his discharge an *interference or restraint* on those activities.

Id. at 833 n.10 (emphasis added).

Assuming that by "interference or restraint," Justice Brennan meant a deterrent effect on the exercise of activities for mutual aid or protection, it is possible that Justice Brennan's footnote could apply to the *Weingarten* right in certain instances. If, for example, an employer were to adopt a blanket policy of foregoing investigatory interviews every time employees invoked their *Weingarten* right, and employees perceived a benefit associated with investigatory interviews, those employees might forego their *Weingarten* right to gain an interview. Those employees would thus have been "interfered with" and "restrained from" the exercise of a protected concerted activity, namely seeking a *Weingarten* representative, in violation of Section 8(a)(1) of the NLRA. What bars the application of footnote 10 in *City Disposal* in the *Weingarten* context, however, is that under *Weingarten*, there exists no employee right to the investigatory interview in the first instance. Thus, there is an underlying tension between Justice Brennan's *Weingarten* opinion on the one side, and Section 8(a)(1) and Justice Brennan's comments in *City Disposal* at footnote 10 on the other.

4. *Weingarten*, 420 U.S. at 260.

5. *Id.* This quoted language, taken alone, can be interpreted to show that the Court intended to grant labor an entitlement designed to benefit both individual employees and the collective as a unit. The statutory forums of the Board and the courts, however, have eschewed this expansive vision. See generally *infra* notes 45-60 & 62-75 and accompanying text. But see note 61.

The statutory forums instead have viewed the *Weingarten* right as intended for the sole benefit of the collective. Following this collectivist vision, the statutory forums developed *Weingarten* to enable members of the collective to engage in activities for mutual aid or protection. See *supra* note 3. Because allowing members of the collective to engage in activities for mutual aid or protection is the remedial purpose of Section 7 of the NLRA, the notion of the *Weingarten* right as being remedial in nature is inextricably intertwined with the concept of the right as being collectively held.

tions unanswered. First, because the employer in *Weingarten* had taken no disciplinary action, the Court's opinion did not determine the scope of remedies available to an employee whose *Weingarten* right is violated during the process of being discharged or otherwise disciplined. Second, the Court failed to address whether the *Weingarten* right was among those rights that a union could bargain away.⁶ Finally, because *Weingarten* involved an employee who was a union member, the Court left undecided whether the right to representation would apply to non-union employees.⁷ In *Weingarten*'s wake, the National Labor Relations Board ("NLRB" or "Board") struggled with these issues as it developed the nature and contours of the statutory *Weingarten* right,⁸ thus shaping the manner in which unions and employers handle daily confrontations between individual employees and their supervisors. The union's role in such confrontations is especially significant because a union's ability to intervene on the employee's behalf might influence the outcome of the confrontation for the employee.

Industrial arbitrators had long recognized the right to union representation at investigatory interviews before the Supreme Court handed down its *Weingarten* decision.⁹ Unlike the statutory forums of the Board and the courts, arbitrators have tended to perceive the *Weingarten* right as one designed to protect individual employees. This perception is evidenced by the fact that arbitrators have generally granted individual employees subjected to a *Weingarten* violation some type of substantive remedy, whereas the statutory forums of the Board and the courts do not.¹⁰

This Comment explores the difference in perspective on the

6. The right may be bargained away. See *infra* notes 56-64 and accompanying text.

7. The Board regards the right to representation at investigatory interviews as existing only for union employees and that a union representative, and not "just any" fellow employee, is the only allowable representative. *E.I. duPont de Nemours & Co.*, 289 N.L.R.B. 81 (1988). For a discussion of the *duPont* line of cases, see *infra* notes 65-75 and accompanying text.

8. Throughout this Comment, the term "*Weingarten* right" refers both to the statutory entitlement found to exist under Section 7 of the NLRA and to the right found by arbitrators either expressly in collective bargaining agreements, or implicitly, flowing from arbitral notions of fundamental fairness and just cause. See *infra* note 82. This method of classification is in accord with arbitral practice.

9. See *infra* note 41.

10. *Maui Pineapple Co.*, 86 Lab. Arb. (BNA) 907 (1986) (Tsukiyama, Arb.); *Kraft, Inc.*, 82 Lab. Arb. (BNA) 360 (1984) (Denson, Arb.). Throughout this Comment, the term "substantive remedy" refers to a remedy that gives relief to the grieving employee, as opposed to a "prospective remedy" such as a cease and desist order. Generally, substantive relief consists of some combination of reinstatement and award of back pay, either with or without any loss of seniority for time lost during the pendency and resolution of the grievance arbitration or NLRB unfair labor practice hearing. Also, the record of the alleged work rule violation may be stricken from the employee's personnel file.

Weingarten right as between industrial arbitrators and the statutory forums of the NLRB and the courts. It also considers the consequences for employees when alleged violations of the right are adjudicated as a contract grievance in an arbitration proceeding rather than before the NLRB as a statutory unfair labor practice. Section II of this Comment outlines the early arbitral development of the *Weingarten* right. Section III examines the three aforementioned issues left unresolved by *Weingarten*, and inquires into whether the statutory forums of the Board and the courts have resolved these issues by adopting a conception of *Weingarten* as a remedial right, intending to benefit the collective.¹¹ Section IV identifies factors arbitrators tend to consider in fashioning a remedy for a *Weingarten* violation, to discover whether the arbitral conception of the right substantially resembles the Board's. Finally, in Section V, this Comment concludes that there is an essential difference between the manner in which arbitrators and the statutory forums of the Board and the courts conceive the *Weingarten* right. Specifically, arbitrators view the right as a bargained-for part of the collective agreement between management and labor, meaningful in and of itself, while the Board perceives the right as a component of an extensive statutory scheme that exists only to enable employees to engage in activities for mutual aid or protection.

II. PRE-*WEINGARTEN* ARBITRATIONS

Arbitrators recognized the right of employees to have union representation at investigatory interviews at least a decade before the United States Supreme Court decided in *Weingarten* that union members had such a right under Section 7 of the NLRA.¹² This Section describes the analytical process by which these pre-*Weingarten* arbitrations validated the right of employees to have union representation at investigatory interviews.

11. Justice Brennan wrote that the *Weingarten* right to union representation "effectuates the most fundamental purposes of the [National Labor Relations] Act." *Weingarten*, 420 U.S. at 261. Justice Brennan continued:

[T]he 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."

Id. at 261-62. Thus, the right does not appear from its statutory underpinnings to have the protection of an employee's personal rights as a policy purpose.

12. Food Employers Council, Inc., 40 Lab. Arb. (BNA) 1100 (1963) (McNaughton, Arb.); Acrods Co., 39 Lab. Arb. (BNA) 785 (1962) (Teple, Arb.); Valley Iron Works, 33 Lab. Arb. (BNA) 769 (1960) (Anderson, Arb.).

*Valley Iron Works*¹³ is typical of early arbitrations upholding what later became the *Weingarten* right. These early arbitrations tended not to consider the underlying employee misconduct that necessitated the interview in the first instance, but rather the issues of whether an employee's insistence on union representation constituted punishable insubordination, and whether an employer was contractually bound to allow such representation. The *Valley Iron Works* arbitrator held that the employer had violated the governing collective bargaining agreement by not allowing an employee to have his union representative accompany him to an interview with a supervisor.¹⁴ The arbitrator concluded that the collective bargaining agreement dictated a make-whole remedy,¹⁵ without considering the alleged employee misconduct that, in the employer's opinion, necessitated the interview in the first instance.¹⁶ As mentioned previously, in this and

13. 33 Lab. Arb. (BNA) 769 (1960) (Anderson, Arb.).

14. *Id.* at 770. In *Valley Iron Works*, an employee had been directed by his foreman to clean out a refuse pit. *Id.* The employee refused to do so and told his foreman that such work was not within his job description. The foreman then left to check the employee's job classification and returned to tell the employee for the second time to clean out the pit. The employee again refused. The foreman then informed the employee that he would have to advise his superiors of the employee's refusal. *Id.* During this second conversation, a union committeeman was present. The committeeman informed the employee that if he should be called into the next-level supervisor's office he would accompany the employee there. When the employee arrived at work the following evening, his foreman informed him that the next-level supervisor wished to see him in his office. The employee insisted that his union representative, the committeeman, also attend the meeting. The next-level supervisor refused this request. The employee then declined to participate in the meeting. He was told by the supervisor to punch out, and he did so. The union then filed a grievance, but no settlement was reached in the matter for almost one month. *Id.* During this time, management took the position that the grievant had quit his job. Several days later, management called the employee back to his job. The employee returned, and was formally reprimanded for his insubordinate attitude in refusing to meet with the supervisor. *Id.*

15. See *infra* note 21. The "make-whole" remedy is the most extensive remedy available to arbitrators or the Board. With a make-whole remedy, the employee receives all of the back pay which has accrued to him while he was precluded from working, is reinstated without any loss of seniority, and has no reference to the incident appearing in his personnel file. Alternatively, the arbitrator may grant the subject employee any lesser combination of these elements of a make-whole remedy.

16. The arbitrator wrote:

In reaching this conclusion the arbitrator in no way wishes to approve of [the employee's] refusal to carry out his foreman's directive to clean out the refuse pit. He [throughout his opinion, the arbitrator refers to himself in the third person] makes no determination as to whether [the employee] was justified in refusing to comply with his foreman's order on the basis that cleaning the pit was not a part of his job duties. He further makes no determination as to whether [the employee] could be disciplined for such refusal. He does observe that arbitrators have usually held that an employee must comply with a foreman's order, if he can reasonably do so, and thereafter may file a grievance.

Valley Iron Works, 33 Lab. Arb. (BNA) at 771-72.

other pre-*Weingarten* arbitrations,¹⁷ neither the union nor the employer perceived the alleged underlying employee misconduct to be a relevant issue. In these early arbitrations, the parties presented the arbitrator solely with the question of whether clauses in collective bargaining agreements allowing for union representation during grievance procedures were to be interpreted as allowing for representation at investigatory interviews, or whether such representation was appropriate only at a later stage in the process.¹⁸

In *Valley Iron Works*, the employer argued that if union representation preceded the commencement of any formal grievance procedure, "the effective management of the plant would be imperiled by constant conferences in which Union representatives could be requested to participate."¹⁹ The employer's argument failed to persuade the arbitrator, however, who held that the violation of the employee's right to union representation at the investigatory interview made the reprimand and suspension of the employee improper.²⁰ The arbitrator concluded that, in accordance with the terms of the agreement,²¹ the employee should be made whole.

The terms of the collective bargaining agreement in *Valley Iron*

17. *E.g.*, Food Employers Council, 40 Lab. Arb. (BNA) 1100 (1963) (McNaughton, Arb.); Acrods Co., 39 Lab. Arb. (BNA) 785 (1962) (Teple, Arb.).

18. In these early arbitrations, management contended that the appropriate time for union representation was after a formal grievance had been filed by the employee. Food Employers Council, Inc., 40 Lab. Arb. (BNA) 1100 (1963) (McNaughton, Arb.); Acrods Co., 39 Lab. Arb. (BNA) 785 (1962) (Teple, Arb.); *Valley Iron Works*, 33 Lab. Arb. (BNA) 769 (1960) (Anderson, Arb.). In reaching the same conclusion as the arbitrators, namely that allowing representation at subsequent stages in the grievance process may be too late, Justice Brennan wrote in *Weingarten* that this assertion by management:

suggests . . . that union representation at this stage [prior to any formal grievance] 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, [management] 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.

Weingarten, 420 U.S. at 263-64.

19. *Valley Iron Works*, 33 Lab. Arb. (BNA) at 771.

20. *Id.* at 772.

21. The collective bargaining agreement read in pertinent part:

ARTICLE IX DISTRIBUTION OF WORK-DISCHARGE

.....

2. No employee will be discharged or suspended without just and sufficient cause. If, after proper and thorough investigation which is to be conducted as expeditiously as possible and requested immediately after the discharge or suspension, it is determined that an employee has been unjustly discharged or suspended, he shall be reinstated with full pay for all time lost. The investigation

Works, however, did not specifically dictate that the denial of union representation at the investigatory interview made the suspension and reprimand improper.²² The arbitrator reasonably could have determined that the employee's alleged misconduct was an aggravating circumstance and fashioned a lesser remedy. In subsequent arbitrations, many arbitrators employed such a balancing procedure.²³ In those arbitrations, however, the employer presented the employee's underlying misconduct to the arbitrator as an issue.

Acrods Co.,²⁴ another early arbitration, reached the same result as did *Valley Iron Works* on similar facts. The *Acrods* employee refused on two occasions to accompany his supervisor to the supervisor's office for a discussion of his job performance unless the employee's union representative was present. The employer argued at arbitration that the employee's refusal to go to his supervisor's office unless accompanied by his union representative was insubordination.²⁵ Arguing that the employee had not disobeyed a work order, the union contended that he had only asked to exercise a right that the collective bargaining agreement guaranteed.²⁶ As with *Valley Iron Works*, neither the employer nor the union brought the alleged underlying employee misconduct to the arbitrator as an issue for his consideration. The arbitrator rejected the employer's contention that the employee's refusal constituted insubordination, and instead held that the employee's reasonable fear that the meeting would result in discipline justified his refusal to attend.²⁷ Both *Acrods* and *Valley*

referred to shall be conducted by representatives of the Company and the International Association of Machinists.

Id. at 771.

22. The collective bargaining agreement read in pertinent part:

ARTICLE XIV GRIEVANCES

1. Should differences arise between the Company and its employees, either individually or collectively, an earnest effort shall be made to settle any such differences at the earliest possible time by the use of the following procedure:

(a) The employee or employees together with the Union Steward in the department where the grievance occurred, shall discuss the matter with the appropriate departmental foremen and attempt to settle the grievance.

Id.

23. See, e.g., *infra* notes 95-105 and accompanying text.

24. 39 Lab. Arb. (BNA) 784 (1962) (Teple, Arb.).

25. *Id.* at 787.

26. *Id.* The collective bargaining agreement defined a grievance as "any difference arising between management and a Union member." *Id.* The collective bargaining agreement provided that employees would have access to their union steward in grievance proceedings.

27. *Id.* at 788-89. The arbitrator wrote:

In determining the fundamental nature of the order and the propriety of the employee's refusal, the test is not what the Company may have had in mind [as to whether to discipline the employee], which could have been known only to the Company officials themselves, but what appearance was presented to the

Iron Works thus framed the *Weingarten* issue in terms of whether the employee's insistence upon union representation constituted insubordination, and both arbitrators held that such insistence was not insubordination.

Food Employers Council, Inc.,²⁸ another pre-*Weingarten* arbitration, dealt with the *Weingarten* issue under the same "insubordination" paradigm. In *Food Employers Council*, a supervisor called the employee into his office to discuss the employee's sub-standard job performance, as well as to have the employee sign a statement that indicated he was on notice of possible termination unless the perceived deficiency was corrected.²⁹ The employee had requested that the supervisor permit the employee's union steward to attend the meeting, but the supervisor refused, stating that the employee could meet with his shop steward afterwards.³⁰ The employee abruptly left to get his steward, and as a result was subsequently terminated for insubordination.³¹

The *Food Employers Council* arbitrator sought to resolve two related issues: First, under what circumstances was an employee entitled to bring his shop steward to a conference; and second, was the employee guilty of insubordination when he left his supervisor's office where the interview was to have taken place, after the supervisor had denied him access to his union representative.³² In addressing the first issue, the arbitrator balanced management's right to direct its work force against the union's prerogative to represent its bargaining unit so that the bargaining unit may receive the benefits of the collective bargaining agreement. To strike this balance, the arbitrator concluded that, although it would be unfair to management to grant employees the right to union representation at "every conference, regardless of its nature," the collective bargaining agreement nonetheless permitted employees to call in their shop stewards when an issue existed regarding job performance.³³ The arbitrator's interpretation of the collective bargaining agreement demonstrated a fair amount of

employee concerned and the conclusion which he might reasonably draw therefrom.

Id. at 789.

28. 40 Lab. Arb. (BNA) 1100 (1963) (McNaughton, Arb.).

29. *Id.* at 1101.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* The collective bargaining agreement stated in pertinent part: "The employee shall first attempt to resolve the issue with his immediate supervisor, or other representative designated by the employer, requesting the cooperation of the union steward if he so desires."
Id.

solicitude for the union's position, in that his analysis incorporated a broad interpretation of the word "discipline," and allowed union representation in situations in which a supervisor gives a disciplinary warning.³⁴

In addressing the issue of insubordination, *Food Employers Council*, like *Acrods* and *Valley Iron Works*, did not consider the underlying employee misconduct. Again, the arbitrator did not make the employee whole to redress a "procedural" violation,³⁵ but instead merely addressed the issue of whether the employee's insubordination constituted a violation of the collective bargaining agreement.³⁶ These early arbitrations³⁷ would comport with the Board's current conception of the *Weingarten* right.³⁸ Both arbitrators and the NLRB would grant a make-whole remedy to the employee on the facts of these early arbitration proceedings. They would do so, however, for different reasons: An arbitrator would find that the employer had taken disciplinary action without just cause,³⁹ while the Board would find an unfair labor practice because an employee had been denied his statutory right to engage in activities for the purpose of mutual aid or protection.⁴⁰

34. The arbitrator accepted the union's contention that "a disciplinary warning is a form of discipline," as opposed to management's contention that "the action had not been completed and, therefore, a grievance had not arisen which would have allowed the employee to insist on his shop steward's participation." *Id.* at 1101-02.

35. A "procedural" violation occurs where an employer does not allow the employee union representation and then disciplines the employee not for his insistence upon union representation, but rather for his underlying misconduct. Such a violation by an employer is procedural in that the employer inflicts discipline to redress a work rule violation, and not to punish an employee for his insistence upon the procedural safeguard (the right to representation) guaranteed in the collective bargaining agreement. That the employer has a justifiable reason to discipline the employee, which would not be questioned but for the denial of the procedural safeguard, is what makes the violation procedural.

36. *Food Employers Council*, 40 Lab. Arb. (BNA) at 1103.

37. Later arbitrations tend to go further, and give a remedy to employees who are not disciplined for their insistence on union representation, but rather for the underlying misconduct that necessitated the interview. *Maui Pineapple Co.*, 86 Lab. Arb. (BNA) 907 (1986) (Tsukiyama, Arb.); *Kraft, Inc.*, 82 Lab. Arb. (BNA) 360 (1984) (Denson, Arb.); *South Cent. Bell Tel. Co.*, 71 Lab. Arb. (BNA) 174 (1978) (Wolff, Arb.); *Combustion Eng'g, Inc.*, 67 Lab. Arb. (BNA) 349 (1976) (Clarke, Arb.).

38. The NLRB grants a make-whole remedy only when employers take disciplinary action to punish employees for requesting union representation. If, however, the discipline is for the underlying misconduct, the Board will grant no remedy to an employee for a *Weingarten* violation. *Taracorp Indus., Div. of Taracorp Inc.*, 273 N.L.R.B. 221 (1984). For a discussion of *Taracorp*, see *infra* notes 48-55 and accompanying text.

39. See, e.g., *Food Employers Council, Inc.*, 40 Lab. Arb. (BNA) 1100 (1963) (McNaughton, Arb.); *Acrods Co.*, 39 Lab. Arb. (BNA) 784 (1962) (Teple, Arb.); *Valley Iron Works*, 33 Lab. Arb. (BNA) 769 (1960) (Anderson, Arb.). The just cause concept has a profound influence on the arbitral process. See, e.g., *infra* note 82.

40. See *supra* note 3.

On another level, however, these pre-*Weingarten* arbitrators and the statutory forums of the Board and the courts, in sanctioning the *Weingarten* right, were pursuing a similar objective: Both forums sought to allow unions to represent members of the bargaining unit in their individual confrontations with management. The motivation for this action, however, differs between the two forums.

III. THE EVOLUTION OF THE STATUTORY ENTITLEMENT

In *Weingarten*, the Supreme Court recognized that the right to union representation was well established in industrial grievance arbitration.⁴¹ The Court did not, however, ground the right in arbitral precedent.⁴² Instead, the Court grounded the right in Section 7 of the NLRA and thus deemed the right to be a means to an end—the means being union representation of employees at employer-conducted investigatory interviews, and the end being employees banding together for mutual aid or protection.

The Court's decision in *Weingarten* left open three issues. First, the Court failed to address whether substantive remedies⁴³ for *Weingarten* violations were inappropriate because of the remedial nature of the NLRA. Second, the Court left unresolved whether a union may bargain away the *Weingarten* right. Finally, the Court failed to clarify whether the *Weingarten* right would apply to non-union employees. The difference between how the statutory forums and arbitrators resolved these three issues highlights the essential difference in their conception of the right. By answering each of the three issues in the affirmative, the statutory forums have limited the scope of the *Weingarten* right to promoting its limited, remedial purpose under the NLRA.⁴⁴

41. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975). The Court cited several arbitrations recognizing the right including *Acrods Co.*, 39 Lab. Arb. (BNA) 784 (1962) (Teple, Arb.), and *Valley Iron Works*, 33 Lab. Arb. (BNA) 769 (1960) (Anderson, Arb.). *Weingarten*, 420 U.S. at 268 n.12.

42. Instead, the Court grounded the right in Section 7 of the National Labor Relations Act, which provides in pertinent part that employers may not interfere with, or restrain employees from, "engag[ing] in . . . concerted activities for the purpose of mutual aid or protection." *Weingarten*, 420 U.S. at 260 (citing *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847 (7th Cir. 1973)).

43. "Substantive remedies" can be defined as a remedy granted to an employee whose rights were violated, as opposed to a cease and desist order. The issue of substantive remedies only arose in the context of an employee who was disciplined for his underlying misconduct, and not for his insistence upon union representation. In situations that involve an employee disciplined for his insistence upon union representation, the Board's position on remedies remains to make the employee whole. *Taracorp Indus., Div. of Taracorp Inc.*, 273 N.L.R.B. 221 (1984).

44. See *supra* note 3.

A. Remedies

The Board's choice of remedies for *Weingarten* violations reveals much about its evolving conception of the right. The Board originally held that employees were, under certain circumstances,⁴⁵ entitled to remedies that included reinstatement and backpay for a *Weingarten* violation.⁴⁶ The awarding of such substantive remedies, however, indicates not merely a remedial right, but a right significant in itself.⁴⁷ Recognizing this, the Board, in *Taracorp Industries, Division of Taracorp Inc.*,⁴⁸ substantially narrowed the range of circumstances under which it would grant such substantive remedies. Conversely, industrial arbitrators tend to be more free in granting substantive remedies for *Weingarten* violations, which is in accord with their conception of the right as significant in itself.

In *Taracorp*,⁴⁹ the Board held that substantive remedies for *Weingarten* violations are inappropriate when an employer committed a *Weingarten* violation, but the employee was disciplined or discharged for cause.⁵⁰ Instead, the extent of the available remedy for

45. Kraft Foods, Inc., 251 N.L.R.B. 598 (1980), *overruled*, Taracorp Indus., Div. of Taracorp Inc., 273 N.L.R.B. 221 (1984).

46. See *infra* note 50.

47. See *infra* text accompanying note 50.

48. 273 N.L.R.B. 221 (1984).

49. *Id.*

50. See *infra* note 55. The Board's original position was that, under certain circumstances, the make-whole remedy was applicable in situations in which *Weingarten* violations occurred, even if the employee had been disciplined or discharged "for cause." Kraft Foods, Inc., 251 N.L.R.B. 598, 598 (1980), *overruled*, Taracorp Indus., Div. of Taracorp Inc., 273 N.L.R.B. 221 (1984). In *Kraft Foods*, the subject employee was discharged for his involvement in a fist fight following a forklift collision. *Id.* The *Kraft Foods* Board held that it would not grant a make-whole remedy. It applied the following rule: When an employee proves that his *Weingarten* right has been violated, and that he was subsequently disciplined for conduct that was the subject of the interview, the burden of proof will shift to the employer to rebut "the *prima facie* showing of the appropriateness of a make-whole remedy." *Id.* Hence, the employer met its burden by showing that its decision to discipline (discharge) the employee was not based upon information obtained at the violative interview; and hence, a cease and desist order was the only available remedy. *Id.*

The Administrative Law Judge in *Kraft Foods* wrote that the investigatory taint rendered unlawful that which may have otherwise been a lawful discharge for cause." *Id.* at 604. The term "investigatory taint" is reminiscent of *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court held that "the atmosphere and environment of incommunicado interrogation as it exists today is inherently intimidating and works to undermine the [Fifth Amendment] privilege against self-incrimination," and that therefore, before questioning an arrested suspect, police must inform that suspect of his right to remain silent and his right to counsel. *Id.* at 445-58, 467-73. The Court held that any such admissions made by a suspect where the suspect had not been informed of these rights was "tainted" and therefore inadmissible. *Id.* at 479.

Interviews that violate *Weingarten* are not conceptually analogous to *Miranda* violations. The constitutional protection against self-incrimination is an entitlement that belongs to each

the violation should be a cease and desist order, issued by the Board, and posted by the employer. The Board in *Taracorp*, reasoned that to grant a substantive remedy for employees who were disciplined or discharged for cause would be to grant them a windfall because they were disciplined not for their insistence on the statutory right to representation, but for their underlying misconduct that necessitated the interview in the first instance.⁵¹ The Board also noted that granting a substantive remedy would tend to create situations that encouraged "the transformation of investigatory interviews into formalized adversary proceedings,"⁵² something the Supreme Court had indicated in *Weingarten* was undesirable.⁵³

In addition, the Board in *Taracorp* concluded that to allow a make-whole remedy would deviate from the remedial nature of the NLRA.⁵⁴ The Board, in justifying this determination, cited the remedial restriction in Section 10(c) of the NLRA, which provides that: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause."⁵⁵ Thus, the Board viewed the *Weingarten*

individual citizen. *Miranda* rights are designed to safeguard each individual citizen against oppressive governmental power. As such, *Miranda* rights exist for their own sake. Because the *Weingarten* right exists only as part of a distinct statutory scheme to facilitate organized labor, the concept of "taint" in the *Miranda* sense misses the mark. Keeping this in mind, it is not surprising that the Board overruled *Kraft Foods* in *Taracorp*.

51. *Taracorp*, 273 N.L.R.B. at 223.

52. *Id.* (footnote omitted).

53. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 261 (1975).

54. In this regard, the Board noted that it:

possesses a certain latitude in fashioning remedies for unfair labor practices. Our discretion, however, is not absolute. Thus, we are bound by certain specific and general restrictions that limit our remedial authority. This is particularly true regarding our authority to impose a remedy of reinstatement and backpay. The clearest example of when a make-whole remedy of reinstatement and backpay is appropriate is where an employee is discharged or disciplined for engaging in union or other protected concerted activities.

Taracorp, 273 N.L.R.B. at 222.

55. The Board went on to distinguish between "cause" as Section 10(c) contemplates, and "just cause" as arbitrators use the term. Chairman Dotson wrote:

It is important to distinguish between the term "cause" as it appears in Sec. 10(c) and the term "just cause," which is a term of art traditionally applied by arbitrators in interpreting collective-bargaining agreements. Just cause encompasses principles such as the law of the shop, fundamental fairness, and related arbitral doctrines. Cause, in the context of Sec. 10(c), effectively means the absence of a prohibited reason. For under our Act: "Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom but with one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which [the Act] forbids."

right as merely a means of facilitating employees banding together for mutual aid or protection, and not as an individual entitlement.

B. *Waiveability*

Because the NLRB, in enforcing the National Labor Relations Act, seeks primarily to create an environment in which employees may band together and select a bargaining representative that will negotiate the terms and conditions of employment,⁵⁶ it follows that a collective bargaining representative should be able to bargain away the *Weingarten* right during the course of contract negotiations with management. This is because once employees have been able to band together for mutual aid or protection, and have reached the collective bargaining stage, the purpose served by the *Weingarten* right has been fulfilled.⁵⁷ To enforce the right in situations in which it had been waived, therefore, would be beyond the scope of the Act, unless the Board determined that when the right had been waived, employees could no longer band together for mutual aid or protection. The Board, however, has made no such determination.

In *Prudential Insurance Co. of America v. NLRB*,⁵⁸ the United States Court of Appeals for the Fifth Circuit held that a collective bargaining representative could bargain away the *Weingarten* right.⁵⁹ The Fifth Circuit stated:

Since the right to representation only inheres upon the employee's request, it is clear that the employee's silence can be an effective waiver of the right. Since the individual can waive his *Weingarten* right and the Supreme Court has recognized the right of a contractual waiver for other such fundamental rights, it would appear that a contractual waiver of the *Weingarten* right is possible.⁶⁰

The Fifth Circuit recognized that although certain "individual

Id. at 222 n.8 (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956)).

Notwithstanding the import of the above-quoted language, when an employer inflicts discipline putatively in response to an employee's underlying misconduct, and a *Weingarten* violation takes place, if the employer disciplines the employee on the basis of information elicited during the course of the violative interview, one could argue that the cause-in-fact for the discipline was the *Weingarten* violation. *But cf. supra* note 50 (concept of "taint" in the *Miranda* sense is not applicable to *Weingarten* situations because of the collectively held nature of the *Weingarten* right). The "real motivating purpose," to borrow the phrase from *Columbus Marble Works, supra*, for discipline in such a scenario, however, is not retaliation for the employee's insistence on the *Weingarten* right, but rather for the underlying misconduct. Under the "real motivating purpose" formula, there would be no unfair labor practice.

56. *See* F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 419 (4th ed. 1985).

57. *See supra* note 3.

58. 661 F.2d. 398 (5th Cir. 1981).

59. *See infra* notes 61-64 and accompanying text.

60. *Prudential*, 661 F.2d at 400.

statutory rights"⁶¹ were waiveable,⁶² waiver would not be allowed "when the waived right affect[ed] the employee's right to exercise his basic choice of bargaining representative."⁶³ The only rights that cannot be forfeited, then, without negating the statutory purpose of Section 7, are those rights that focus directly on employee selection of a collective bargaining representative.⁶⁴ Because these rights are of such independent significance under the Act, they are deemed indispensable. However, the *Weingarten* right is not an independently significant, indispensable right, and thus may be traded away by unions.

C. *The Union as Providing the Sole Allowable Weingarten Representative*

In *E.I. duPont de Nemours & Co.*,⁶⁵ the NLRB held that the right to representation at investigatory interviews applies only to union employees.⁶⁶ The Board based its decision on the rationale that *Weingarten's* purpose of fostering an environment in which employees may band together for mutual aid or protection was not necessarily served by allowing *Weingarten* rights to apply in non-union situations. The Board concluded that although Section 7 could be interpreted as giving the *Weingarten* right to non-union employees, the interests of both labor and management are better served by not extending the right.⁶⁷

The *duPont* Board advanced three arguments to support its decision. First, the Board observed that union representatives seek to dis-

61. *Id.* In *Prudential*, the Board held that a union had not in fact waived the employee's *Weingarten* right. *Prudential Ins. Co. of Am.*, 251 N.L.R.B. 1591, 1592 (1980). The Fifth Circuit denied enforcement of the Board's decision, holding that the union had waived the right. *Prudential*, 661 F.2d at 401.

The Fifth Circuit termed the *Weingarten* right an "individual" right. *Id.* at 400. It based its classification on the fact that an employee may waive his *Weingarten* right simply by not invoking it. *Id.* In this sense, the *Weingarten* right may be called an individual right. *Weingarten's* true focus, however, is not on the individual, but rather the collective. See *supra* note 11.

62. The Fifth Circuit in *Prudential* cited *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1953) (union waiver of employees' right to strike), for the proposition that "individual" statutory rights may be waived by the collective bargaining representative. *Prudential*, 661 F.2d at 400-01.

63. *Id.* at 401.

64. See *supra* note 3.

65. 289 N.L.R.B. No. 81, 1987-1988 NLRB Dec. (CCH) ¶ 19,477A, at 33,718 (June 30, 1988); see Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 819-20 n.111 (1989) (criticizing the *duPont* decision).

66. In so holding, the *duPont* Board followed *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985), *rev'd on other grounds*, 794 F.2d 120 (3d Cir. 1986).

67. *duPont*, 289 N.L.R.B. No. 81, 1987-1988 NLRB Dec. (CCH) ¶ 19,477A, at 33,718 (June 30, 1988).

cover and remedy employer unfair labor practices, which may also constitute behavior in contravention of the collective bargaining agreement.⁶⁸ Thus, the Board concluded, union representatives tend to look after the interests of the entire bargaining unit.⁶⁹ Individual employees, on the other hand, simply wish to avoid any negative consequences that may result from the investigatory interviews, and usually are unconcerned with the overall welfare of the bargaining unit.⁷⁰ The *Weingarten* right, with its basis in Section 7 of the NLRA, does not have as its primary focus the individual employee who might be the subject of the interview. Allowing "regular" employees to act as *Weingarten* representatives thus would not further the statutory purpose of Section 7.⁷¹

Second, the Board noted that the Supreme Court in *Weingarten* had expressed its expectation that by allowing employees to insist on the presence of their union representative at investigatory interviews, resort to formal grievance procedures could be avoided.⁷² The union representative, the Court had surmised, could assist the parties in "getting to the bottom" of the situation at the interview itself.⁷³ The Board interpreted the Court's expectation as a fundamental aspect of *Weingarten*'s purpose and reasoned that non-union employees are unlikely to serve the purpose of issue clarification and resolution as *Weingarten* representatives.⁷⁴ Finally, the Board reasoned that non-

68. *Id.* at 33,720.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* For a counterargument to this line of reasoning, see Taracorp Industries, Division of Taracorp Inc., 273 N.L.R.B. 221 (1984).

74. *duPont*, 289 N.L.R.B. No. 81, 1987-1988 NLRB Dec. (CCH) ¶ 19,477A, at 33,720 (June 30, 1988). The *duPont* Board wrote:

The [*Weingarten*] Court also saw the presence of a union representative as serving the interest of the employer as well. Thus, it observed that a "knowledgeable union representative could assist the employer by eliciting favorable facts" that an inarticulate employee might to [sic] be too fearful or otherwise unable to mention, thereby "sav[ing] the employer production time by getting to the bottom of the incident occasioning the interview." In this regard, the Court [in *Weingarten*] viewed the "presence of the union steward . . . as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance"

Examining the foregoing considerations in a nonunion setting, we conclude that many of the useful objectives listed by the Court either are much less likely to be achieved or are irrelevant. Thus, in a nonunion setting there is no guarantee that the interests of the employees as a group would be safeguarded by the presence of a fellow employee at an investigatory interview. Unlike a union steward (or his or her proxy), a fellow employee in a nonunionized work force

union employees would not possess the expertise necessary to vindicate the collective right. The Board apparently presumed that such expertise is possessed exclusively by union stewards who are trained to represent employees at investigatory interviews.⁷⁵ In concluding that *Weingarten* applies exclusively to union employees, the Board remained faithful to its conception of *Weingarten* as an instrument for protecting labor's right to band together for mutual aid or protection, rather than as an entitlement meaningful in itself.

IV. ARBITRAL TREATMENT OF EMPLOYEES' RIGHT TO UNION REPRESENTATION AT INVESTIGATORY INTERVIEWS SINCE *WEINGARTEN*

Unlike the pre-*Weingarten* arbitrations,⁷⁶ those occurring after *Weingarten* have addressed the issue of whether an employer's denial of the *Weingarten* right would serve to mitigate or eliminate prejudice against an employee for his alleged underlying misconduct.⁷⁷ These arbitrators have in many instances considered the employer's violation as a mitigating factor for the employee.

As noted previously, arbitrators often grant substantive remedies to employees whose *Weingarten* right has been violated,⁷⁸ whereas the NLRB does not.⁷⁹ This difference in remedy reflects the distinction between the manner in which arbitrators and the Board view the nature and purpose of the *Weingarten* right. The Board views the

has no obligation to represent the interests of the entire bargaining unit. Furthermore, an employee in a nonunion work force would be much less able than a union representative to "exercis[e] vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly," as it is unlikely that such an employee would have the benefit of a framework similar to that typically established in a collective-bargaining agreement in which acts amounting to misconduct and means of dealing with them are defined. Nor would an employee in a nonunion setting be likely to have access to information as to how other employees had been dealt with in similar circumstances; whereas a union representative would typically be entitled to information from which it could be determined whether the employer was maintaining consistency and fairness in discipline.

Id. (citations and footnotes omitted).

75. See *supra* note 74.

76. See, e.g., Food Employers Council, Inc., 40 Lab. Arb. (BNA) 1100 (1963) (McNaughton, Arb.); Acrods Co., 39 Lab. Arb. (BNA) 784 (1962) (Teple, Arb.); Valley Iron Works, 33 Lab. Arb. (BNA) 769 (1960) (Anderson, Arb.).

77. See, e.g., Maui Pineapple Co., 86 Lab. Arb. (BNA) 907 (1986) (Tsukiyama, Arb.); Kraft, Inc., 82 Lab. Arb. (BNA) 360 (1984) (Denson, Arb.); South Cent. Bell Tel. Co., 71 Lab. Arb. (BNA) 174 (1978) (Wolff, Arb.); Combustion Eng'g, Inc., 67 Lab. Arb. (BNA) 349 (1976) (Clarke, Arb.).

78. See *supra* notes 76-77. For a definition of "substantive remedies," see *supra* note 10.

79. Taracorp Indus., Div. of Taracorp Inc., 273 N.L.R.B. 221 (1984).

right as remedial in nature.⁸⁰ To the Board, the *Weingarten* right is merely an instrument to allow employees to engage in activities for mutual aid or protection.⁸¹ Arbitrators, on the other hand, view the right as one that is bargained for. Arbitrators find the right to exist either as a direct provision of a collective bargaining agreement, or as an implied provision via arbitral notions of fundamental fairness and just cause.⁸² In either instance, to the arbitrator, the right exists for its own sake, and hence requires a substantive remedy. Given that arbitrators are generally willing to provide a substantive remedy to an employee whose *Weingarten* right has been violated, there remains the issue of how arbitrators determine the extent of the appropriate remedy.

In *Maui Pineapple Co.*,⁸³ the arbitrator faced a dilemma when attempting to determine an appropriate remedy for a *Weingarten* violation. One commentator has described the dilemma:

When the employer has not observed contractually mandated procedural requirements, or is found to have otherwise engaged in procedural irregularities inconsistent with a "just cause" standard, arbitrators are faced with the problem of formulating a remedy. . . .

. . . [W]hen there has been a procedural violation in a discharge or discipline case, there are three possible positions that arbitrators may adopt: (1) that unless there is strict compliance with the procedural requirements, the entire action at issue will be nullified ["fatal error"]; (2) that the requirements are of significance only where the employee can demonstrate that he has been prejudiced by failure to comply therewith; or (3) that the requirements are important, and that any failure to comply will be penalized, but that the action taken is not necessarily rendered null and

80. See *supra* note 3.

81. The statutory end that *Weingarten* pursues is enunciated in Section 8(a)(1) of the NLRA. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1); see *supra* note 3.

82. Consider the comments of the arbitrator in *Maui Pineapple Co.*, 86 Lab. Arb. (BNA) 907 (1986) (Tsukiyama, Arb.): "Even where the right of union representation is not explicitly provided in the agreement, the trend of arbitral authority regards the 'Weingarten right' as an implied requirement of procedural 'just cause' in management's disciplinary process." *Id.* at 910.

83. 86 Lab. Arb. (BNA) 907 (1986) (Tsukiyama, Arb.). The arbitrator in *Maui Pineapple* articulated this dilemma. He wrote: "An arbitral dilemma is created when an employee is found guilty of gross dischargeable misconduct but management's action disciplining for such offense is found to be deficient, flawed or in violation of contractual procedure." *Id.* at 911.

In *Maui Pineapple*, the grieving employee was terminated for sleeping on the job after having been cited by the employer with a final warning against such behavior. This employee behavior constituted the "gross dischargeable misconduct" of which the arbitrator wrote. *Id.* at 911-12. The arbitrator found, however, that the employer had denied the employee access to his union representative at the investigatory interview that took place after the employee's foreman found the employee sleeping. This denial constituted the "flawed procedure" to which the arbitrator alluded. *Id.* at 912.

void.⁸⁴

Reviewing these alternatives, the *Maui Pineapple* arbitrator reasoned:

Where the procedural violation is egregious or flagrant, the appropriate remedy might be to nullify the discharge action entirely. But where, in balance, the dischargeable misconduct is serious and heavy, established by clear, convincing proof, and free of arbitrary, capricious or discriminatory management conduct, a proper remedy may call for the application of the second and/or third position or option above-discussed.⁸⁵

Following this calculus, the arbitrator balanced two factors: The fact that the employer had used some statements made during the course of the violative interview against the fact that the arbitrator did not believe that union representation would have impacted the outcome.⁸⁶ The arbitrator concluded that, although the discharge had been for cause, the employer's denial of the employee's procedural right under the collective bargaining agreement merited punishment.⁸⁷ Accordingly, the arbitrator allowed the discharge, but awarded the grievant back pay.⁸⁸

A. *Fatal Error*

A minority of arbitrators follow the first alternative of nullifying an employer's disciplinary action when the employer has committed a *Weingarten* violation. Arbitrators who believe that redress of a *Weingarten* violation calls for the nullification of all disciplinary action presumably also believe that the due process and just cause concerns of labor cannot be met while the disciplinary action is allowed to stand.⁸⁹ If those arbitrators believed otherwise, they would instead

84. M. HILL & A. SINICROPI, REMEDIES IN ARBITRATION 91 (1981), quoted in *Maui Pineapple*, 86 Lab. Arb. (BNA) at 911-12. Alternatives (2) and (3) represent the "balancing approach." See *infra* notes 95-105 and accompanying text.

85. *Maui Pineapple*, 86 Lab. Arb. (BNA) at 912.

86. *Id.* Thus, it appears that the central concern for the *Maui Pineapple* arbitrator was whether the grievant had been prejudiced by the violation.

87. The arbitrator quoted Hill & Sinicropi:

The third approach recognizes that procedural requirements are important and that any failure to comply will be penalized, but will not thereby render the action void. . . . In order to encourage future compliance, one remedy is not to reinstate the grievant, but rather to order the employer to pay the grievant back pay from the date of the violation to the date of the award because it failed to follow the procedural requirements of the contract.

Id. (quoting M. HILL & A. SINICROPI, *supra* note 84, at 95).

88. *Id.*

89. Under the "fatal error" paradigm, the remedy for a *Weingarten* violation is to make the employee whole. For a discussion of the make-whole remedy, see *supra* note 15.

balance the underlying employee misconduct against the employer's procedural breach, as part of their effort to reconcile the opposing interests of management and labor.

The arbitrator in *Combustion Engineering, Inc.*⁹⁰ adopted the "fatal error" method of remedy selection.⁹¹ In *Combustion Engineering*, the collective bargaining agreement contained a provision that required that the agreement be construed so as to comply in all respects with the laws of the United States.⁹² The arbitrator found no language in the collective bargaining agreement that addressed the *Weingarten* issue.⁹³ The arbitrator determined that *Weingarten* required that the employee be made whole regardless of his alleged misconduct.⁹⁴

B. *The Balancing Approach*

The majority of arbitrators have not read *Weingarten* as broadly as did the *Combustion Engineering* arbitrator. Rather, most arbitrators have tried to balance concepts of "just cause," "fundamental fairness," and "industrial due process" with management's prerogative to direct its workforce. *Kraft, Inc.*⁹⁵ is an example of such an effort to reconcile the conflicting interests of the opposing parties. The *Kraft* arbitrator found that a violation of the employees' right to union representation during investigatory interviews, which was provided for in the collective bargaining agreement, was to an extent offset by the employees' refusal to submit to a body search for marijuana when the employer reasonably suspected that there had been a violation of its drug rule.⁹⁶

The *Kraft* arbitrator apparently was aware of managerial con-

90. 67 Lab. Arb. (BNA) 349 (1976) (Clarke, Arb.).

91. In *Combustion Engineering*, the employee's foreman noticed that the employee was not at his work station. *Id.* at 350. The foreman searched for the employee and eventually found him in a restroom. After some discussion between the two men, the foreman ordered the employee to accompany him to his supervisor's office. The employee demanded that his union steward be present at this discussion. His request was denied by the foreman. During the meeting between the employee, his supervisor, and his foreman, the employee was suspended pending further disciplinary action. *Id.*

92. The collective bargaining agreement read in pertinent part: "Any part of this Agreement which is or may become in violation of or in conflict with the laws of the United States . . . shall be null and void, and shall be made to conform to such laws without voiding any other part of this Agreement." *Id.* at 349-50.

93. The arbitrator, at least, cited no such language in his opinion.

94. *Combustion Eng'g*, 67 Lab. Arb. (BNA) at 352.

95. 82 Lab. Arb. (BNA) 360 (1984) (Denson, Arb.). This arbitration should not be confused with the NLRB *Kraft Foods* case, *see supra* note 50, that deals with remedies in the statutory context.

96. *Kraft*, 82 Lab. Arb. (BNA) at 365.

cerns. He wrote that "[s]upervisory orders are to be promptly complied with and not after a period of debate and deliberation by the employees."⁹⁷ The arbitrator's chosen remedy, however, indicated that arbitral notions of just cause and fundamental fairness also influenced his decision.⁹⁸ The *Kraft* arbitrator, unlike others, was not especially concerned with whether the procedural violation had in fact prejudiced the employee.⁹⁹

In *South Central Bell Telephone Co.*,¹⁰⁰ the arbitrator expressed greater concern for whether a *Weingarten* violation had prejudiced the employee. The *South Central Bell* arbitrator considered the merits of the case, and placed relatively little weight on the procedural breach by the employer when he fashioned a remedy. The arbitrator found the denial of union representation to be a breach of the collective bargaining agreement, but did not consider the breach to affect the merits of the case.¹⁰¹ The arbitrator emphasized instead that the employer, in conducting the violative interviews, could have elicited information damaging to the subject employee,¹⁰² but in fact no employee made any incriminating statements during the course of the violative interviews. The arbitrator stated that had any of the employees made incriminating statements during the violative interviews, those statements "would be regarded with skepticism and given

97. *Id.*

98. The *Kraft* arbitrator concluded: "Equity requires that the Company not be permitted to fully enforce its contractual right to discharge employees without first fully complying with the contractual due process requirements regarding representation. Based on these considerations, the appropriate penalty is a suspension without pay, rather than discharge." *Id.* at 366.

99. The *Kraft* arbitrator believed: "Whether earlier representation of the grievants would have changed the outcome of this matter is not important." *Id.*

100. 71 Lab. Arb. (BNA) 174 (1978) (Wolff, Arb.). In *South Central Bell*, several phone operators walked off the job after the office air-conditioning had been inoperative for two days. *Id.* at 175. The following day, when the employees returned to work, the company supervisor met with each of them. *Id.* Among other things, the supervisor inquired as to the reason for leaving, whether there was a concerted movement to leave, and in at least one instance, the supervisor made notes from which a statement was prepared for signature by the employee being questioned. *Id.* at 176. During the meetings, several of the employees asked to have their union representative present, but the supervisor refused their requests. *Id.*

101. *Id.* at 177.

102. Dealing with the issue of prejudice, the arbitrator wrote: "Had the employee during the interview made incriminating statements, or statements that were used in a subsequent arbitration proceeding, those statements would 'be regarded with skepticism and given weight only when other evidence corroborates their substance.'" *Id.* By coming to this conclusion, the arbitrator construed the right so as to give it practical value to employees (they cannot be disciplined or discharged based solely on incriminating statements made during violative interviews) while not interfering with management's prerogative to discharge or discipline for cause, so long as the "cause" is not provided at the violative interview.

weight only when other evidence corroborates their substance.”¹⁰³ Although the arbitrator determined that none of the employees made any incriminating statements during the violative interviews,¹⁰⁴ he warned that had any been made, “if the discipline was grounded in such statements, the discipline might well be set aside.”¹⁰⁵ The *South Central Bell* arbitrator thus was primarily concerned with whether the *Weingarten* violation had prejudiced the employee.

Kraft and *South Central Bell* are both variations on the balancing theme. These two opinions generally demonstrate what arbitrators often do when faced with the task of balancing a management violation of the collective bargaining agreement against a work rule violation by an employee. In such situations, arbitrators tend to weigh three factors in fashioning a remedy: the extent of the employer’s denial of union representation, the severity of the employee’s work rule violation, and the prejudice to the employee resulting from the employer’s denial of union representation. This balancing approach seems to be the sole manner in which arbitrators can accomplish three competing objectives: preserving management’s authority to direct its workforce, allowing the union to represent its members and enforce the collective bargaining agreement, and dispensing justice to both parties to the arbitration.

V. CONCLUSION

Industrial arbitrators and the statutory forums of the Board and the courts recognize the *Weingarten* right to union representation at investigatory or disciplinary interviews conducted by management.¹⁰⁶ The right takes on a substantially different character, however, when applied in one forum as opposed to the other. The NLRB conceives of the right as a component part of the guarantee of Section 7 of the NLRA that workers may band together for mutual aid or protection. Arbitrators perceive the right as one for which the union has bargained. As a practical matter, violations of a bargained-for right require harsher sanctions than do violations of a remedial right. This is so because when a remedial right has been violated, a prospective remedy will suffice, as the right does not exist for its own sake. The Board, as enforcer of a remedial right, is thus seeking to redress the

103. *Id.* (citing *Thrifty Drug Stores*, 50 Lab. Arb. (BNA) 1253, 1262 (1968) (Jones, Arb.)).

104. *Id.*

105. *Id.*

106. *Maui Pineapple Co.*, 86 Lab. Arb. (BNA) 907 (1986) (Tsukiyama, Arb.); *Kraft, Inc.*, 82 Lab. Arb. (BNA) 360 (1984) (Denson, Arb.); *South Cent. Bell Tel. Co.*, 71 Lab. Arb. (BNA) 174 (1978) (Wolff, Arb.); *Combustion Eng’g, Inc.*, 67 Lab. Arb. (BNA) 349 (1976) (Clarke, Arb.); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

cause of the violation, rather than its consequences to the individual employee. Managerial interference with the right of employees to band together for mutual aid or protection is the evil the statutory right seeks to eradicate. A bargained-for right, however, may be presumed to exist for its own sake.¹⁰⁷ It therefore requires redress for each individual violation.

Beyond the bargained-for nature of the *Weingarten* right as it exists in the arbitral context, notions of fundamental fairness and just cause tend to influence arbitrators toward granting a substantive remedy to employees whose *Weingarten* right has been violated. Thus, although the *Weingarten* right appears facially identical in either forum, the essential difference in the way the forums conceive of the right has produced significant practical manifestations.

STEVEN J. SILVERMAN

107. In the arbitral context, the *Weingarten* right may be presumed to exist for its own sake because it was retained by labor, when instead labor could have traded the right for some other entitlement. For a discussion of the *Weingarten* right in light of the Coase Theorem, see Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 280-82 (1987).