In the

Supreme Court of the United States

National Labor Relations Board,

Petitioner

v.

J. Weingarten, Inc.

No. 73-1363

Washington, D. C.
November 18, 1974

Pages 1 thru 41

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD, Petitioner	
v.	No. 73-1363
J. WEINGARTEN, INC.	

Washington, D. C.

Monday, November 18, 1974

The above-entitled matter came on for argument at 1:38 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

PATRICK HARDIN, ESQ., Associate General Counsel, Department of Justice, Washington, D.C. 20530
For the Petitioner

NEIL MARTIN, ESQ., 800 Bank of the Southwest Building, Houston, Texas 77002
For the Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1363, National Labor Relations Board against J. Weingarten.

Mr. Hardin, you may proceed whenever you are ready.

ORAL ARGUMENT OF PATRICK HARDIN, ESQ.,

ON BEHALF OF NATIONAL LABOR RELATIONS BOARD

MR. HARDIN: Mr. Chief Justice, and may it please the Court:

This case, like the one just argued, presents the Court with the issue of whether it is an unfair labor practice for an employer to refuse an employee's request for the presence of her union representative at an investigatory interview which the employee reasonably believes will lead to disciplinary action.

And I'd like to begin by pointing out that there are no cross-petitions in this case and that the propriety of the Labor Board and the Fifth Circuit determination that the right to union representation as a part of the right to bargain collectively arises at the point where discipline is to be imposed, is an issue not directly presented in this case.

We are here concerned with a different part of the statutory rights conferred by Section 7. Specifically,

they are the rights to act in concert for mutual aid or protection.

The board has held that that grant of statutory right which is to be distinguished from the right to act in concert for the purpose of collective bargaining, does grant to the employee the right to be represented at an investigatory interview.

I am going to state the facts of -- excuse me.

QUESTION: Mr. Hardin, it has to be - you have to say this involves engaging in concerted activities.

MR. HARDIN: Yes. There must be --

QUESTION: Not just act in concert but --

MR. HARDIN: -- concerted activities.

QUESTION: -- the statute says, "Engage in other concerted activities."

MR. HARDIN: That's correct.

QUESTION: Now, that's a little different, arguably. In other words, if you are going to rely on the statutory language, I think it is quite important that we keep our eye on what the statutory language is.

MR. HARDIN: You are quite right. You are quite right. It must be concerted activity and the Labor Board, of course, has found that when one employee stretches a hand to the other to seek that mutual aid, they are engaged in concerted activity or are seeking to do so, a

right which the board can protect.

I think that a statement of the facts will help to illustrate for the Court very clearly the value to the employee of the right which the board has recognized in this case, as it did in Quality.

J. Weingarten Company operates a chain of about 100 retail stores in the Houston, Texas area. Like most large retail and distribution enterprises, it maintains a centralized security apparatus, one of the purposes of which is to investigate suspected employee theft.

Leura Collins is an employee of J. Weingarten and has been employed since 1961 in a number of stores working lunch counters or in the lobby departments, a more sophisticated prepared food take-out arrangement.

In June of 1972, Mrs. Collins was working at store Number 98 and in June of 1972, information came to the company's attention which suggested that Mrs. Collins was engaged in dishonest activities.

The record does not disclose either the source or the nature of that information.

The company reacted to it by dispatching one of its Loss Prevention Specialists, Mr. Hardy, to conduct an investigation and on June 15, 1972, Mr. Hardy began two days of plainclothes surveillance of the operation of the lobby department of Store Number 98.

He saw nothing which indicated any evidence of wrongdoing by the employees and on the third morning, which would have been the 18th, he introduced himself to the store manager at Store Number 98, Mr. York. The two had not previously known one another and the Loss Prevention Specialist identified himself as a member of the Central Security Bureau of the employer's operation.

He reported that he had conducted an investigation in the lobby department and had found no evidence of any employee dishonesty.

The manager responded by saying, "Why, just this very morning, another employee in the lobby department reported to me that yesterday Mrs. Collins took a $3 box of fried chicken from the lobby department and put only a dollar in the till."

Well, the Loss Prevention Specialist decided to check that out. He summoned the employee who had so reported to the manager, a Mrs. Moody, and he interrogated her about the allegation that Mrs. Collins had stolen $2 worth of chicken the day before.

Mrs. Moody confirmed the story and then Mrs. Collins was summoned to an area near the manager's office. There she was confronted with the Loss Prevention Specialist from headquarters, who began to interrogate her about general acts of dishonesty.

Mrs. Collings asked if she could have the assistance or presence of her union representative and the store manager said, "No, this is a private matter between you and the company."

With respect to the questioning about the box of chicken on the preceding day, Mrs. Collins stated, "We had been out of small boxes, so I took a small, $1 quantity of chicken, put it in a larger box, paid $1 for it and left the store."

The loss prevention specialist went to check this out and he determined that, in fact, the store had been out of smaller boxes on the preceding day and that the employee who had reported on Mrs. Collins didn't know how much chicken she had put in the large box.

He went back to the interview and said the interview had terminated. Her story checks out.

At that point, Mrs. Collins became very emotional and began to cry, probably tears of relief, but at any rate, in her relief she says, "I've worked for Weingarten's for 11 years and I've never taken anything that I haven't paid for except the free lunches."

The loss prevention specialist and the manager professed to be astonished that anyone was getting free lunches at Weingarten's and they immediately resumed the interrogation.

QUESTION: Well, what is this "loss prevention specialist?" That is certainly a high-sounding title.

MR. HARDIN: That is the company's terminology, your Honor.

The -- Mrs. Collins again asked for the assistance of her union representative. She insisted that she had taken lunches because it was the practice of all the employees, including the lobby department manager, to do so and she indicated that she would not sign a statement which the loss prevention specialist was then typing by which she was to acknowledge a debt to the company of $160 for lunches which she shouldn't have eaten.

The loss prevention specialist then made some further inquiries and discovered that no one at company headquarters could say for sure that there was or was not a policy permitting free lunches at Store 98.

QUESTION: At the previous store, there clearly had been a policy.

MR. HARDIN: There clearly had been, at the lunch counter, at the previous --

QUESTION: Store Number 2 or whatever it was.

MR. HARDIN: That's right, Store Number 2. When she had transferred to Store Number 98 the company apparently had thought that she and all employees had been instructed that there would be no free lunch, but there is no evidence

in the record --

QUESTION: In the lobby-type store.

MR. HARDIN: That's right. The record does not disclose affirmatively that such instructions wver were given and it does show that all of the employees in the lobby department, including an employee titled "Lobby Department Manager" were taking free lunch every day that they worked.

The interview was terminated. Later in the afternoon, the manager discovered that, in fact, all the employees in the lobby were getting free lunches and he -- the next day, issued an order directing that it be stopped.

Meanwhile, he sent Mrs. Collins home, gave her the afternoon off because she was so distraught, and asked that she not discuss the interview with anyone.

Well, she discussed it with the union representative, and that led to the filing of the charge with the National Labor Relations Board and the General Counsel issued a complaint against the company alleging specifically that the company had denied Mrs. Collins' request for the assistance of a union representative during these interviews and that the denial was a violation of Section 8(a)(1).

QUESTION: Nothing more ever happened to Mrs. Collins.

MR. HARDIN: That is correct.

QUESTION: She came back to work?

MR. HARDIN: She returned to work. She was paid, ultimately, for the four hours she had taken off the preceding afternoon and as far as the record discloses, I think that she is still working there.

QUESTION: And so what was the board's order? There was no reinstatement order necessary.

MR. HARDIN: No, of course not. Nor was there in the Mobil Oil case which has been discussed this morning. It is a direction to the company to cease and desist --

QUESTION: Right.

MR. HARDIN: -- from interrogating employees unless they are accorded the right to have the assistance of a union representative.

QUESTION: Is there any -- the facts, because of what you have just told us, sir, are a little less -- a little more mild in this case than in the previous one, but is the issue an identical issue? Is there any difference at all?

MR. HARDIN: It is identical in this case to the situation that the woman in Quality had been in who was asking for the assistance of her union representative.

QUESTION: You also have there the representatives

MR. HARDIN: The representatives themselves being disciplined for their efforts to provide representation.

QUESTION: But it is essentially the same issue.

MR. HARDIN: It is the same issue. It is precisely the same issue.

QUESTION: Precisely the same.

MR. HARDIN: That is correct.

The board adopted the decision of its administrative law judge which applied the then-recent Quality Manufacturing decision and found that there had been concerted activity for the purpose of mutual aid and protection and then addressed the question whether Mrs. Collins' fears that the interview might lead to discipline were reasonably based in all the circumstances.

The decision takes particular note of the fact that these events occurred in the retail industry and that Weingarten, in common with most members of that industry, most employers in that industry, regard employee dishonesty, where proved to the employer's satisfaction, to be an unpardonable offense, the discipline for which ordinarily is discharge unless there are exceptional mitigating circumstances.

With that in mind and because the contract here provided that the usual system of warning notices was not available to an employee who was deemed guilty of theft to the employer's satisfaction, the law judge concluded that Mrs. Collins' manifest fears had, indeed, been reasonably

grounded in objective circumstances and that she was entitled either to have the assistance of her union representative at that interview or to have the company terminate the interview and forego the benefit of what information it might get from interrogating her.

The Fifth Circuit refused to enforce the order of the board. It noted first an apparent conflict or inconsistency between the result in this case and the result which that court had disapproved in the earlier Texaco decision. It noted the apparent inconsistency between the results here and its own earlier Texaco decision but then, coming directly to grips with the board's rationale in this case, that is, the proposition that the language of Section 7 itself confers the right, the court rejected that rationale, apparently -- and the opinion is not entirely clear -- but, apparently, not because it regarded its own earlier decisions as controlling, but because it disagreed with the board about the need to extend that kind of protection to employees.

The court says, and this is on page 7a of our petition for certiorari in this case, the court says, "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. To extend the scope of the act's protection to such preliminary

contacts between an employee and his employer would be to apply an overbroad interpretation of Section 7 without explanation as to why or direct explanation as to why it regarded the protections as unneded and the construction of the statute which the board had settled on as being overbroad."

Now, the decision of the Fifth Circuit is defended in this Court basically upon two grounds. First, there is the argument that the right conferred cannot be logically found within the confines of the statute itself and, secondly, it is argued that the board decision is basically unwise, or that the costs of securing these employee rights will be so far outweighed by the - the advantages of securing these employee rights will be so far outweighed by the costs to the employers that it is unwise to grant them in the first instance.

A variant on that last argument is that the board hasn't really clearly told us it made that balance and so you can't affirm it even if it is the right balance.

QUESTION: Do you think that at such an interview as this, preliminary interview where you do not concede the right to have a friend there, that the employee could make statements that would be incriminating?

I am now distinguishing your case as not part of the state. It is not a governmental operation.

MR. HARDIN: Incriminating literally, you mean?

QUESTION: Yes.

MR. HARDIN: It certainly is possible --

QUESTION: In the Fifth Amendment sense.

MR. HARDIN: Yes. It is not only possible, it is fairly common for an employee, caught in the toils of the employer's security apparatus, not only to make incriminating statements, but to see them written out and then to sign them. But the --

QUESTION: There is nothing undesirable about that, though, is there, if the statements are truthful?

MR. HARDIN: Certainly not. Certainly not. The interest of the employee and the interest of the employer are basically in harmony in such a circumstance.

Each has an interest in seeing that the truth, whatever it is, is disclosed and in preventing overreaching by the interrogator which leads to confessions by employees to events which they may or may not be guilty of but of which they are not guilty in fact, I mean to say.

QUESTION: Now, I take it that you distinguish that the situation to which you just responded from the typical official incrimination on that ground I suggested, that you are not part of a governmental apparatus, this is a private contractual arrangement between an employer and an employee and that in the traditional sense, the Fifth

Amendment protections do not reach that.

MR. HARDIN: There is no contention whatever in this case that the employer's actions are colored by any state action notions whatever and the board, in its discussion of these issues, has never cast its discussions in constitutional terms or analyzed the issues by reference to the decisions of this Court in the area of Fifth Amendment protections.

The right which the board is seeking to protect here springs from the statute and has been accommodated as best the board can accommodate that right to the realities of industrial life.

QUESTION: Well, I gather that the concerted activities, in the court of appeals view, is a very special deference to board judgment as to what does constitute a concerted activity.

MR. HARDIN: That is correct, your Honor.

QUESTION: Is that it?

MR. HARDIN: That is correct.

QUESTION: Well, in terms of judicial review, a board's determination of what constitutes a concerted activity, what is the test?

MR . HARDIN: The --

QUESTION: Of course, I gather what the Fifth Circuit has done here is to say -- well, not too clearly,

that it doesn't accept --

MR. HARDIN: Well --

QUESTION: -- as within a board competence, this definition, at least.

MR. HARDIN: I think we have to separate two things in this discussion, your Honor. First of all, the question of how much deference the board's view about the meaning of the law entitled to.

It is entitled to great weight but it is certainly-- the standard of review is not so rigorous or so confined as it would be in the case of examination for abuse of discretion or something of that nature.

But the second point which has to be remembered here is that a part of the process of judging in these cases has been the process of adapting the perceived statutory right so that it can function in a useful way in the real world and it is that part of the board's decision-making function which is entitled to very, very great deference in reviewing courts and here the board clearly has in its course of decision taken a primary statutory right, a right that, as I have stated before, is described in the disjunctive from the right to bargain collectively and it has tailored that right in an effort to permit employees to have that mutual aid or protection at a point where it clearly is needed -- as Mrs Collins' situation attests -- but

it has been limited.

We are not here arguing, as Mr. Jenkins in the last case appeared to think, that there is an absolute right to union representation at all times under all circumstances.

The right, in the board's view, is available first --

QUESTION: I know, then , the board isn't taking that position, but if this all turns around the word "concerted" and it is concerted because one employee was holding out his hand to the other, I don't know where your limits are when he doesn't fear discipline, it is true investigation or it is just a conversation and he holds out his hand to the other and he wants somebody along with him.

MR. HARDIN: Well, that -- the accommodation of admittedly conflicting interests in that area is one --

QUESTION: Would you say that that probably won't happen as long as the board sits?

MR. HARDIN: I wasn't going to say that. I was going to say that the entire matrix of law that exists under the act today is the consequence of a series of adjustments between conflicting rights of employees on the one hand and needs of employers on the other.

QUESTION: And I suppose you would say as to that, in the real world, which is the board's responsibility to

have in mind when it makes this kind of determination, this is well within a board competence to --

MR. HARDIN: Yes, and well within its province to decide.

QUESTION: Mr. Hardin, this morning I think you were here when we had this case from the Court of Appeals in the District of Columbia circuit argued, the Truck Drivers' case and there, of course, the Court of Appeals upset a determination by the board and the board is here, Mr. Comart is here to have it reinstated and you are here basically in the same capacity from a different decision this afternoon.

Do you see any difference in the standard of review of the board's exercise of discretion in the case this morning that should be applied by this Court or the case you are arguing?

MR. HARDIN: Any difference in the standard of review?

QUESTION: Yes, that the Court should apply to a determination by the board.

MR. HARDIN: I think the only useful distinction is that in this morning's case, the board was writing against a background of considerable judicial ruling by this Court and a number of others.

In this afternoon's cases, we are dealing, perhaps

not with a tabula rosa but with a province where the board is still making the first pronouncements and I think that is a factor which can legitimately affect the scope of the review.

QUESTION: The fewer judicial decisions in this area than there were in the area this morning.

MR. HARDIN: That is correct.

QUESTION: Mr. Hardin, did you find anything in the legislative history of Section 7 that supports your view of it today as embracing within the phrase, "concerted activity" the type of meetings and conferences we are talking about?

MR. HARDIN: No, your Honor, neither we nor any other party has been able to take any comfort from the legislative history in this matter. As you know --

QUESTION: Is that flat silence?

MR. HARDIN: Virtually so. As you know, the statutory language came into the National Labor Relations Act via the Railway Labor Act and the National Industrial Recovery Act and its precise language received relatively little attention from the drafters.

QUESTION: Well, the precise language having to do with representation appears in another part of the act, doesn't it?

MR. HARDIN: The precise language having to do --

QUESTION: That is, the right to have union representation or a union representative at the time of a grievance. That appears somewhere else in the act, doesn't it?

MR. HARDIN: Yes, it is in the proviso to 9(a).

QUESTION: The proviso to 9(a).

MR. HARDIN: That is correct.

QUESTION: And in view of that very precise language at the time that the Congress was focusing on those problems, don't you suppose that that could be argued that is the meets and binds of what Congress intended to give by way of representation?

MR. HARDIN: Well, 9 --

QUESTION: The legislative history certainly shows -- if I remember it and I don't remember it specifically with respect to this problem -- that Section 7 had to do with the right to get together in a group and to organize, first to collectively bargain and, secondly, for various other purposes but not involving, not at all involving, not suggesting that this involved individual representation at the time of an interview between an employee and his employer and insofar as that is covered or dealt with or focused upon by the Congress, you will find that in the proviso to 9(b), won't you?

MR. HARDIN: The -- well, of course, the proviso

to 9(a) --

QUESTION: 9(a), excuse me.

MR. HARDIN: -- was substantially modified during the 1947 amendments. The original version of that, if I am correct, provided that the individual employee was free to present a grievance to his employer.

The modifications in 1947 added to that the right to have it adjusted so that the substantial part of the right to deal individually with respect to grievances was added during the 1947 modifications to the act and at that time, I think it is very pertinent to note that this issue had received only the least adumbration, only one decision from the board had dealt in this area so far as our research discloses and that was a case where the board expressly pretermitted dealing with the question of whether an employee has an individual right to representation.

That, of course, was the Ross Gear and Tool decision.

Well, the Seventh Circuit somewhat put the development of the law off the track by viewing the case as raising the issue which the board had pretermitted but then, instead of remanding the case so the board could answer that question, the Seventh Circuit decided it and probably wrongly.

At the same time that was happening, the

amendments to the act of 1947 were putting the prosecution function in the hands of the independent general counsel and so far as we can tell from the reported general counsel's decisions, for the next 20 years or so, apparently in deference to this view of the loss stated by the Seventh Circuit in Ross Gear, the general counsel refused to issue any complaints in cases of this sort.

So that we only return to this arena with the issuance of the board's decision in Quality Manufacturing, in Texaco and at that point, the Fifth Circuit became persuaded by the board's view that at least at the point where discipline is to be imposed by the employer, the employee has the right, under the collective bargaining part of Section 7, to have the union representative present and the union representative has the right to be there.

It disagreed with the board, however, that the facts in that case presented an occasion where discipline was to be imposed and treated it, instead, as being merely an occasion where the employer intended to interrogate the employee.

QUESTION: Mr. Hardin, you are not contending, or are you, that this comes under the collective bargaining part of Section 7?

MR. HARDIN: No, we are not. We are not.

QUESTION: Because there was a good deal of such

talk in the briefs, as I remember, as I read them, that maybe in the other case --

MR. HARDIN: Not in our brief.

QUESTION: Well, a week or so, when I read them. This is not collective bargaining.

MR. HARDIN: No, it is not collective bargaining. You can't have collective bargaining until you know there is something to bargain about.

QUESTION: Right.

MR. HARDIN: And the board's view affirms, to some extent, at least, by the Fifth Circuit is that something to bargain about arises, at the earliest, where the employer calls the employee in to impose discipline. This right --

QUESTION: But even a grievance, even a claim of a kind of grievance is not generally known as collective bargaining, is it? It is known as something else.

MR. HARDIN: I -- I --

QUESTION: In any event, we don't need to --

MR. HARDIN: We don't have to reach that, but the statutory language requires bargaining about the meaning of an agreement during its term as well as about the terms which are to be settled on the front end.

QUESTION: The so-called "minor dispute." But this is not collective bargaining. You are not contending

that.

MR. HARDIN: We are not contending that the rights here arise out of collective bargaining.

QUESTION: So through a representative doesn't have any -- that language has been applicable here.

MR. HARDIN: Right.

QUESTION: Could I ask you what the board's rule is under the proviso? If there is a grievance and the employee wants to adjust it by himself with the employer, may he bring a -- is he entitled to have somebody else come with him, even though it isn't the union?

MR. HARDIN: Yes, although I think that Mr. Dunau has, by reference to the Houston decision, correctly stated in the law that he may have the next friend.

Of course, the union must be permitted to be present and the union also has the statutory right to block or at least oppose all the way to the arbitration machinery any settlement which it regards as contrary to the terms of its own collective bargaining.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Martin.

ORAL ARGUMENT OF NEIL MARTIN, ESQ.,

ON BEHALF OF J. WEINGARTEN, INC.

MR. MARTIN: Mr. Chief Justice, and may it please the Court:

In exploring upon what basis the Labor Board now construes that Section 7 creates an affirmative right for an employee, I believe it is interesting to look at what the board does not cite as authority.

First of all, there is no citation or articulation of the legislative history. As has been stated before, the concentration of the legislative history, both for the Wagner Act and the Taft-Hartley Amendments, was directed at the inequality of employees before their employers on the basis of economic pressure.

It is this thrust, as Senator Wagner states in the legislative history, that was sought to be counter-balanced. There was sought to be an adjustment of an employees and employer's right to deal economically one with the other.

Admittedly, Section 7 does not protect all concerted rights and all concerted activities. No one would state that illegal concerted activities are protected by Section 7.

Not every employer contact with an employee was thought to be protected by Section 7. We submit that, based upon the overall view of legislative history, it is the economic pressure that an employee was unable to exert against his employer on an individual basis that is considered and it is this economic pressure that should be

allowed to flow between parties under the statute, Section 7.

As all have stated, there is no collective bargaining in a pre-decisional fact-finding investigation.

There is no decision here that an employer who deals with employees merely to elicit facts is circumventing the provisions of Section 8(a)(5) of the act.

In fact, the legislative intent does not manifest an employee may control the employer's avenue of gaining information concerning his operations.

The idea of mutual aid or protection has been discussed. What is a dichotomy and, perhaps, anomaly, is the fact that the board has taken the position that these collective interests do not rise to a level sufficient to permit the union to be present but do rise to a level to permit the employee to institute representational assistance if he so desires.

It is difficult for us to understand why, if the union requests the representation, it is not permitted and while the employee requests it, it is.

It seems to us that the same rights would be involved regardless of the party requesting representation. The Labor Board has imputed or implied that an employee, when he seeks the aid of his representative or another employee, is engaged in protected, concerted activity.

This implies that employee is not seeking

self-protection or protection against questions which may be embarrassing or particularly probing, but that he is seeking to, in the future, make a situation where other employees will be accorded similar treatment.

Now, this is a factor which has not been explored by the record, but it is imputed to an employee by the Labor Board that when he does request that a union representative be present, it is for concerted activity when, in fact, it may be for self-preservation as opposed to any effort or motivation on a concerted basis.

It has been stated that the contracts in many major companies provide for representation of an employee and an investigatory interview. The fact that this is in industrial situations today, we believe to be evidence of the fact that the right to bargain collectively for the right of representation of an employee at an investigatory interview has not been diluted by the prior position of the board that no right existed in the context of the fact-finding investigation.

In fact, the board has not taken the position today that any of its prior decisions have been reversed. In a prior case of Daton Typographic, where the employer sought to question employees about errors they made in proofreading, the trial examiner of the Labor Board found that there was no concerted activity and the board adopted

that position.

Yet the board has not attempted to reverse that decision or other decisions which have created this dichotomy between investigatory and disciplinary reviews.

The idea that an employee is statutorily protected from interviews by his employer presupposes that there is an adversary condition, that there is a situation where an employee is immediately placed under suspicion or under fear of adverse consequences and to permit an employee's speculation as to what an employer may do with the information that he gathers is to take the employer's unfair labor practice completely out of his intent or purpose for an employee may wrongly suppose that an employer's questions may result in disciplinary action.

The case that is before this Court involves a suspicion of theft. The case that involved the Labor Board decision of Texaco-Los Angeles Terminal involved the situation where an employee refused to drive a piece of equipment which he deemed to be effective.

In that case, the trial examiner found that there was no violation of the act because the employee, on one point, had no reason to believe that his job status was in jeopardy. It is difficult for us, representing employers, to determine which belief of the Labor Board is to be followed. Where they adopt decisions by administrative law

judges or trial examiners that questions concerning insubordination do not raise the level of reasonable fear, whereas they say that questions concerning thefts do raise that fear.

It has been stated that the prior --

QUESTION: In the previous case, we had what seemed to be an insubordination case, sassing -- sassing Mrs. Gerlach or whatever her name was and the board came out the same way, saying that that created a reasonable fear on behalf of the employee to the extent that she was entitled to have a union representative present if she wanted to.

MR. MARTIN: Yes, but we understand --

QUESTION: So the board has, as I understand it in these two cases, has not made the distinction that you just just suggested.

MR. MARTIN: No, the cases appear to exist co-equally without a distinction being drawn between why one question concerning insubordination would not raise reasonable fear and while other questioning concerning insubordination would raise that fear.

The test of reasonable fear of an employee has no relationship to the realities of the circumstances. There is no relationship between the results of the interview and whether an employee may reasonably fear that his

job status is in jeopardy.

QUESTION: Do you, Mr. Martin, accept the law of the National Labor Relations Board that at a concededly disciplinary interview an employee has a right to a fellow employee or a labor representative?

MR. MARTIN: No, your Honor, I do not because there is no statutory basis for it. It has been created in a situation of the only decision I know, which is the Texaco decision of the Fifth Circuit in 1969.

In that particular context, the Labor Board found a violation of Section 8(a)(1) because the employer violated the employee's right to union representation and it was a disciplinary interview.

Upon appeal, the Fifth Circuit said that they found no basis upon which an employer is required to permit an employee representative to be present and, further, that the investigation was not disciplinary but it was investigatory.

QUESTION: Well, that --

MR. MARTIN: It is that dichotomy which has been created because of the decision of that court.

QUESTION: Yes, but you are complaining about the dichotomy that I had -- which would suggest that you might be accepting the validity of it in the disciplinary kind of meaning.

MR. MARTIN: Well, your Honor, in the context of deciding upon which basis an employer will permit employee request and will not, it is far more comfortable for the employer to face the disciplinary interview dichotomy than it is the situation which is now pressed upon us by the Labor Board.

QUESTION: Well, we are dealing here -- the question here is, what does the statute require?

MR. MARTIN: We are of the position that the statute does not require union representation, an employee's request for union representation, at either --

QUESTION: At either --

MR. MARTIN: -- an investigatory or a disciplinary interview.

QUESTION: Or at anything until or unless the disciplinary action is a grievance.

MR. MARTIN: Correct. There has been a previous decision involving what was termed "inchoate grievance," that is, a predecisional matter and the board again found that disciplinary action was so remote that it did not warrant finding of a violation and we would take the position that the dichotomy is not soundly based in statute but it is far more of a reasonable standard for both the employer and the employee to rest upon than a decision which is based upon the employee's fear.

QUESTION: But, again, you are confusing me. If you are -- I don't know if you are attacking the dichotomy or if you are saying no representation is statutorily required at all at any interview.

MR. MARTIN: At either an investigatory or a disciplinary interview. That is our position.

QUESTION: Then you don't have to worry about any dichotomy.

MR. MARTIN: That is correct.

QUESTION: Don't you have to take that position in this case where they called him in and said, "I understand you are stealing."

MR. MARTIN: I'm sorry, I did not catch all of your question.

QUESTION: Don't you have to take that position on the facts in your case where this lady was brought in [they] and/said, "We are investigating you for stealing." That is a little investigatory, isn't it?

MR. MARTIN: Oh, yes, and that is the position that both the employer and the Labor Board have taken consistently, that it was for purposes of investigation.

QUESTION: So you have to take that position, if you want to win.

MR. MARTIN: The case of the question concerning disciplinary action we do not feel is vefore us on our facts

situation, your Honor.

QUESTION: Why, because you didn't discipline her?

MR. MARTIN: Because the purpose of the interview was not to determine the extent of discipline nor was there a decision made that discipline would be taken before the interview began.

QUESTION: Well, what was the purpose of the interview?

MR. MARTIN: The purpose of the interview was to determine if there was a basis for the suspicions which had been created in the mind of the employer by a fellow employee of Mrs. Collins, who was under the impression that she had taken more chicken than she had paid for.

But the record is clear that neither party that was present for the employer had authority to make any decision concerning discipline based upon the facts.

QUESTION: Well, was this interview before the employer or before this man who was protecting stealing or something -- what was his title?

MR. MARTIN: The loss prevention specialist is a --

QUESTION: Yes.

MR. MARTIN: -- broad title which encompasses more than merely thefts. In the retail industry there is a phrase called "shrinkage" and that can occur for many

reasons, an investigative --

QUESTION: Including stealing.

MR. MARTIN: Including stealing.

QUESTION: Breakage would be a factor there.

MR. MARTIN: Breakage or items not shipped, in transit -- there would be many reasons why loss would be present aside from any employee thefts.

QUESTION: So management had an expert there but the lady couldn't have anybody to help her.

MR. MARTIN: She could have terminated the interview, if she had desired, and could have refused to answer any questions, your Honor.

QUESTION: Could she have been fired?

MR. MARTIN: She could only have been fired legitimately under the provisions of the contract, had there been just cause for termination.

QUESTION: Oh, well, then, you disagree with the case before.

MR. MARTIN: The case that was raised -- the fact situations in the Quality Manufacturing case are distinguished -- are distinguishable from our case.

QUESTION: Mr. Martin --

MR. MARTIN: Yes, sir?

QUESTION: -- you do take the same position as the employer in the previous case, namely, the correct

interpretation of the statute is that concerted activities do not include the right of an employee to have representation at an employer interview.

MR. MARTIN: Correct, your Honor, that is correct.

The present position of the board, besides leaving other decisions which apparently are conflicts upon their face also placed both the employee and employer at their own peril.

It subjects the employee to a review by a person other than himself or herself, in this case, as to what is reasonable cause, or what are reasonable grounds.

It is submitted that, had this case been decided in 1971, the Labor Board would have taken the position that no violation occurred for in the Illinois Bell Telephone case, the employee was called in concerning alleged thefts.

He was asked concerning thefts. He requested union representation. The company repeatedly denied that representation and he furnished a statement admitting the thefts.

In that case, the Labor Board found that the administrative law judge's opinion was right and denied the contention of the union that representation should be afforded in investigatory stages of those cases involving misconduct which could result, conceivably, in criminal prosecution.

QUESTION: Well, are you contending that the rule you subscribed to not only is beneficial to the employer but also to the employee?

I mean, it seems to me what you are saying is, under the rule you contend for, or under the statute, no finding could ever be made in favor of the employee. Under the board's rule, occasionally it will be.

Now, if I were an employee, I'd rather have a rule that would occasionally benefit me than one that would never benefit me.

MR. MARTIN: Under the rule as it is stated now, your Honor, the rule says "where it may possibly result in a decision adversely affecting his inclement status."

That permits a broad possibility of maze and under that circumstance, it would be very difficult for an employee not to be entitled to protection because he could fear that it may possibly result in disciplinary action under even the most innocuous circumstances.

What we are saying is that, in an investigatory interview, there is no coercive atmosphere automatically imputed to it.

The board has further confused the issue by its decision in Western Electric Company. There, the two members, Pinello and Kennedy, voted that there was no statutory right, were joined by Chairman Miller, who found

that where the employer had previously arbitrated the issue of whether or not an employee is entitled to representations at an investigatory interview, that since it had been previously decided adversely to the union in prior arbitration cases, that this was sufficient to permit the employer to deny the representation in this case and he found that it was consistently a statutory scheme to permit such a ruling.

So where we have a situation where there is no basis upon which an employer's either purpose or intention or knowledge controls his own unfair labor practices, then we are at a situation where speculation, where subjective state of mind of the employee controls an employer's unfair labor practice.

And the role of the union representative is largely unrefined, as it is now stated.

Before the Court, at Mobil, the board took the position that the representative of the union was merely there present as an advisor, as a conciliator perhaps.

If you follow the logic of the board's position and of the statute where the union is the exclusive bargaining representative of its employees, then perhaps the union would be in a position to preclude the employer from directing any questions to the employee directly, but would have to go through the union as the exclusive

representative of the employee to direct any questions concerning the employee's activities.

We would summarize by saying that an investigatory interview is a premature stage at which the right of representation exists because the purpose is to merely elicit, in a true fact-finding investigation, the facts of the matter and not to predecide or to preseal a decision of an employer or the fate of an employee.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Martin.

You have about three minutes left, Mr. Hardin.

REBUTTAL ARGUMENT OF PATRICK HARDIN, ESQ.

MR. HARDIN: Mr. Chief Justice, and may it please the Court:

I would conclude by pointing out to the Court that the statutory language "concerted activity" is more than just language. It defines a rather broad concept.

This Court, in the Jones and Laughlin case upholding the constitutionality of the statute acknowledged that it granted fundamental rights and the board's decision as to what that statutory language means, what content it should be given in the real industrial world, is entitled to great weight and should be accepted, if the interpretation is reasonable.

And it is reasonable here. The board has fashioned

a rule which does not grant an absolute right, the right to the assistance arises only if there is a reasonable objective basis for the fear that discipline is to follow.

And, even in that event, the employer is given the option of foregoing the interview altogether.

The board has balanced the conflicting interests and has settled on a resolution which is well within the perimeters of statutory language.

Here, to return to Mr. Justice REhnquist's question again, the problem here for the reviewing court is much the same as it is in the Linden and Wilder cases this morning.

The Congress has left it to the board to find the reach of the broad statutory language in the first instance and we submit that in both these cases, the board has reached a reasonable result and that defines the limits of judicial review in both cases.

QUESTION: Do you know of anything that would prevent every collective bargaining contract to contain a provision that representation would be allowed in all these circumstances, all these formerly one-to-ones?

MR. HARDIN: There is certainly no legal impediment to whether --

QUESTION: That is not what I am talking about.

MR. HARDIN: -- whether the parties would regard

it as desirable in the context of their particular relationship, only the parties to individual agreements can do that.

QUESTION: There may be some differences of view in the negotiations on that.

MR. HARDIN: There might well be.

QUESTION: They could write it into every contract if there --

MR. HARDIN: They wished.

QUESTION: -- was agreement.

MR. HARDIN: But that, of course, neglects the question whether Section 7 extends rights in this arena, not only to employees who are represented by a union, but also to employees who are not and the statutory statement of the language in the disjunctive suggests that Congress intended to grant some rights beyond the right to engage in collective bargainings through a representative and the board has given content to this where it is here by finding that the right exists where the employee reasonably perceives that he or she needs help and seeks it.

QUESTION: Under your contentions, the employer, by a commitment with the union, causes the right to be waived on behalf of an employee. This is a statutory question.

MR. HARDIN: I believe that follows from the board's rationale, your Honor, although the board has not

expressly spoken to that point.

The union might be able to waive its right to respond when the employee asked, but the question whether the union could waive the right of the employee to ask, the analysis which the board has gone through, would seem to preclude that result.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:27 o'clock p.m., the case was submitted.]