TWO NLRB DECISIONS EXPAND EMPLOYEES RIGHTS
Nonunion workers now have “Weingarten” rights, and unions are freer to organize temps

by Gregory Robertson
and Frederic Freiliecher

In two recent decisions important to nonunion employers, the National Labor Relations Board (NLRB) expanded the right of an employee of a nonunion employer to have another employee present during an interview where discipline may be imposed and enhanced the ability of a union to organize “leased” employees in a unit together with a contracting employer’s full-time regular employees.¹ Both cases narrowly overruled long standing precedent.

In Epilepsy Foundation of Northeast Ohio, the Board granted Weingarten rights to employees who are not represented by a union.² The Supreme Court in Weingarten held that, under Section 7 of the National Labor Relations Act (NLRA),³ an employee is entitled to have a union steward or representative present at the employer’s investigatory interview with the employee where the employee reasonably believes that there is the prospect discipline could be imposed on him. Initially, the NLRB had taken the position that the Weingarten rule also applied in a nonunion setting.⁴ Three years later, in 1985, in Sears, Roebuck & Co.,⁵ the Board held that Weingarten did not apply to employees who were not represented by a union.

In its most recent opinion, a three-member majority of the five member Board (the three Democrats: Chairman John C. Truesdale and Members Sarah M. Fox and Wilma B. Liebman) overruled Sears, Roebuck and held once again that Weingarten applies where no union represents the employees. This rule does not, however, give Weingarten protection to supervisors because they are excluded from coverage under Section 2(3) of the NLRA.

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The Board majority’s theory in Epilepsy Foundation was that the NLRA protects employees who seek to act together to address the prospect of what they consider to be imposition of unjust discipline. The Board reasoned that when an employee anticipating he may be disciplined seeks the assistance of another employee at an employer interview, the two employees are engaged in concerted (there are two employees), protected (it concerns a working condition--employee discipline) activity that is covered by Section 7 of the Act.

Republican Board Members Peter S. Hurtgen and J. Robert Brame wrote separate dissents. Member Hurtgen contended that Section 7 of the NLRA does not obligate the employer to grant the employee’s request to have a representative present at the investigatory interview. Unlike the unionized setting in Weingarten, noted Member Hurtgen, the employee’s representative in a nonunion setting is not representing the interests of the other employees in the bargaining unit and the employer is ordinarily entitled to deal on a one-on-one basis with the employees. Agreeing with Member Hurtgen, Member Brame also emphasized that the majority’s view upsets the delicate balance between management and labor by requiring the presence of a co-worker who may be emotionally involved in the matters at issue and who does not bring the same level of assistance to the situation as would a union representative.

The Epilepsy Foundation decision could impact significantly on how an employer investigates employee misconduct. The presence at an investigatory interview of another rank-and-file employee who, unlike a union steward or business agent, may have little or no experience in dealing with workplace issues, could have a chilling effect on the nonunion employer’s ability to learn the truth. The decision could also enhance a labor union’s organizing efforts directed at employees of a nonunion employer by providing pro-union employees the opportunity to intercede in disciplinary matters affecting other employees.
Fortunately for the employer, the Board and courts have circumscribed an employee’s Weingarten rights, and these limitations should also apply in the nonunion setting. The employer must inform the employee in advance that the investigatory interview could result in discipline and, at the employee’s request, give the employee the opportunity to consult with his chosen representative. The employer does not, however, have to advise the employee of the employee’s Weingarten rights or find a representative for the employee where the employee has not requested one. If the employee requests a representative, the employer still can cancel the interview or offer the employee the choice of having the interview without representation or of having no interview.

If the employer merely wants to inform the employee of a decision concerning his discipline that the employer has already made (and not to seek the employee’s acknowledgment of his misconduct) or to discuss a matter where the employee would not reasonably expect discipline to follow, the employee is not entitled to a representative. For example, if an employee merely witnessed events that may lead to the imposition of discipline against another employee, such as sexual harassment by another employee, the witness is not entitled to have a representative present during an investigatory interview.

Even where the employee is entitled to representation, the representative is there to advise the employee. The representative cannot obstruct the employer’s investigation, for example, by interposing constant objections to the employer’s questions or directing the employee not to answer questions. If the representative does obstruct, he/she can be ejected from the room.

While the Board has not decided the question, it is probable that the Board will limit the employee’s choice of representative just to another employee. To extend that choice to an
outsider - an attorney, for example - would undermine the Board’s Epilepsy Foundation reasoning that the nonunion employee is entitled to Weingarten protection because he is requesting as a representative a fellow employee with whom he is acting in concert. Moreover, the unavailability of the employee’s preferred representative does not entitle the employee to decline to attend the investigatory interview. If an alternate is available, the employee must proceed with the interview.\textsuperscript{11}

The Board’s usual remedy for denying an employee’s Weingarten right is a cease and desist order. Where, however, an employer unlawfully discharges an employee for attempting to invoke his Weingarten rights the Board will reinstate the employee with back pay. If the discharge is for an offense unrelated to the employee’s attempt to have a Weingarten representative present at the investigatory interview, the Board will not require reinstatement or back pay.\textsuperscript{12} In an organizing context the employer’s failure to admit a requested pro-union activist into a disciplinary interview could result in an unfair labor practice charge and claims of objectionable employer conduct which interfered with the conduct of a fair election.

For twenty-seven years prior to its recent decision in M.B. Sturgis, beginning with Greenhoot, Inc., the Board had taken the position that where two or more employers obtain employees from the same supplier - an agency supplying temporary employees, for example - and a union sought to represent the employees of the supplier together in a single unit with the employees of the user employer, that unit was a multiemployer unit. A multiemployer unit is not an appropriate unit without the consent of all the employers involved.\textsuperscript{13} Later, in Lee Hospital,\textsuperscript{14} the Board held that where a single user employer contracts with one or more suppliers to provide employees, and a union seeks to represent those employees together with the user employer’s regular employees in a single unit, that unit is a type of multiemployer unit that is inappropriate
for collective bargaining in the absence of the consent of all employers. These decisions made it difficult for unions to organize contingent workers because their primary employer ordinarily would not consent to the multiemployer unit.

Deciding to overrule Lee Hospital and modify Greenhoot, the Board in M.B. Sturgis held permissible a unit combining employees who are jointly employed by a supplier employer and a user employer together with the regular employees of the user employer even without both employers’ consent. The same three member majority that had decided Epilepsy Foundation reasoned that this unit was not really a multiemployer unit because all the work was being performed by the user employer and the user employer employed all the employees either solely or jointly. The Board also modified Greenhoot. It found that where a union petitions for a unit of the supplier employer’s employees who are working at a number of user employers, but the union seeks to bargain only with the supplier employer, the unit can be an appropriate one even without the consent of the user employers. The Board will consider such a unit to be a single employer unit even though all the employees involved may be jointly employed by the supplier and user employers.

In a lengthy dissent, Member Brame contended that the Board majority was requiring nonconsenting employers to participate in a multiemployer bargaining unit, contrary to the NLRA and precedent. Member Hurtgen recused himself.

The Board’s decision is significant for the employer both in an organizing context and in the event a union wins an NLRB election in a unit where contingent or “leased” employees are jointly employed by two employers, the agency supplying the employees and the user employer, and other employees in the unit are employed just by the user employer. The decision gives the unions more flexibility and opportunity to organize otherwise difficult-to-organize contingent
workers by removing a significant procedural hurdle. Substantively, where there is a strong core of pro-union employees employed just by the user employer whose votes would outnumber those of the contingent workers in a combined unit, the union’s greater access to the temps could be followed by greater organizing success. Where the contingent workers are receiving pay and benefits that are less than those of the regular workers employed just by the user employer, the Board’s decision provides union organizers with the opportunity to offer contingent workers the vote-getting prospect of having their wages and benefits brought up to the level of the regular employees.

Bargaining under these circumstances could be difficult. Because the employment agency and user employer likely have a contract governing the conditions under which work by the “leased” workers will be performed and the remuneration for that work, the supplier and user employer’s interests may not always coincide. They may not be able easily to agree between them on how to react to a union proposal. Where a union’s proposal is directed to a term of employment controlled only by the supplier employer, and the union thereafter strikes both the user and supplier employer over that proposal, there is a serious question whether the user employer is a “neutral” who can seek the secondary boycott protections of Section 8(b)(4)(ii)(B) of the NLRA.

There are some prerequisites that must be satisfied before “leased” employees can be included in the same unit as regular employees. The Board’s decision to combine in a single unit “leased” employees of a supplier employer together with the user employer’s regular employees is dependent on its finding that the “leased” employees are jointly employed by the supplier and user employer. That joint employer finding in turn usually hinges upon a showing that the user employer supervises and controls to some extent the day-to-day labor relations of the leased
employees. The appropriateness of such a unit also depends on a finding that the “leased”
employees share a sufficient community of interest with the regular employees of the user
employer to warrant combining both groups in one unit. If the leased employees are temporary,
with no reasonable expectancy of continued employment beyond a certain date, they will likely
not be included in a unit with regular, full-time employees.  

The Board’s decision in Epilepsy Foundation and in M.B. Sturgis are thus significant for
nonunion employers as well as for their employees and for unions seeking to organize them.
What will be the practical impact of these decisions in the workplace is not yet clear, however.
Only time will tell.

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1 See, Epilepsy Foundation of Northeast Ohio, 331 NLRB No. 92 (July 10, 2000); M.B.
3 29 U.S.C. § 151, et. seq. Section 7 of the NLRA affords employees, among other things, the
right to engage in concerted activities for their mutual aid or protection. It is a violation of
Section 8(a)(1) of the Act to interfere, coerce, or restrain employees in the exercise of their
Section 7 rights.


8 Meharry Medical College, 236 NLRB 1396 (1978).


12 See, Taracorp Industries, 273 NLRB 221 (1984); Communications Workers Local 5008 v. NLRB, 784 F.2d 847 (7th Cir. 1986).


15 See, e.g., Owens-Corning Fiberglass Corp., 140 NLRB 1323 (1963).