

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

UNITED STATES POSTAL SERVICE

and

Cases 10-CA-34974(P)
10-CA-35144(P)

NATIONAL POSTAL MAILHANDLERS
UNION LOCAL 317

and

Case 10-CA-35273(P)

EDWARD STEELE, An Individual

UNITED STATES POSTAL SERVICE

and

Case 10-CA-36056(P)
(formerly 16-CA-23973(P))

NATIONAL POSTAL PROFESSIONAL NURSES

and

Case 10-CA-36057(P)
(formerly 16-CA-24128(P))

NATIONAL ASSOCIATION OF LETTER
CARRIERS, BRANCH 404

John D. Doyle, Jr. Esq. for the General Counsel.
Isabelle G. Dorlan, Esq. and *John C. Oldenburg, Esq.*
for the Respondent.

Mr. Byron Wesley, of Birmingham, Alabama, for
Charging Party National Postal Mailhandlers Union Local 317.

Mr. Edward Steele, of Birmingham, Alabama, *pro se*.

Ms. Ajo James, of Rowlett, Texas, for Charging
Party National Postal Professional Nurses.

Mr. Frederick Owen, Jr., of Waco, Texas, for Charging
Party National Association of Letter Carriers, Branch 404.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge. These consolidated cases were tried in Birmingham, Alabama on March 22 and 23, 2006, and in Fort Worth, Texas on March 28 and 29

and July 24, 2006.¹ Charges and amended charges were filed collectively beginning April 23, 2004 and ending on February 15, 2005. As here pertinent, on February 21, 2006 two consolidated complaints (one involving two of Respondent's Birmingham facilities and the other involving two of Respondent's Texas facilities) were issued, and on the same date an order was issued consolidating all of the above-entitled cases. The consolidated complaints will hereinafter be referred to collectively as the complaint. To the extent that it refers to conduct which allegedly occurred in Birmingham, the complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act) (a) by denying the requests of named employees² to meet and confer with a union representative prior to the commencement of an interview, and to be represented by the union during the interview, which the employee had reasonable cause to believe would result in disciplinary action, and (b) by conducting the interviews even though it had denied the employee's request for union representation.³ To the extent that it refers to conduct which allegedly occurred in Texas, the complaint alleges that Respondent violated Section 8(a)(1) of the Act (a) by denying the requests of named employees⁴ for union representation during interviews which the employees had reasonable cause to believe would result in disciplinary action, and (b) by conducting an interview even though it had denied the employee's request for union representation. Also, with respect to conduct which allegedly occurred in Texas, the complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by suspending Rajan twice for refusing to attend an interview without union representation.⁵

¹ The proceeding was continued from March 29, 2006 to July 24, 2006 to allow the Respondent to have an expert examine an audio tape recording and the equipment used to make the recording.

² David Callens, William Amerson, Tommy Jones, Tyrone Hendrix, and Edward Steele.

³ All but one of the Birmingham interviews was allegedly conducted at the Birmingham Annex facility which is located at 4500 1st Avenue South. Jones was interviewed at the Birmingham Plant facility which is located 351 24th Street North.

⁴ Annu Rajan and Deloris Snyder. Rajan was interviewed at Respondent's DFW Turnpike facility which is located at 401 DFW Turnpike, Dallas, Texas. Snyder was interviewed at Respondent's Groesbeck facility, which is located at 112 South Dr. J.B. Riggs Drive, Groesbeck, Texas.

⁵ General Counsel requests as a part of the remedy that Respondent be required, on request of the involved union, to repeat the interviews of each of the above-named employees except Rajan, afford the employees their full rights of union representation, reconsider any disciplinary action taken, and if it is determined that the action was unwarranted or that a mitigation of the penalty is warranted, rescind, modify and expunge the discipline and make the employee whole for any losses suffered. Additionally, General Counsel requests that Respondent notify the involved employee of the results of the reconsideration and, if relevant, afford them any appeal or grievance rights that may exist under the collective bargaining agreement, law or regulation. And finally, General Counsel requests that Respondent be required to provide each and every supervisor at the facilities involved in these proceedings a copy of any court order that enforces any Board order in these matters; that each and every Respondent supervisor at the facilities involved herein sign a written acknowledgment of receipt of said court order, that they understand the court order and that they understand that any future violations of an employees' *Weingarten* [*NLRB v. J. Weingarten*, 420 U.S. 251 (1975)] rights might result in contempt proceedings against them personally.

Respondent denies violating the Act as alleged.⁶

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and the Respondent on October 3, 2006,⁷ I make the following

Findings of Fact

I. Jurisdiction

The Respondent admits and I find that Respondent provides postal services for the United States and operates various facilities throughout the United States in the performance of that function, including the four facilities described above, which are the only facilities involved in this proceeding. The Respondent admits and I find that the Board has jurisdiction over the Respondent by virtue of Section 1209 of the Postal Reorganization Act (PRA). The complaint alleges, the Respondent admits, and I find that National Postal Mailhandlers Union Local 317, National Postal Professional Nurses, and National Association of Letter Carriers Branch 404 are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Alabama

Byron Wesley has worked for Respondent since July 1997, has been a mailhandler since April 1999, has worked at the Birmingham annex since 2000, is a member of Mailhandlers Local 317, and is a steward with the Union. He testified that he has attended between 100 and

⁶ Additionally, Respondent argues that alleged denials of *Weingarten* rights are matters that may and should be deferred to an arbitrator under the involved collective bargaining agreements; that here the alleged unfair labor practices are not so numerous, pervasive, and outrages that special remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found; that the National Association of Letter Carriers has specifically waived employees' *Weingarten* rights for 'official discussions'; that run of the mill conversations, such as the one had with Snyder, do not require the presence of a union representative; that a new investigatory interview resulting in the reconsideration and possible modification of discipline with the attendant recession of the original discipline and the potential issuance of new discipline with appeal rights is in direct conflict with *Taracorp Inc.*, 273 NLRB 221 (1984); that the requested special remedy would deprive the Respondent of the right to discontinue the interview or offer the employee the choice of continuing the interview unaccompanied by a union representative, or of having no interview at all; that General Counsel's suggestion that supervisors be in jeopardy of findings of contempt against them personally is overbroad and would reach a large number of individual supervisors and managers not shown to have now or previously engage in such violations of the Act; and that General Counsel's special remedy would create the false impression in the minds of supervisors that any nature of *Weingarten* violation by them could put them in contempt of the rather limited court order in *NLRB v. USPS*, 969 F. 2d 1064 (D.C. Cir. 1992). Actually, the special remedies sought by General Counsel refer to "a copy of any Court Order that enforces any Board Order in these matters." General Counsel does not refer to the court order cited by Respondent.

⁷ The due date for filing briefs was extended since the transcript for the July 24, 2006 session was not made available by the court reporter until September 19, 2006.

150 predisciplinary meetings as a union steward; that a predisciplinary interview is management's fact finding expedition to determine whether discipline is warranted; that it has been his experience that 99 percent of the time discipline has been issued based on the event that was discussed during the predisciplinary interview; and that there have been instances where no disciplinary action was taken following a predisciplinary meeting.

General Counsel's Exhibit 2 is a Notice to Employee, dated "2/18/04," posted pursuant to an Order of a United States Court of Appeals. The Notice reads as follows:

PLEASE TAKE NOTICE that on December 18, 2003, the United States Court of Appeals for the District of Columbia Circuit issued a Consent Order against the United States Postal Service approving a settlement between the Postal Service and the National Labor Relations Board. Under that Consent Order the Postal Service is required to institute a nationwide educational program directed at all supervisors, acting supervisors, postal inspectors and managers with direct responsibility for bargaining unit employees concerning employee rights in investigatory interviews, otherwise known as Weingarten rights. As part of that education program, we list below a summary of such employee rights:

1. An employee has the right to be represented by a *union steward* when the employer meeting is an *investigatory* interview - when management is searching for facts and trying to determine the employee's guilt or innocence, or where facts elicited at the meeting might ultimately result in discipline or a change in previously imposed discipline. The employee being interviewed has the right to such representation by a steward where he or she *reasonably* believes that discipline or changes in previously imposed discipline could result from the investigatory interview.

2. It is the employee's obligation to request representation of a union steward at the investigatory interview.

3. An employee facing an investigatory interview has the right to meet with his or her union steward in *advance of the interview* to prepare for the interview.

4. At the investigatory interview, the employee is entitled to a union steward's *assistance*. The Postal Service violates the employee's rights if it refuses to allow the steward to speak or tries to restrict the steward to the role of a passive observer.

5. Employees may exercise any or all of the rights listed ... without reprisals of any kind from the Postal Service. *Improperly denying any of these rights* may have legal consequences for the Postal Service.^[8] [Emphasis in original]

⁸ Counsel for General Counsel introduced two charges, one in Case No. 10-CA-34186 and one in Case No. 10-CA-34456 which he stated are the two charges that are referenced in the above-referenced D.C. Circuit Court of Appeals consent order of 2003. He indicated that the charges were introduced to give some frame of reference for the earlier Birmingham based charges. Opposing counsel pointed out that one of the charges involves Ensley, Alabama and not Birmingham; that these matters were the subject of a negotiated settlement with a non-admission clause; that there was resolution without adjudication; and that the charges should not stand as evidence against the Respondent of any nature of a violation. Counsel for General Counsel then indicated that they were offered as background to aid in understanding the

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5 Wesley testified that he first saw this Notice in February 2004 when he went to Respondent's Birmingham plant on 24th Street and saw it posted on the bulletin board; that he read the entire notice; that this Notice was not posted at that time at the Birmingham Annex; that mailhandlers are employed at the annex and at the plant; that such a notice was posted at the Annex around February 2004; and that this notice was discussed with about 20 union members who were told that if they felt that a meeting would result in discipline they had a right to speak with a steward before the meeting took place. Wesley further testified that the President of the Union, Mitchell, went over General Counsel's Exhibit 2 at a steward meeting, and Amerson, who is a steward, was present.

10 Steele, who has worked for the Respondent for 12 years, with the last 7.5 years spent at Respondent's Birmingham Annex, testified that he is a member of the Mailhandlers Union; that he had been Chief Shop Steward on Tour I for 4 or 5 month at the time he testified at the trial herein; that in April 2004 he was a Shop Steward at the Annex; that he first saw General Counsel's Exhibit 2, the above-described notice which informs employees of their *Weingarten* rights, a couple of years ago (in 2004) posted in the foyer of the Annex; that in the months following February 8, 2004 he attended union meetings; and that in the March 2004 union meeting he commented on the fact that management was not following what was posted.

20 Supervisor Leon Nash testified that he has attended approximately 100 investigatory interviews; that he did not recall seeing General Counsel's Exhibit 2, the notice regarding employees' *Weingarten* rights, posted at the annex facility in 2004; that he saw the notice about 2 weeks before he testified at the trial herein on March 23, 2006; that he has received instructions or directives on more than one occasion regarding what procedure to follow if during an investigatory interview or at the commencement of the investigatory interview there is a request for the steward and the employee to meet before going any further; that he was first given such instructions in January 2005; that it has been his experience that seldom does a steward or an employee ask to meet before going further with the investigatory interview; that over the past year or two such a request has been more frequently; and that he noticed it started to occur more and more often as of January 2005.

30 On cross-examination Nash testified that the only ones he remembers who asked for a meeting between steward and employee before proceeding with the investigatory interview were Amerson and Steele; that Amerson made such a request as a steward but not as an employee; that Steele made such requests as a steward but not as an employee; that he gave a deposition to the National Labor Relations Board (Board) in January 2005 when he was asked about some of the events he described below; that from this point on he understood there was a special significance to circumstances where there was an investigatory interview and there was a request from someone that the steward and the employee be permitted to meet before the interview continued; and that before that time he did not necessarily perceive there would be some special significance to whether the meeting with the steward occurred after the interview was over or before it continued or at any particular point in time. Subsequently Nash testified that the incidents where an employee requested a pre-interrogation consultation increased after January 2005 because he actually paid more attention to it, that is "when I found - - learned more about the Weingarten Act [sic] and that is when I started - - that is definitely when I started paying more attention ... to the request" (transcript pages 399 and 400); that employees did

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context. The exhibit, General Counsel's Exhibit 6, was received. Since it involves two charges, obviously the exhibit, in and of itself, is not evidence of a violation.

request pre-interrogation consultation before January 2005 and he did not deny these requests; and that such requests increased after January 2005 and he was not sure why.

5 One of Respondent's attorneys, John Oldenburg, indicated at the outset of the Fort Worth session that there was a posting of the above-described notice as required in the Birmingham Annex; that there may have been some evidence that people saw it posted at the main post office (the Plant); and that it was posted in early 2004.

1. David Callens

10 The complaint alleges that on or about April 14, 2004, Respondent, by Nash, at Respondent's Birmingham Annex facility, by denying the request of employee David Callens and Mailhandlers Local 317 Steward Edward Steele to meet and confer prior to the commencement of the interview, denied the request of its employee David Callens to be represented by Mailhandlers Local 317 during an interview; that Callens had reasonable cause to believe that the April 14, 2004 interview would result in disciplinary action against him; and that Nash conducted the interview with Callens even though the Respondent had denied the employee's request for union representation.

20 Steele testified that in April 2004 he attended an investigatory interview with Callens in the supervisors' break room, which they sometimes use as an office; that Nash came to him and told him that he needed him to go to the supervisors' break area; that Nash was in the break room when he arrived and Callens arrived later; that Callens and Nash got into a heated discussion about Nash doing an investigatory interview regarding Callens not being at the limited-duty table where he was assigned; that Callens told Nash that he was on break; that when the heated discussion started he told Callens to calm down; that Callens said that he needed to speak to the Union representative; that Nash "told him that it wasn't going to be long, and I might let you meet with him afterwards" (transcript page 192); that "after Leon [Nash] tried to continue on, Mr. Callens interrupted again, and they got into this loud shouting match, and Mr. Callens rushed out of the room" (Id.); that he then told Nash that he was wrong because Callens is allowed to converse with his union steward and his union steward is allowed to converse with him and "I tried to explain to him [Nash] that when I say I need to speak with him, then the meeting stops right then whether you like it or not. And he said, no, it's not going to go that way" (Id. at 192 and 193); that Nash told him that he had to go get Callens because Nash was about to put him off the clock, and his patience was wearing thin with Callens; that he got Callens to come back to the meeting, telling him just to sit down and not say a word because if he was put off the clock it would mean more work "instead of just this little penny ante stuff that he's trying to do now" (Id.); that Callens came in and sat down while Nash went on with the meeting, and then Nash told them to go back to work; that during the reconvened meeting Nash told Callens that he did not want to cause conflict but he wanted to know where Callens was and what he was doing; that Callens told Nash that he was on break and there was no standard time for breaks; that Nash told Callens that he would tell him when he could take a break; and that about 35 minutes passed from the start of the first meeting to the end of the reconvened meeting.

45 On cross-examination Steele testified that the investigatory interview involving Amerson probably occurred the day before the investigatory interview involving Callens but he was not sure; that there is no reference to his participation as a steward in the Callens investigatory interview in either of the affidavits he gave to the Board on October 26, 2004; that when Nash told Callens that this was an investigatory interview, Callens said that he needed to speak with Steele; that other than saying that it was an investigatory interview, Nash had not indicated what he was investigating when Callens asked to speak with his union steward; that he thought that

5 Callens knew what was going on and he wanted to enlighten him; that when Nash said that he would let us speak later, Nash said this investigatory interview is about you not being where you were supposed to be; that then Nash and Callens got into a heated dispute when Callens then asked Nash "well, where was I supposed to be" (transcript page 213); that Nash said that Callens was on his break too long; that "Nash and ... Callens have a history of hatred for one another" (Id. at 214); that Callens told Nash that he was being treated unfairly and Nash denied this; that the discussion was loud and angry; that Callens said that he was where he was supposed to be, namely on break; that Nash said that he wanted to finish reading what Callens was here about and he would let them meet afterwards; that Callens left the room after Nash said that he was on break too long; and that when he brought Callens back to the room Callens did not remain silent.

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Callens testified that he has been an employee of the Respondent for over 12 years; that in April 2004 he worked in Respondent's Birmingham Annex as a mail handler on limited duty; that he was represented by Mailhandlers Local 317; that he was assigned to work on the night of April 15, 2004; that at about 2:30 a.m. on that night Nash approached his work area where he was sitting at a conveyor belt; that Nash asked him about his break, namely where he had been and why he was gone so long; that he asked for a shop steward because he thought he might be written up; that Nash said that a steward was not necessary and he continued to question him; that between 6:45 and 7 a.m. of that same shift Nash called him into the office where Steele was already present; that Nash started to read a statement he had prepared telling me that he was going to be giving me disciplinary action; that at that point in time he asked for the opportunity to confer with a union steward; that Nash told him that he did not need to talk with a steward at that time and he could talk with the steward after the meeting; that Nash described the meeting as a predisciplinary meeting when he began reading the statement; that Nash said that this was to inform him that this is a predisciplinary meeting; that Steele was present at the time; that he asked Nash for an opportunity to confer with a steward beforehand and Nash said that that was not necessary and that we could talk afterwards; that after Nash read his statement, Nash asked him if he had anything to say; that he did not say anything so the meeting ended; that the meeting took about 5 minutes; that the meeting became heated because he was angry with Nash questioning him on the work floor in front of all the other employees; that he and Nash raised their voice during the meeting; that he did not recall Steele speaking during the meeting; that he thought that the events he described above occurred on the shift which began on April 14 and carried into April 15, 2004; that during the predisciplinary meeting there was no discussion about break and break times; and that during the previous meeting there was a discussion about break and break times.

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On cross-examination Callens testified that Steele was already in the room at the direction of Nash; that when Nash said that he was going to be giving him a disciplinary action he asked for an opportunity to confer with his steward; that he did not talk about whether he was taking breaks at this meeting; and that he did not recall Nash asking him questions during this meeting. On redirect Callens testified that page one of Respondent's Exhibit 17 is a copy of the April 30, 2004 warning letter he received. And on recross Callens testified that a grievance was filed with respect to this warning letter; that Amerson was the steward handling the grievance⁹; and that he was not sure if the grievance was still in his record.

⁹ While it was not a subject covered on direct, on cross-examination Amerson testified that he attended, as steward, a predisciplinary hearing with employee David Callens in April 2004 and a meeting later in April 2004 where discipline was issued to Callens; that both were conducted by supervisor Nash; that at the second meeting Nash also wanted to do another

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5 Nash testified that he was involved in an investigatory interview of Callens in April 2004; that on the night in question Callens was on limited duty and he was assigned to work on a belt; that one of Callens's duties was to check the priority mail for errors prior to dispatch; that the mail came over at about 1:55 a.m. and Callens was not at his assigned work station; that he had to make other arrangements to get the work done and Callens came back about 25 minutes later; that when he asked Callens where he had been Callens said that he had been on break; that a few months earlier he had given Callens written instructions to report for work at 11 p.m., go on break at 1 a.m., break again at 3 a.m., and go to lunch at 5 a.m.; that when he asked Callens why he took his break at that time Callens said he had no designated time, Nash was no longer his supervisor, and Jackie Hill told him to disregard the written instructions Nash had given him regarding when he was supposed to take breaks; that he talked with Jackie Hill and she said that was not true; that since Amerson, who was the primary union steward, was not there that morning he got Steele, who was the alternate union steward, to come and sit in on the investigatory interview; that it is his practice to get a union steward before the employee asks for a union steward so that he does not have to waste time looking for a union steward if the employee decides that he or she wants a union steward; that when he met with Callens, Steele was present; that he did not remember if either Callens or Steele asked him that they be allowed to meet before he began his interview; that he is not sure that if the request was made that it would be something he would remember; that he has had such a request and "[u]sually I would grant the time [for] no particular reason" (transcript page 367); that he said usually because he could only remember one occasion when he did not and Steele was not involved in that situation; that Callens did not request a steward¹⁰; and that Respondent's Exhibit 17 is the documentation of the discipline he gave to Callens over this incident.

25 On cross-examination Nash testified that union steward Steele did not make a request to meet with Callens before the investigatory interview went forward.

Analysis

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predisciplinary on Callens; that in one of the affidavits he gave to the Board he describes the predisciplinary interview he attended with Callens and Nash; that as indicated in his affidavit to the Board, Callens asked Nash for the opportunity to confer with his union representative before the meeting went forward; that the predisciplinary interview in the Annex Tour office involving the question of Callens being away from his work area and possibly on break at a different time than was scheduled occurred on or about April 15, 2004; that according to his time and attendance report, Respondent's Exhibit 16, he was not at work at 6 a.m. on April 15, 2004; that he did come to work at 11 p.m. on April 15, 2004; that Respondent's Exhibit 17, dated April 30, 2004, is the letter of warning Callens received from Nash at a meeting he, Amerson, attended; that the letter indicates that the incident in question occurred at 1:55 a.m. on April 15, 2004; and that his own predisciplinary hearing with Nash in April occurred within a day or two of Callens' investigatory interview. It appears that Amerson was confused and his role in this matter was limited to handling the grievance.

¹⁰ This testimony was given after Nash refreshed his recollection by looking at a deposition he gave to an attorney with the Board.

In my opinion, the Respondent violated the Act on or about April 14, 2004 as alleged in the complaint. On the one hand, we have the employee and the Union steward who was present testifying unequivocally that Nash denied Callens's request to meet with his Union steward in advance of the interview. On the other hand, we have Nash initially testifying equivocally that he did not remember if Callens or Steele asked him that they be allowed to meet before the investigatory interview. Then, after looking at a document, Nash testified that Callens did not request a steward. The issue here is not whether Callens requested a steward but rather whether Nash unlawfully denied Callens's request to meet with his steward before the investigatory interview went further. Subsequently Nash testified that Steele did not make a request to meet with Callens before the investigatory interview went forward. Nash is not a credible witness. At one point he testified that when he has such a request he would usually grant it for no particular reason. At another point, treated below, Nash testified that in 2004 he denied an employee's request to meet with his Union steward before the investigatory because he, Nash, was pressed for time. When asked if that meant that his schedule trumped the employee's right to meet with his Union steward Nash answered that he was unaware of the right in June 2004 and if he had known of the right, he would have granted the employee's request to meet with his Union steward before the investigatory interview.

As noted above, a Notice dated "2/18/04" was posted pursuant to an Order of the United States Court of Appeals.

PLEASE TAKE NOTICE that on December 18, 2003, the United States Court of Appeals for the District of Columbia Circuit issued a Consent Order against the United States Postal Service approving a settlement between the Postal Service and the National Labor Relations Board. Under that Consent Order the Postal Service is required to institute a nationwide educational program directed at all supervisors, acting supervisors, postal inspectors and managers with direct responsibility for bargaining unit employees concerning employee rights in investigatory interviews, otherwise known as Weingarten rights. As part of that education program, we list below a summary of such employee rights:

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3. An employee facing an investigatory interview has the right to meet with his or her union steward in advance of the interview to prepare for the interview. [Emphasis in original]

One of Respondent's attorney's, Oldenburg, indicated that this Notice was posted, as required, in the Birmingham annex in early 2004.

Also Sharon Davis, who is a supervisor at the Birmingham Annex, testified that a couple of years before she testified at the trial herein on March 23, 2006 she received notice of the employee's right to have a pre-investigatory consultation with his or her union steward in the mail and in an e-mail; and that the information she received advised her that employees are entitled to confer with their union representative before the investigatory interview. Respondent's attorney Oldenburg made the following statement at the end of Sharon Davis's testimony:

... we talked about the consent decree previously. A mass mailing of *Weingarten* instructions approved by the NLRB was part of that to be sent to every supervisor in the Postal Service. And I can state that I know that is what she was referring to. It sounds like one of the usual suspects. [Transcript page 477] [Emphasis added]

5 Nash testified that he first received instructions in January 2005 regarding what procedure to follow if during an investigatory interview or at the commencement of the investigatory interview there is a request for the steward and the employee to meet before going any further; that after he was deposed by the Board in January 2005 he understood that there was a special
10 significance to circumstances where there was an investigatory interview and there was a request that the employee and the steward be permitted to meet before the interview continued; and that he did not necessarily perceive that there would be some special significance to whether the meeting with the steward occurred after the interview was over or before it continued or at any particular point in time. With his testimony, Nash contradicts the testimony of another supervisor at the Birmingham Annex and one of the Respondent's attorneys. Nash was placed on notice in early 2004 that employees are entitled to confer with their union representative before the investigatory interview. Notwithstanding the instructions, Nash decided that his schedule took precedence over this right and he told employees that they could meet with the steward after the investigatory interview. Nash lied under oath about not realizing the significance or his actions until January 2005. He had instructions in early 2004. He refused to follow those instructions until he was deposed by the Board in January 2005. Consequently, it must be concluded that Nash had notice of the employee's right to pre-interrogation consultation with his steward in early 2004, he refused to follow the instructions, and he lied about his refusal while under oath at the trial herein. Nash told Callens that it was a predisciplinary interview and Nash conducted the predisciplinary meeting after he denied the request for a pre-interrogation
20 consultation. Again, Respondent violated the Act on or about April 14, 2004 as alleged in the complaint.

2. William Amerson

25 The complaint alleges that on or about April 16, 2004, Respondent, by Leon Nash, at Respondent's Birmingham Annex facility, by denying the request of employee William Amerson and Mailhandlers Local 317 Steward Edward Steele to meet and confer prior to the commencement of the interview, denied the request of its employee William Amerson to be represented by Mailhandlers Local 317 during an interview; that William Amerson had reasonable cause to believe that the April 16, 2004 interview would result in disciplinary action against him; and that Nash conducted the interview with Amerson even though the Respondent had denied the employee's request for union representation.
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35 Amerson, who has worked for the Respondent for over 12 years and who was working at the Birmingham Annex in 2004, testified that he was the Mailhandlers' Chief Shop Steward at the Annex in 2004; that as a steward he has attended approximately 100 predisciplinary hearings; that he has attended a predisciplinary hearing where he was the subject of the hearing; that he attended two predisciplinary hearings in April 2004 at which Edward Steele was present as his steward; that supervisor Leon Nash held a disciplinary hearing with him in April 2004 at the Annex in the Tour office at about 6 a.m.; that he was told by a supervisor to report to the Tour office; that Steele and Nash were in the Tour office when he arrived; that Nash said that it was a predisciplinary hearing; that he asked Nash if he could see his shop steward and confer with him prior to the meeting going forward; that Nash said that he did not see any need for that and he was going to go ahead with the meeting; that Nash started to ask him questions with respect to his whereabouts throughout the night; that he responded to Nash's questions; and that the meeting lasted about 15 minutes.
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45 On cross-examination Amerson testified that when Nash told him to go to the Tour office Nash did not tell him why he wanted to see him in the Tour office; that he did not ask for Steele to be present; that when he walked into the office Nash, with Steele present, told him that

5 he was going to give him a predisciplinary interview; that he wanted to meet with Steele before Nash told him what the meeting was about because sometimes supervisors will discuss with a steward what is involved prior to the predisciplinary meeting; that Nash did not permit the preconsultation that he requested; that he did not recall Steele saying anything when he made his request; that he answered Nash's questions; that no discipline issued from this interview; that during the meeting Steel, on occasion, said that he, Amerson, was right with respect to his answers to Nash's questions; and that he did not file a grievance regarding the denial of a request to speak with a steward before the investigatory interview because he was denied union time to gather information for the grievances and to prepare the grievances.

10 Steele testified that in April 2004 he attended an investigatory interview as a steward for Amerson; that the meeting was held upstairs in the conference room at the Annex; that he, Nash and Amerson were present; that while he was working, Nash came and told him that he needed to see him in the conference room in 10 minutes; that Nash was in the conference room and Amerson arrived later; that Nash told Amerson that it was an investigatory interview and Amerson said that he wanted to speak with his shop steward; that Nash said that he "might let you all meet after we're finished, but I'm going to finish reading the charges" (transcript page 15 190); that Nash and Amerson started conversing and he indicated to Amerson that he should calm down; that he told Nash that Amerson was entitled to meet with his steward and he was entitled to meet with Amerson; that Nash said "we're going to do this my way today" (Id.); that then Amerson answered Nash's questions about whether Amerson was where he was supposed to be at work when Nash was looking for him; and that the meeting lasted about 15 or 20 minutes.

25 On cross-examination Steele testified that he asked Nash to speak with Amerson after Nash said that this is an investigatory interview because you were missing; that Nash said that he wanted to go ahead and finish reading the charges and he would let them meet afterwards; that in one of his affidavits to the Board he indicated that when Amerson came into the conference room Amerson was the one who asked Nash if he could have a few minutes to talk to a steward; and that it could have been Amerson who asked but he remembered asking Nash to speak with Amerson.

30 Nash testified that the only investigatory interview he had with Amerson as an employee occurred in June 2004. On cross-examination Nash testified that in less than five instances when he has conducted investigatory interviews, he was satisfied with the employee's explanation and he did not take it further; that he typically takes notes during an investigatory interview; that if he requests discipline after the investigatory interview, he uses his notes to draft the document which will be sent up and then throws his notes away; that if he decides not to proceed after an investigatory interview, he disposes of his notes; that less than five times he has conducted an investigatory interview and not referred the matter any further; that he would remember if he conducted a pre-disciplinary interview in about April 2004 and decided not to refer it any further; that he recalled an occasion in April 2004 noticing Amerson somewhere that did not appear to be his work station; that he recalled asking Amerson about his whereabouts on that occasion; that on this occasion he spoke with Amerson on the south dock; that he did not recall Amerson asking to have a steward present; that Steele was not present when he, Nash, asked Amerson questions; that from January 2005 to the time he testified herein he attended six or seven investigatory interviews where Amerson was the steward; that at most of those interviews Amerson asked that he and the employee be given a chance to meet before the interview proceeded; that he did not remember any particular instance where Amerson did not make such a request; that from January 2005 to the time he testified herein he, Nash, attended six investigatory interviews where Steele was the steward; that on all of those interviews Steele asked that he and the employee be given a chance to meet before the

interview proceeded; and that he did not remember any particular instance where Steele did not make such a request.

Analysis

5 In my opinion, the Respondent on or about April 16, 2004 violated the Act as alleged in the complaint. Once again it is the word of an employee, Amerson, and a Union steward, Steele, against the word of Nash. The problem with Nash is, as indicated above, he is not a credible witness. As described above, he lied under oath at the trial herein. The above-
10 described testimony of Amerson and Steele is credited.¹¹ Amerson had reasonable cause to believe that the April 16, 2004 interview could result in disciplinary action against him, and Nash conducted the interview with Amerson even though he denied Amerson's request to meet with his steward before the investigatory interview proceeded. Since this matter did not go beyond the investigatory interview, it is understandable that there would not be any documentation. Also Amerson explained why no grievance was filed. All things considered, General Counsel has
15 shown by a preponderance of the evidence that Respondent violated the Act on or about April 16, 2004 as alleged in the complaint.

3. Tommy Jones

20 The complaint alleges that on or about April 21, 2004, Respondent, by Diane Crenshaw, at Respondent's Birmingham Plant facility, by denying the request of employee Tommy Jones and Mailhandlers Local 317 Steward Douglas Cash to meet and confer prior to the commencement of the interview, denied the request of its employee Tommy Jones to be represented by Mailhandlers Local 317 during an interview; that Tommy Jones had reasonable cause to believe that the April 21, 2004 interview would result in disciplinary action against him; and that Diane Crenshaw conducted the interview with Tommy Jones even though the
25 Respondent had denied the employee's request for union representation.

In April 2004 Douglas Randall Cash, who at the time was Chief Shop Steward for Mailhandlers Local 317 on Tour II at Respondent's Birmingham Plant, attended a predisciplinary meeting with employee Tommy Jones. Cash, who no longer worked for the Respondent when he testified at the trial herein, testified that as steward he attended approximately 50 disciplinary meetings; that the April 2004 meeting involving employee Tommy Jones was held in the supervisors' break room at the Birmingham Plant; that he, Tommy Jones, and supervisor Diane Crenshaw were present at the meeting which was held about 1 to 1:45 p.m.; that Crenshaw came to his work area and told him that she needed him to come to the supervisors' break room because she was going to issue Tommy Jones a "Pre-D" (transcript page 32) that day; that he
35 went to the supervisors' break room; that when he, Crenshaw, and Jones arrived at the door to the break room Jones asked him what was going on; that when he told Jones that Crenshaw had told him that she was going to issue a Pre-D, Jones again asked him what was going on; that he told Jones that he needed to request of Crenshaw that he and Jones be able to have some time before they went into the Pre-D; that Crenshaw, who was standing there, said no she
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11 With respect to the fact that Amerson testified that the meeting was held in the Tour office and Steele testified that the meeting was held in the upstairs conference room, it is noted that the employee and the union steward in the admitted supervisor Diane Crenshaw
45 investigatory interview described the room in the Birmingham Plant where the meeting was held in different terms (supervisor's break room in the plant vis-à-vis a computer room in the plant). It appears that different employees can describe the same room in different terms.

would give Jones time to see him after they got through the Pre-D; that the three of them entered the room and sat down at a table; that no one else was in the room; that Crenshaw started to read off a paper that Jones was being charged with an unsafe act; that he then told Crenshaw that Jones asked if he could meet with him prior to us going into this Pre-D, and he asked Crenshaw twice if she was saying that they could not meet prior to the Pre-D; that
5 Crenshaw replied "No. I'm saying that you can meet, but I'll let you meet after the Pre-D" (transcript page 34); that he then told Jones to ask Crenshaw if he could meet with Cash before they went any further with the meeting; that Jones asked Crenshaw if he could meet with Cash before they went any further with the Pre-D; that Crenshaw said "No. I told you that I'm going to let you have some time with the shop steward after the Pre-D" (Id. at 35); that Crenshaw then
10 proceeded to read the charges alleging the unsafe operation of a tow motor; that when she concluded reading the document she asked Jones if he would like to give an explanation of what had happened; that he then told Crenshaw twice that he "would like to close this meeting because you have violated Mr. Jones' Weingarten rights" (Id. at 35 and 36); that Crenshaw told him "No, I haven't violated his rights because you are sitting here with him" (Id.); that Crenshaw told him that he could not stop the meeting; that he told Crenshaw that as a shop steward he could stop a meeting if he believed that an employee's rights were being violated; that
15 Crenshaw said she started the meeting so he could not stop it; that Crenshaw told him to get off union time and go back to work; that he asked Crenshaw about Jones; that Crenshaw gave Jones a direct order to stay in the break room with her; that he told Crenshaw that she would be violating Jones's rights again if she was going to continue to talk to him about the unsafe act; that Crenshaw told him "Well, I'm his supervisor. I have the right to hold him in here"
20 (Id. at 37); that he left the room and went back to work; and that the meeting lasted about 7 minutes at most.

On cross-examination Cash testified that Crenshaw was reading a precharge to Tommy Jones; that Crenshaw told Jones that he was being charged with committing an unsafe act; that
25 "yes" (Id. at 44) after reading "the charge," (Id.) Crenshaw asked Jones if he would like to explain; that Jones did not answer this question while he, Cash, was in the room; that Crenshaw never said "you've won, I'm stopping, I'm not doing anything more" (Id. at 46); that it was not a win or lose situation and Crenshaw knew the rights because two or three days prior he had a discussion with Crenshaw in front of her office about the posting of the Weingarten rights that
30 had been sent down and posted in front of the office; and that that discussion occurred prior to another predisciplinary interview with someone else.

Tommy Jones, who has worked for the Respondent at its Birmingham Plant since 1982, testified that he was on Tour II in April 2004, Crenshaw was his immediate supervisor, and he was not a member of the Mailhandlers Union; that at the time he testified at the trial herein he
35 was a member of the Mailhandlers Union; that he attended a predisciplinary meeting in April 2004 with Crenshaw and a union representative in a computer room in the Plant; that Crenshaw told him that she wanted to see him to give him a predisciplinary and he asked her for a shop steward; that Crenshaw told him that she had already arranged for Cash to meet with them; that when Cash arrived to go into the meeting Crenshaw told him what the meeting was about and
40 Cash told Crenshaw that he needed to meet with Jones prior to the predisciplinary meeting; that Crenshaw told Cash that the way she does it is to have the predisciplinary meeting first and then she would allow him and Jones to meet afterwards; that he, Crenshaw, and Cash went into the office; that when Crenshaw started giving him the charges Cash interrupted her and told her that she was violating the employee's right to have a shop steward meeting prior to the
45 predisciplinary meeting; that Crenshaw continued to read the charges; that Cash again told Crenshaw that she was violating the employee's right and he wanted to have a consultation with Jones; that Crenshaw told Cash that he was being rude and she wanted him to let her continue; that Cash again told Crenshaw that she was violating Jones's right and he wanted to have a

5 consultation with Jones prior to the predisciplinary meeting; that Crenshaw was reading the charges relating to running a tow motor between machines from a paper; that Cash told Crenshaw that she was violating Jones's rights and the meeting was over; that Crenshaw said that the meeting was not over because she was the supervisor; that Cash left the room and Crenshaw told him to be seated and not to get up and leave; and that when Crenshaw was reading the charges and Cash was telling her that she was violating the employee's right, Cash also told him not to answer any questions and so he did not.

10 On cross-examination Tommy Jones testified that he was not disciplined regarding the subject matter of this predisciplinary interview; that he did not tell Crenshaw that he wanted to meet with the steward before the predisciplinary meeting; and that Crenshaw did not ask him any questions after Cash said the meeting was over. Subsequently Jones testified that after he said that he was calling the meeting to an end, Cash got up and left; that Crenshaw did not say anything about Cash being on union time or going back to work; that Crenshaw then said she would "get with" (transcript page 165) him the next day and she would allow the shop steward to meet with them; and that the next day he again was not allowed to meet with the shop steward prior to the predisciplinary meeting.

15 Crenshaw, who is a supervisor of distribution operations at Respondent's Birmingham Plant, testified that on April 21, 2004 she attempted to have an investigatory interview with Tommy Jones and the following day she did have the interview; that she held the interview because she had been given some paperwork, as Jones's administrative supervisor, from the maintenance department referencing Jones operating equipment in an inappropriate manner; that she got a shop steward, Cash, and told him that she needed him to meet her in the computer room and he had to go on union time (designated operation 612); that she then told Jones that she needed him in the computer room; that Cash asked her what it was about when he arrived at the computer room; that she told Cash that she had called him as a union steward for Jones; that when Jones later arrived in the computer room Cash told Jones to ask for a shop steward and Jones said that he wanted a shop steward; that she told Jones that she had a shop steward there, Cash; that neither Cash nor Jones said anything else at that time; that she attempted to give Jones a predisciplinary interview; that she told Jones that it was a predisciplinary interview and she had information from maintenance charging him with speeding; that Cash then said "you have already charged him, this meeting is over" (transcript page 330); that she told Cash that she called the meeting, it wasn't over, Jones had a steward present, and she could give Jones an investigatory interview; that Cash, in a loud tone, told her that she could not ask Jones anything else; that the only thing that Jones said during the whole interview was that he wanted a shop steward when Cash told him to ask for a shop steward; that Cash told Jones not to answer any questions; that Cash told her that she could not ask any more questions since Jones had already been charged and that the meeting was over; that she told Cash to get off union time and go back to work right away; that she instructed Jones to stay; that Jones was there less than a minute after Cash left, she did not ask him any questions, and he did not say anything to her; and that she did not tell Jones at the end of the meeting on April 21, 2004 that the investigatory interview would be held the following day.

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50 On cross-examination Crenshaw testified that she has attended between 30 and 50 predisciplinary interviews as a supervisor; that Cash has been the steward at some of the other ones she has conducted; that there could have been up to four stewards on the involved Tour II on April 21, 2004; that she would say that all Mailhandlers knew that Cash was a steward; that she believed that Jones knew that Cash was a steward; that Cash told Jones to ask for shop steward; that she understood that Jones and Cash wanted to meet outside her presence; that she did not tell Jones and Cash that she would leave the room so that the two of them could meet or that they could leave the room or any words to that effect; that she did see General

5 Counsel's Exhibit 2, the notice about *Weingarten* rights posted in the Birmingham Plant but she could not recall if she saw it around February 18, 2004, the date on the notice; that prior to seeing the notice she did not know that it was a part of the law that an employee had the right to meet with his steward in advance of the investigatory interview; that it could have been March or April 2004 when she read the notice about *Weingarten* rights posted in the Birmingham Plant; that she was aware that the notice changed the employee's rights in that the employee now had the right to meet with his or her steward in advance of the interview; that on April 21, 2004 she told Jones that it was a predisciplinary interview; and that while she did not have a chance on April 21, 2004 to tell Jones that he would have an opportunity to give an explanation regarding his conduct, she had had predisciplinary interviews with Jones in the past and there was no doubt that Jones understood that he would have an opportunity to explain.

10 On redirect Crenshaw testified that when Jones was told by Cash to ask for a steward and Jones said he wanted a steward, she did not understand that to be a request for a private meeting between Cash and Jones.

15 On recross Crenshaw testified that she told Jones on April 21, 2004 "at a later time" (transcript page 349) "you have the opportunity to speak with him [Cash]" (Id.); that she told Jones that "you and Mr. Cash can meet later" (Id. at 350)

20 Subsequently Crenshaw testified that the only thing she said to Jones on April 21, 2004 after Cash left was to apologize for what had occurred.

Analysis

25 In my opinion, the Respondent on or about April 21, 2004 violated the Act as alleged in the complaint. Crenshaw admitted that she told Jones that he could meet with steward Cash later, at a later time. In other words, Crenshaw told Jones that he could not meet with Cash in advance of the investigatory interview. But, as indicated in General Counsel's Exhibit 2 set forth above, the law specifies, "3. An employee facing an investigatory interview has the right to meet with his or her union steward in advance of the interview to prepare for the interview." Crenshaw did not specifically deny Cash's testimony that Crenshaw knew the rights because two or three days prior to the Jones's investigatory interview he had a discussion with Crenshaw in front of her office about the posting of the *Weingarten* rights that had been sent down and posted in front of the office. Crenshaw admitted that she read the Notice, General Counsel's Exhibit 2, regarding an employee's *Weingarten* rights, which was posted in the Birmingham Plant, and she did not specifically deny that she saw this notice before the Jones's investigatory interview. Indeed Crenshaw testified that it could have been March or April 2004 when she saw the Notice. Crenshaw was not telling the truth when she testified that at the outset of the meeting steward Cash told employee Jones to ask for a shop steward and Jones said that he wanted a shop steward. What Cash said was that he, as Jones's union representative, wanted to have a pre-interrogation consultation with Jones. While the above-described Notice specifies "2. It is the employee's obligation to request representation of a union steward at the investigatory interview," it is obvious that this means that the employer is not required to supply the steward without the employee's request. Here, for the sake of expediency, the Postal Service makes arrangements in advance of the investigatory interview to have a steward present without the employee first asking to have a steward present. There was no need for Jones to ask for a steward. The steward was already there. As noted above, the above-described Notice also specifies "3. An employee facing an investigatory interview has the right to meet with his or her union steward in advance of the interview to prepare for the interview." Here the union representative, in the presence of Jones, asked a number of times to have a pre-interrogation consultation and Crenshaw denied the request each time. It would have been an exercise in

futility for Jones to also then ask for a pre-interrogation consultation. Crenshaw is not testifying that she did not grant the request because the union representative instead of the employee made the request. Crenshaw denies that the request was even made. An employee's union representative, the steward, can be the one who demands pre-interrogation consultation on behalf of the employee. *Climax Molybdenum Company*, 227 NLRB 1189 (1977), enforcement denied, 584 F.2d 360 (10th Cir. 1978).¹² In *Climax Molybdenum Company* at 1190, the majority of the Board indicated that

the Union must have the right to a preinterview consultation with the employee in order to advise him of his rights to representation if the right is in reality to have any substance, for it is the knowledgeable representative who as a practical matter would be informed on such matters. Thus, since, in our view, the right to representation includes the right to prior consultation, the denial of this right upon the Union's request is a denial of representation.

Here Cash demanded that right and Crenshaw unlawfully denied that right.¹³ Crenshaw told Tommy Jones that it was a predisciplinary interview and after denying the request for a pre-interrogation consultation she attempted to continue with the interview. Respondent violated the Act on or about April 21, 2004 as alleged in the complaint.

¹² The court indicated that *Weingarten* requires that the employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his representative on his own time in advance of the investigatory interview. More specifically the court at 365 held as follows:

The employer is under no obligation to accord the employee subject to an investigatory interview with consultation with his union representatives on company time if the interview date otherwise provides the employee adequate opportunity to consult with union representatives on his own time prior to the interview. Thus, we do believe that *Weingarten* requires that the employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his representative in advance thereof on his own time.

Here Respondent did not meet that requirement. On this basis alone the cases can be distinguished. Moreover, it is the duty of an Administrative Law Judge to apply established Board precedent which the United States Supreme Court has not reversed. *Los Angeles New Hospital*, 244 NLRB 960, 962 at fn 4 (1979)

¹³ Both Cash and Jones agree that Cash told Crenshaw that he needed to meet with Jones before they proceeded with the predisciplinary meeting. As noted above, since Crenshaw said that she would not allow them to meet before going forward with the predisciplinary meeting, it would have been futile for Jones to repeat the request. Cash believed that Jones did repeat the request. Jones testified that he did not tell Crenshaw that he wanted to meet with the steward before the predisciplinary meeting. The fact that Jones himself did not reiterate the request is not crucial. Obviously the gesture would have been an exercise in futility. And since Crenshaw was already placed on notice by Cash that the demand was being made and he was not going to let her proceed while she was violating Jones's right to a pre-interrogation consultation with his steward, whether Jones himself made the request is, in these circumstances, meaningless. *Weingarten* requires that the employee, and not the union, request that the employee be represented at a predisciplinary meeting. Once the employee is represented, be it at the request of the employee or at the behest of the employer with the employee accepting the representation, *Weingarten* does not indicate in circumstances such as exist here that only the employee, and not the union representative, can request pre-interrogation consultation.

4. William Amerson

5 The complaint alleges that in or about July 2004, Respondent, by Leon Nash, at Respondent's Birmingham Annex facility, by denying the request of employee William Amerson and Mailhandlers Local 317 Steward Byron Wesley to meet and confer prior to the commencement of the interview, denied the request of its employee William Amerson to be represented by Mailhandlers Local 317 during an interview; that William Amerson had reasonable cause to believe that the July 2004 interview would result in disciplinary action against him; and that Nash conducted the interview with Amerson even though the Respondent had denied the employee's request for union representation.

10 In June 2004, according to the testimony of Wesley, he attended a predisciplinary meeting as a steward where Amerson was the employee. Wesley testified that the meeting occurred in the Birmingham Annex, in the north break area adjacent to the maintenance cage between 7 and 7:30 a.m.; that supervisor Leon Nash approached him when he was clocking in about 7 a.m. and told him that Amerson would need a steward, and he was to report to the north break room adjacent to the break room cage for the meeting; that when he arrived at the north break room Nash and Amerson were already present; that he asked Nash what the meeting was about and Nash told him that it was attendance related; that he then asked to speak with Amerson before they proceeded; that Nash denied his request, telling him that it would only take a minute and he, Wesley, could talk to Amerson afterwards; that Nash then proceeded with the interview; that during this part of the conversation Amerson did not say anything; that Nash proceeded to question Amerson about attendance related issues and Amerson was not very forthcoming; and that the meeting lasted 10 to 15 minutes.

15 On cross-examination Wesley testified that it is the practice at the Annex and the Plant that management gets the steward before the predisciplinary meeting and then the manager gets the employee; that Nash did not tell him that Amerson requested a steward; that Amerson did not request to speak with him in advance of the meeting; that when Nash denied his request to meet with Amerson in advance of the meeting Amerson did not protest; and that Amerson did not answer Nash's questions during the interview.

20 Amerson testified that he attended a predisciplinary hearing at which Wesley attended as his steward at the end of June 2004; that Nash conducted the hearing; that the hearing, which related to his presence at the facility, was held a little after 6 a.m. in the Annex downstairs break room next to the maintenance cage; that Nash had told him to go to the break room and wait for him; that Nash and Wesley came to the break room about 5 minutes later; that Nash said that it was a predisciplinary hearing; that he asked if he could talk with his shop steward, Wesley, prior to the meeting; that Nash said that "I was a shop steward and he was tired of me and that he was going to get me. And he didn't see any reason for me to do that and that he just wanted to proceed with the meeting. He didn't have all day" (transcript page 57); that Nash then started to ask him questions about something that had happened two weeks earlier when he, Amerson, was a representative for somebody that had an EEO hearing; that he told Nash that he had followed instructions while he was at the EEO meeting and he answered Nash's questions about what he did after the EEO meeting; and that this predisciplinary meeting lasted for approximately 15 minutes.

25 On cross-examination Amerson testified that this meeting involved the question of where he was in the plant after he attended an EEO mediation session for part of a day; that Wesley, who was his steward during this meeting, was not the one who asked to have a consultation before the predisciplinary meeting; that he and not Wesley made this request; that at least to

5 some degree he answered the questions put to him by Nash, and Wesley would be wrong if he
said that he did not answer any questions; that one of the documents in Respondent's Exhibit
15, which are Respondent's documents covering this incident, indicates that he refused to give
a statement to Nash at the investigatory interview on June 29, 2004, but this document is
wrong; that since on the day involved he was not scheduled to work, he did telephone the office,
and when he could not get anyone he brought it to the attention of his Manager of Distribution
Operations (MDO) who told him to report for the EEO mediation on June 9, 2004 as the letter he
received indicated; that he remained at work, and he did work for the remainder of the day after
the EEO mediation; that Nash was not there that day so he worked for acting supervisor Arthur
Gunn; that during the investigatory interview Nash read the charges and then asked him
10 questions; and that no grievance was filed over the discipline he received.

15 Nash testified that he has never told Amerson that this is just an investigatory interview,
you don't need to consult with anybody because it is just an interview; that he never told
Amerson that he did not need a steward, he was a steward himself, and he did not need
representation; that this investigatory interview was occasioned by the fact that Amerson came
to the facility on his day off for a mediation, and when the mediation ended Amerson stayed in
the facility; that he asked Amerson where he worked after the mediation ended and Amerson
told him that he worked with Larry Jones; that he checked with Larry Jones who said that he did
not work with Amerson but maybe Amerson worked with Jackie Hill; that he checked with Hill
who told him that Amerson did not work with her; that he spoke with the MDO who told him to
do an investigatory interview; that he did not believe that Edward Steele was there that morning
20 as a Tour I union steward so he had Byron Wesley, a Tour II steward attend the investigatory
interview as Amerson's steward; that the investigatory interview occurred on June 18 or 19,
2004; that Respondent's Exhibit 15 contains the no-time-off suspension (no loss of pay) in lieu
of 7-day suspension, the administrative request form dated "6/29/04," the investigatory interview
form dated "6/29/04" concurred in by MDO Rowland Simmons, time and attendance
25 information, excerpts from the involved collective bargaining agreement and the interpretation
manual, typed statements from Larry Jones and Jaclynn Hill, and other documents he included;
that he gave the documents to the MDO; that he got Wesley before he got Amerson since it is
his practice to get the steward before he gets the employee; that neither Amerson nor Wesley
asked him for the two of them to be allowed to talk before the investigatory interview was
30 conducted; that if such a request had been made he would have granted it; that during the
investigatory interview he asked Amerson questions regarding the information he had gathered;
that he asked Amerson if he had a statement and Amerson did not give one; and that he then
told Amerson to go back to work.

35 On cross-examination Nash testified that from time to time when he is preparing to
conduct an investigatory interview either the employee or the steward asks to meet before the
interview goes forward; that usually when such a request is made he permits the steward and
the employee to meet before proceeding with the interview; that there was an instance in 2004
when there was a request for the steward and the employee to meet before the investigatory
interview proceeded and he did not permit it; and that Amerson was the union steward in that
40 situation but he could not remember who the employee was.

Subsequently Nash testified that he denied steward Amerson's request to meet with an
employee before proceeding with the investigatory interview because

45 I was pressed for time that morning and that is all I can remember. I was pressed for
time.

I needed - - I had a short period of time in which to do it and that is the reason I gave him ... that I cannot let you do that right now, I am pressed for time and so I went on and moved on with the investigative interview. [Transcript page 401]

5 Nash then gave the following testimony:

JUDGE WEST: Okay. So in other words, your schedule would trump that right?

THE WITNESS: At the time, I was unaware of the rights, sir.

10 JUDGE WEST: Oh, you were unaware of the right at the time?

THE WITNESS: Yes sir. If I had of known, than I never would have done it. I would have allowed them to have that time. [Id. at 401 and 402]

15 On redirect Nash testified that in the situation where he denied steward Amerson's request to meet with an employee before proceeding with the investigatory interview, he, Nash, subsequently stopped the investigatory interview and left the room when Amerson asked to discuss with the employee

20 either something personal or something that involved medical leave. But anyway it was something that they wanted to - - the Union steward wanted to find out without me being present.

Perhaps it was something I should not know about at the time. I can't remember. But they asked me if I would excuse myself and I said yes. And I stepped outside.

25 ... and once again it was something either about annual or end-of-the month leave that they wanted to discuss, so they asked me if they could discuss it in private, so I left the room. [Transcript at 402 - 404]

30 On recross Nash testified that he believed there were other instances, or at least another instance, during 2004 where there was a request that the employee and the steward meet before the investigative interview proceeded and he granted that request.

Analysis

35 In my opinion, it has been shown that the Respondent in or about July 2004 violated the Act as alleged in the complaint. Nash does not deny that this investigatory interview occurred. There is documentation which refers to this investigatory interview. Nash does deny that either Amerson or Wesley asked him for the two of them to be allowed to talk before the investigatory interview was conducted. And Nash goes on to assert that if such a request had been made he would have granted it. Why? At one point Nash incredibly claims that before January 2005 he did not understand or he did not necessarily perceive that there was some special significance regarding the right of employees to meet with their steward in advance of the investigatory interview to prepare for the interview. At another point Nash in effect testified that in 2004 his scheduled trumped an employee's *Weingarten* right when he denied steward Amerson's request for a pre-interrogation consultation because at the time he was unaware of the right. Nash is not a credible witness. As indicated in the Notice dated "2/18/04," General Counsel's Exhibit 2, "[i]t is the employee's obligation to request representation of a union steward at the investigatory interview." Here Nash supplied the union representative without the employee asking for a union representative. But this does not relieve Respondent of its obligation to allow a pre-

interrogation consultation between the employee and the union representative. As indicated in the Notice dated "2/19/04,"[a]n employee facing an investigatory interview has the right to meet with his or her union steward *in advance of the interview* to prepare for the interview."

(Emphasis in original) Here Nash should have accorded employee Amerson the opportunity to meet with union representative Wesley before proceeding with the investigatory interview. While the Notice indicates that it is the employee's obligation to ask for a union representative at the investigatory interview, the Notice does not indicate that it is the employee's obligation to ask for a pre-interrogation consultation with his or her steward. Rather once the union representative is there, according to the plain meaning of the Notice, the employee "has the right to meet with his or her union steward *in advance of the interview* to prepare for the interview." As noted above, the Board in *Climax Molybdenum Co.*, 227 NLRB 1189 (1977) upheld the right of pre-interrogation consultation even when asked for by the union representative and not the employee. Also, as noted above, in reviewing that decision the United States Court of Appeals for the 10th Circuit, while it did not agree with the Board in that instance because the employees involved had 17.5 hours to consult with their union representative before the investigatory interview and they chose not to, held at 584 F. 2d 360, 365 (10th Cir. 1978) that

The employer is under no obligation to accord the employee subject to an investigatory interview with consultation with his union representatives on company time if the interview date otherwise provides the employee adequate opportunity to consult with union representatives on his own time prior to the interview. Thus, we do believe that Weingarten requires that the employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his representative in advance thereof on his own time.

In 1988 the Board in *Postal Service*, 288 NLRB 864 (1988) held that if the employer insists that the interview take place immediately it must permit the employee and his or her union representative to confer in private in advance. This has been the law for many years and it was specifically addressed in a United States Postal Service case. Nash did not accord Amerson this right. It is highly unlikely that Amerson, a steward who is experienced with respect to Weingarten rights, a steward who participated in the discussions which stewards held regarding General Counsel's Exhibit 2 when it was posted, and a steward who Nash testified asked in 2004 for pre-interrogation consultation which Nash denied, would not have asked for pre-interrogation consultation when he was the employee involved. I credit his testimony that he did ask for the pre-interrogation consultation. But even if one credits Wesley, who was Amerson's union representative at more than one investigatory interview and therefore (notwithstanding being shown company documents regarding this investigatory interview) might be mistaken with respect to whether Amerson asked for the pre-interrogation consultation in this instance, under Board law the union representative can be the one who asks for the pre-interrogation consultation. This would apply especially when the Respondent does not give the employee any of his own time before the investigatory interview to consult with his union representative. It is obvious that Respondent's involved Alabama supervisors viewed employees' Weingarten rights as a nuisance; something that was taking up the supervisors time when they could be doing something more important. That is why those supervisors themselves made arrangements for a union representative to be present before the involved employee even asked for the union representative. In taking the approach they did, these supervisors were not going to delay the investigatory interview to allow the employee to consult with his union representative. Nash told Amerson that it was a predisciplinary interview, and Nash conducted the interview after he denied the request for a pre-interrogation consultation. Respondent violated the Act as alleged in the complaint.

5. Tyrone Hendrix

5 The complaint alleges that on or about August 11, 2004, Respondent, by Sharon Davis, at Respondent's Birmingham Annex facility, by denying the request of employee Tyrone Hendrix and Mailhandlers Local 317 Steward William Amerson to meet and confer prior to the commencement of the interview, denied the request of its employee Tyrone Hendrix to be represented by Mailhandlers Local 317 during an interview; that Tyrone Hendrix had reasonable cause to believe that the August 11, 2004 interview would result in disciplinary action against him; and that Sharon Davis conducted the interview with Tyrone Hendrix even though the Respondent had denied the employee's request for union representation.

10 Amerson testified that in August 2004 he attended, as a steward, a predisciplinary meeting involving employee Hendrix; that the supervisor involved was Sharon Davis and the meeting was held in the Birmingham Annex Tour office at about 6 a.m.; that Davis requested that he go to the Tour office; that he, Davis, and Hendrix were present; that Davis said that it was a predisciplinary meeting; that Hendrix then asked to speak with the shop steward, Amerson, before the meeting occurred; that Davis said that "she didn't have all day, and she was going to go ahead with the meeting anyway" (transcript page 60); that he told Davis that they should do it right, he should be able to meet with Hendrix, and he had not clocked out for union time; that Davis proceeded with the meeting asking Hendrix questions, and Hendrix replied to the questions; and that the meeting lasted 15 to 20 minutes.

20 On cross-examination Amerson testified that Hendrix was at the door to the Tour office when he arrived; that page 3 of Respondent's Exhibit 13 is correct where it indicates that "I [Davis] asked the employee if he had anything to say. He said he had nothing to say, that he would wait until it came back from Labor"; that he remembers this being said "[t]o a degree" (transcript page 116) or "something similar to that" (Id. at 122); that he had no basis to dispute the assertion that no grievance was filed over this discipline; and that at this point in time labor charges were filed because he could not interview, he could not investigate to work up the grievance because he was not given union time.

30 On redirect Amerson testified that during 2004 the union was experiencing frustration with the grievance procedure both at the Annex and at the Plant in that supervisors would not allow union time, they would not meet with stewards, and they would not give requested information¹⁴; that Art Hill, who is an Manager of Distribution Operations (MDO) on Tour III, told him in 2004 at the Annex that if the Union "wanted to file grievances, I'll show [you] how to fight. He is sick of us filing grievances or wanting union time" (transcript page 147); and that the Union has filed an unfair labor practice charge regarding Hill's statements. On recross Amerson

35 _____
14 General Counsel's Exhibit 4 is a Board complaint in Case No. 10-CA-34454, dated September 29, 2003, which alleges, among other things, that since February 2003, the United States Postal Service has denied Union time to Amerson. Counsel for General Counsel stated that this exhibit and another exhibit, General Counsel's Exhibit 5, corroborate certain testimony by witnesses concerning their motivation for filing Board charges and not filing grievances regarding some of the actions that are the subject of the hearing; and that the complaints are pending, they have not gone to hearing, and they have not yet been litigated. General Counsel's Exhibit 5 is a complaint in Case No. 10-CA-34620(P), dated November 25, 2003, which alleges, among other things, that on or about September 13, 2003, the United States Postal Service assigned more onerous working conditions to its employee Steele because he engaged in union activities and concerted activities for mutual aid and protection. As noted herein, Steele is a union steward.

testified that his time and attendance reports for week 1 through week 25 of 2004 reflect union time.

5 Hendrix, who has worked for the Respondent for about 12 years and who is a member of the Mailhandlers Union, testified that in 2004 he worked at Respondent's Birmingham Annex; that he attended a predisciplinary interview in the Tour office with his supervisor Sharon Davis in August 2004 where sleeping at the facility was discussed; that Amerson attended the meeting; that Amerson got him from his work area and told him that Davis wanted to see them in the office; that when Davis arrived she told them that it was an investigatory interview and Davis started reading the charge which dealt with sleeping in the break room beyond his lunch break; 10 that when he heard the charge he told Davis that he needed to see Amerson to talk about this, and he did not even know that this was what he came to the office for; that Davis denied his request and told him that they were going to go on and he could talk with Amerson afterwards; that Davis indicated that Simmons woke him up in the break room and she asked him if he had anything to say; that he did not say anything; that the meeting lasted about 30 minutes; and that another issue was coming in early but they did not get into that because he filed a labor charge 15 against Davis about that.

On cross-examination Hendrix testified that when Amerson got him he asked Amerson what Davis wanted to see him for; that he did not believe that this meeting occurred on the same day that he overslept; that when Davis told him what they were back there for he asked 20 her to speak with Amerson before proceeding; that if he is not allowed to meet with the steward before the investigatory interview, he does not normally respond to questions; that as soon as he found out what the meeting was about he asked to speak to the steward; that he did oversleep and, therefore, came back late from his lunch break; that to him it was not a big deal because people came back from lunch late all the time; and that he could not recall if the investigatory interview, as indicated in Respondent's Exhibit 13, was held on July 24, 2004. 25

Supervisor Sharon Davis testified that in 2004 she gave Hendrix an investigatory interview at the Birmingham Annex; that a manager asked her where Hendrix was when he did not return from lunch; that the investigatory interview was occasioned by (a) what a boss had written out regarding what he had observed when Hendrix was not in his work location, and (b) 30 what she found out upon her investigation of that, namely that Hendrix had come in early without authorization; that Respondent's Exhibit 13 contains documents she typically fills out for investigatory interviews; that she first told steward Amerson that he should go to a specified area in the office; that she then went to Hendrix and told him that she needed him to go to the same area; that she arrived at the room shortly after Hendrix and Amerson arrived; that she told them that it was an investigatory interview and corrective actions could follow the meeting; that 35 she then began to read what she was investigating from the form in Respondent's Exhibit 13; that at no time did Hendrix ask to have a steward; that Amerson asked what was she requesting and she told him that it would be sent to labor and she was requesting a seven day; that she asked Hendrix if he had anything to say about the charges and he replied that he would wait until it came back from labor; that Hendrix did not reply when she asked him about whether 40 anyone had authorized him to come in early; that she finished conducting her interview, Hendrix and Amerson were getting ready to leave, and Hendrix asked who was requesting the discipline; that she told him that she was requesting the discipline; that Hendrix said that he just wanted to know who he would be filing his EEO on; that Hendrix motioned, she thought, to tell Amerson that he wanted to talk to him; that she was going to leave the office and let them 45 confer but Amerson motioned Hendrix to go on and Amerson stayed in the office with her; that Amerson then asked her when he could have his day of mourning for the passing of former President Reagan; that she left the office and Amerson let Hendrix know that he would talk to him then; that before she started her investigatory interview Hendrix did not ask to talk with

Amerson; that before she started her investigatory interview Amerson did not ask to talk with Hendrix; that during the interview neither one requested to be able to speak in private; that she signed page "6 of 7" of the Administrative Action Request form in Respondent's Exhibit 13; and that all but the last page of Respondent's Exhibit 13 are documents she sent up with the Administrative Action Request, and the last page is the suspension letter which was issued to Hendrix.¹⁵

On cross-examination Davis testified that during the investigatory interview Hendrix did not ask her for the opportunity to meet with Amerson but at the end of the interview Hendrix motioned to Amerson that he would like to speak with him; that she gave a deposition to the Board in February 2005; that she did not recall Hendrix actually saying that he wanted to speak with Amerson; that at lines 18 through 22 on page 23 of the transcript of her deposition, General Counsel's Exhibit 8, it is indicated that she testified "And he asked to speak to Mr. Amerson and I was getting ready to leave out of the room and Mr. Amerson said that was okay. He stayed in and talked for an additional period of time" (transcript page 461); that the "he asked" in the above-described portion of the deposition refers to Hendrix; that she read the description of the incident on page 1 of Respondent's Exhibit 13 to Hendrix at the investigatory interview; that she then asked Hendrix if he had any explanation; that Hendrix did not at that point in time ask to speak with Amerson; that Hendrix asked to speak with Amerson at "the end of the meeting" (Id. at 462); that she did not recall if Amerson asked what disciplinary level she was requesting before or after she received any response from Hendrix about the events; that she did not recall seeing General Counsel's Exhibit 2, the notice, posted at the Birmingham Annex in the time period of February to March 2004; that she had seen General Counsel's Exhibit 2 a little more than a year before she testified at the trial herein on March 23, 2006; that she did look at the notice received herein as General Counsel's Exhibit 2 in connection with her deposition in about February 2005; that she could not recall when she saw the notice before that but she had heard of it; that she has conducted between 15 and 25 predisciplinary interviews in the three years she has been a supervisor for the Respondent; that during almost all of the investigatory interviews she has attended she has received a request that the employee and the steward be permitted to meet before the investigatory interview continued; that there was no request for an opportunity to meet with the steward before the interview continued in the interview of Hendrix with steward Amerson present; that such request occurred at the end of the interview; that usually the request to talk is made before the interview begins; that she could not recall if Amerson was the steward at any of the other investigatory interviews she conducted; that Steele has been the steward at three to five investigatory interviews that she has conducted in 2004 to early 2005 where there was a request that the employee and the steward be permitted to meet before the interview continued; that she has a steward at the investigatory interview and she gives them a few minutes before she goes in; and that she tells them what it is about and then they talk, and then she goes in and does her investigatory interview; and that she does it for her protection, she has a shop steward available when she talks to someone.

Subsequently Davis testified that when the employee and the steward are in the room together she asks them "if they would like to talk first before I begin" (transcript pages 472 and 473); that she started doing this since she has been at the Annex; and that she has been at the Annex for three years. Davis then gave the following testimony:

¹⁵ Page 2 of Respondent's Exhibit 13 indicates that investigatory interview occurred on "07-24-04." The last page of Respondent's Exhibit 13 indicates that Hendrix received a no time off suspension, which for purposes of progressive discipline, is treated the same as a time off suspension.

JUDGE WEST: Okay. In allowing the employee and the shop steward to have this pre-investigative consultation, were you relying on any documents which indicated that that was a right that they had or were you just doing this because you felt this was the right approach?

5

THE WITNESS: Both. That it was a right of theirs and I knew that if they needed to talk first, they had ... [that] right.

JUDGE WEST: So it was a right of theirs? You were put on notice at some point in time that they had this right?

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THE WITNESS: Yes, sir.

JUDGE WEST: Do you remember when you were put on notice that they had this right?

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THE WITNESS: I am not quite sure.

JUDGE WEST: In terms of the year?

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THE WITNESS: It was over a year or a couple of years or so.

JUDGE WEST: A couple of years?

THE WITNESS: Yes, sir.

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JUDGE WEST: Do you remember how you were put on notice?

....

THE WITNESS: Well, we received information via email and we also received information in the mail.

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JUDGE WEST: And who did you receive [this] information from?

THE WITNESS: From Washington or wherever they sent out the brochure. I am not sure where but I received something in the mail and email.

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JUDGE WEST: And what did the information tell you?

....

THE WITNESS: It talked about the Weingarten rights, that employees are - - what their rights are and what my responsibilities were in regards to it.

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JUDGE WEST: With respect to employees' rights, what did it - - what did they indicate?

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THE WITNESS: It indicated that the employee has a right for representation if there is a chance - - if I am going to talk to them and there is a chance that discipline could occur from talking to me, from the talk, and they are required - - well, they should

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have representation. They are entitled to that. And they should have time to confer if they need to.

JUDGE WEST: Before - -

5 THE WITNESS: Before.

JUDGE WEST: - - the investigative interview?

10 THE WITNESS: Yes, sir. [Transcript pages 473-475]

On recross Davis testified that she knew that it is best to offer a pre-consultation, the opportunity for an employee and a steward to consult before the investigatory interview continues, before her deposition was taken.

15 One of the attorneys representing Respondent, Oldenburg, made the following statement at the end of Davis's testimony:

20 ... we talked about the consent decree previously. A mass mailing of *Weingarten* instructions approved by the NLRB was part of that to be sent to every supervisor in the Postal Service. And I can state that I know that is what she was referring to. It sounds like one of the usual suspects. [Transcript page 477]

Analysis

25 In my opinion, General Counsel has demonstrated that the Respondent on or about August 11, 2004 violated the Act as alleged in the complaint. Steward Amerson and employee Hendrix agree that after supervisor Davis said that it was a predisciplinary meeting, Hendrix asked to speak with Amerson before going forward with the meeting, and Davis denied the request. Davis testified that Hendrix said only that he had nothing to say and he would wait until the matter came back from Labor. Hendrix, in effect, agreed with this in that he testified he did not say anything and if he is not allowed to meet with the steward before the investigatory

30 interview, he does not normally respond to questions. When she testified at the trial herein on March 23, 2006, Davis testified that she had been at the Birmingham Annex for three years and for these three years she has asked the employee and the steward if they would like to talk first before she began the interview. Davis never specifically testified that she did this in the matter at hand; Davis never testified that she asked employee Hendrix and steward Amerson if they would like to talk first before she begin the interview. The reason she did not follow her alleged

35 normal routine is that before she could ask the question Hendrix asked to speak with Amerson. But Davis denied Hendrix's request notwithstanding the fact that she testified that since about March 2004 she was aware of the employee's right to a pre-interrogation consultation with his steward. The record does not provide the answer to why Davis denied the request for a pre-interrogation consultation between the employee and his steward. Perhaps like Nash, Davis

40 was pressed for time on this occasion and she decided that her schedule trumped the employee's involved right. Perhaps it had something to do with the personalities involved. It does not really matter. What matters is that Davis violated the Act in denying Hendrix the right to a pre-interrogation consultation with his steward after she declared that it was an investigatory interview and then proceeded with the investigatory interview. Respondent violated the Act as

45 alleged in the complaint.

6. Edward Steele

The complaint alleges that on or about October 26, 2004, Respondent, by Paula Brown, at Respondent's Birmingham Annex facility, by denying the request of employee Edward Steele and Mailhandlers Local 317 Steward William Amerson to meet and confer prior to the commencement of the interview, denied the request of its employee Edward Steele to be represented by Mailhandlers Local 317 during an interview; that Edward Steele had reasonable cause to believe that the October 26, 2004 interview would result in disciplinary action against him; and that Paula Brown conducted the interview with Edward Steele even though the Respondent had denied the employee's request for union representation.

In October 2004 Amerson attended a predisciplinary hearing as steward where Steele was the involved employee. Amerson testified that the involved supervisor was Paula Brown; that the meeting was held in MDO Hill's office in the Annex; that he, Brown, Steele, and Lois Embry, who was an acting supervisor, were present; that Brown said that she was going to give Steele a predisciplinary hearing; that at that point Steele asked to talk with the shop steward before the meeting happened; that Brown said that "this was just basically a predisciplinary hearing and she needed to [go] ahead with the interview" (transcript page 63); that Brown then started to read the charges against Steele and he was contradicting what she was saying; that they discussed Steele being in a particular work area and talking with the employees in that area at that time; that Steele said that he was in the area in question because he was doing his required nightly safety inspection, when he noticed a violation he questioned the people in the area, Embry approached him, they had an exchange, and then Brown got involved; and that the meeting lasted about 15 minutes.

On cross-examination Amerson testified that when Brown first approached him she did not tell him that Steele asked for a union steward; that Brown asked him if he was the Chief Shop Steward, and when he responded yes she told him to park his forklift and meet her in Hill's office; that he asked her what it was about and Brown told him that she needed to see him about Steele; that when he again asked what it was about Brown told him to go to MDO Hill's office; that since Brown is not his supervisor and is on another Tour, he went to see his MDO, Rawland Simmons, about taking union time; that this occurred shortly after 11 p.m. during the overlap of tours; that he had clocked in at 11 p.m.; that he found Simmons with Hill, and Hill gave him a direct order to go upstairs (According to page 3 of Respondent's Exhibit 14, Hill ordered him "to take his ass upstairs right now and to shut his mouth.")¹⁶; that it was his understanding that Hill told him to be silent and do nothing; that he did not indicate in the grievance that Steele asked for a pre-interview or that he asked to speak with Steele first; that Steele was the one who requested that he be able to discuss the matter with his steward before the pre-disciplinary meeting; that in his affidavit to the Board he indicates that he was the one who requested the consultation with Steele before the predisciplinary interview; that when he first went into the room Steele requested the consultation with his steward before the predisciplinary meeting; that this is not indicated in his affidavit; that he himself later requested

¹⁶ According to the grievance, "Amerson thus was not allowed official Union Time nor was he allowed to a pre-conference, or to assist and represent Mr. Steele [but rather] ... Amerson ... was merely an observer." The grievance does not indicate that Amerson asked Brown to consult with Steele before the investigatory interview proceeded. The grievance does not indicate that Steele asked Brown to be allowed to meet with Amerson before the investigatory interview proceeded. Indeed what the grievance indicates is that "Mr. Steele's WEINGARTEN RIGHTS were violated. SHOP STEWARD WILLIAM AMERSON WAS GIVEN A DIRECT ORDER BY TOUR III MDO ART HILL to take his ass up stairs right now and to shut his mouth."

to speak with Steele before the predisciplinary meeting began; and that at the time the request for preconsultation was made, Brown had not yet explained what she wanted to talk about.

5 Steele testified that in October 2004 he was shop steward and Safety Captain of Tour I at the Birmingham Annex; that MDO Rawland Simmons, who was the MDO of the Tour held a meeting at 11 p.m. every night, and pursuant to Simmons's instructions he conducted a safety inspection of the building every night since September 2004; that the inspection, which was the first thing he did when he "hit the floor," (transcript page 195) took about 15 to 20 minutes; that one night in October 2004 when he started his inspection tour with his inspection sheet he noticed Clerk Ray Seay strapping mail, which is a Mailhandler's job; that Seay asked him if he was going to file and get paid and he told Seay that he was; that he and Seay were laughing and another Clerk, Joe Williams, said that Mailhandlers were just lazy, they do not want to work, but they always file and get paid for the Mailhandler jobs done by Clerks; that he told Williams that Mailhandlers did not want Clerks to do the Mailhandlers job, and Clerks have to do what management tells them to do; that Acting Supervisor Embry came over and asked him what was he supposed to be doing; that he informed Embry that he was doing his safety inspection, and he, Seay, and Williams were just having a conversation; that Williams was still kind of getting loud, he told Seay that he would talk with him later, and he went back to doing his safety inspection; that he was on the small parcel bar code sorter machine side of the building moving stuff which blocked access to a fire extinguisher when Paula Brown, who is the Supervisor of Distribution Operations (SDO), approached him and told him that she needed to see him upstairs in MDO Hill's office; that Embry was in the office when he arrived with Brown; that when Brown said that she was doing an investigatory interview he told her that he wanted to see a shop steward; that Brown said that she would get one and she left the room; that subsequently Amerson came into the room with Brown, and Amerson was telling Brown that she had not even given him time to clock in on union time; that Brown told Amerson that they would handle that later; that when Brown then said that she wanted to read the charges, he told Brown that he needed to speak with Amerson; that Brown said "no, I'm going to go ahead and read these charges. And you all can meet afterwards" (transcript page 200); that Brown told him that he was being charged with conduct unbecoming a postal employee; that he "asked her how was a postal employee supposed to act? I said because if I act like a postal employee, then I might need to pull out a gun and start shooting," (Id.) and he started laughing; that Brown said that was what she was talking about "[y]ou're not acting as a becoming postal employee" (Id.); that Brown then read the charges and then she asked for his response; that he told Brown that he did not "see how she could come up with those charges, but it's the Post Office, and you all are going to do what you want to do anyway" (Id. at 201); that when he asked to speak with Amerson Brown said after she finished reading the charges, Amerson said "no, I need to speak with him" (Id. at 202); that Brown then said "after I finish reading the charges, you all can meet" (Id.); that at the conclusion of the meeting Brown said "you all can go back to work" (Id.); and that this led him to conclude that he and Amerson were not allowed to meet after she read the charges and he believed that Brown said "you all can do this some other time" (Id.) when Amerson asked to speak with him.

40 On cross-examination Steele testified that when Amerson arrived Brown again said that this is an investigatory interview; that he then said that he wanted to meet with Amerson; that Brown said that they could do it later; that he was not sure if Brown said again that this is an investigatory interview when he asked to speak to Amerson; that he made the first request to speak with Amerson and Amerson then requested to speak with him; that Amerson made his request when Brown started to read the charges, telling her that when a shop steward is present and the steward says he needs to meet with the employee, the supervisor is supposed to leave the room; that Brown said that she wanted to finish with it and he and Amerson could meet later;

that after Brown finished, she told them to go back to work; and that after she finished reading the charges she asked him if he had anything to say and he gave his explanation.

Embry, who is a mail processor and a member of the American Postal Workers Union, testified that she served as an acting supervisor in October 2004; that she attended an investigatory interview of Steele in October 2004 in MDO Hill's office in the Annex; that earlier she had been supervising the 1000 area; that she had two Tour I clerks come in and work on priority class mail that day; that the two clerks had to get the mail on the truck so that it could be dispatched by midnight; that the two clerks were strapping the lids on, which is supposed to be Mailhandlers' work but she was short of Mailhandlers so she had to use what she had to get the mail out; that Steele had some words with Williams who was doing the strapping and it became loud; that she walked upon the scene and asked Steele why he was in her work area disrupting her employees; that Steele told her that he was watching them cross craft so that the Mailhandlers can get paid for Clerks doing a Mailhandler's job; that she asked Steele to leave and let them finish their work so that they would not miss dispatch; that after Steele left she radioed Hill and asked him to come to her operation; that she told Hill about Steele talking about filing a grievance, disrupting William's work, keeping Williams from doing his job, and possibly causing them to miss the dispatch; that Hill radioed Brown and told her to come and give Steele a predisciplinary; that she and Brown met with Hill, who told Brown to take Steele to his office with her and Amerson, tell Steele the charges, and see what Steele had to say; that she and Steele stood at the base of the stairs to Hill's office about 10 minutes and Steele said nothing; that when Brown and Amerson arrived at the bottom of the stairs all four of them walked up the stairs to Hill's office; that when they were in Hill's office Brown began to outline to Steele why she had him up there; that Brown asked Steele why he was there and Steele "just went to screaming over her and saying that he didn't have no business there and it was just a loud commotion and she kept trying to talk and he was talking" (transcript page 306); that when Brown asked Steele to let her speak he told her "you called this meeting but I'm running it" (Id.); that before Brown explained why Steele was there, she, Embry, did not hear Steele request to meet with Amerson first; that when Brown began trying to explain, Steele did not request to meet privately with Amerson; and that Steele said that he was a shop steward and knew what his rights were and that he was the safety captain and he was instructed by his MDO to come in and survey the floor when he walked into the building; that Brown then

told him [Steele] that that is not so, when you come in, you are on Tour III, you do what Tour III tells you to do and you do your survey on Tour I time when Mr. Barrow takes over, not on our time. You come in and do what we tell you to do. [Transcript page 308]

Embry further testified that Steele then said that he was tired of this and he asked Brown if she was finished; that when Brown said yes, Steele went out the door first; that at no time did Steele make any request to meet privately with Amerson; that the entire time Amerson was in her presence he did not say a word; that she and Amerson were silent; that at the conclusion of the meeting she heard a click and Amerson had something in his left pocket and she thought it was tape recorder because he picked it up, clicked it, and dropped it back in his pocket.

On cross-examination Embry testified that Seay was working in the same location as Williams on the night in question in October 2004; that Steele and Williams were having a raucous discussion and Williams had stopped doing his work because they were having this confrontation about strapping; that Seay continued to do his job; that Williams told Steele "look, man, I am trying to do my job, we were told to do this, we got to get this dispatch out, will you get out of the way" (transcript page 311); that Steele was standing in front of Williams hindering production; that it was difficult for her to follow what was being said by Brown and Steele; that she gathered from what Steele was saying that he was trying to bring the meeting to a stop; that

when they got together Steele did not request of either Brown or her that he be allowed to see Amerson; that she did see General Counsel's Exhibit 2 on the bulletin board at the Birmingham Annex and she read it in its entirety; that she had seen it around or before the time frame of the meeting with Steele in Hill's office; that she "stepped down" (Id. at 316) from being an acting supervisor in June 2005; and that in Hill's office Brown told Steele that he was charged with¹⁷

[d]isrupting a work area, being out of his work area when he hit the clock, actually loitering. When you come in and hit the clock, you are supposed to start doing whatever your assignment is, not just walk around the building until our Tour is over and then start your work. [Id.]

Embry further testified that the meeting with Steele in Hill's office lasted 15 to 20 minutes; that Steele was talking the whole time because he was screaming over Brown and wasn't listening to Brown; that it was her understanding that Steele was trying to get the meeting to come to a halt at that point; that Steele talked in her presence for approximately 15 minutes; that everything she remembered Steele saying during his meeting with Brown is as follows:

The first thing that came out of his [Steele's] mouth was, you called this meeting, but I am in control of this meeting. And he went from there to, I haven't done anything wrong; I am doing what my MDO told me to do; they were crossing crafts and I am - - was standing there to represent my Union because I am a shop steward, and I want to get Mailhandlers' pay for them crossing crafts, and I have no reason to be up here; I don't know why you brought me up here.

And he was just loud, I mean, very loud.

....

He - - really wasn't saying anything but repeating the same thing over and over again, like I said, to try to intimidate Ms. Brown.

....

He never made any statement that was forthcoming for his rights particularly. He never did. He was really flexing his power as a shop steward himself. He was acting on his own behalf is what he really was doing.

....

¹⁷ Brown's notice of the 7 day suspension to Steele, page 2 of Respondent's Exhibit 14, indicates that he was charged with the following:

Your actions are contrary to the Employee and Labor Relations Manual, which states in part as follows:

ELM 666.1 - Employees are expected to discharge their assigned duties conscientiously and effectively.

ELM 666.5 - Employees must obey the instructions of their supervisors.

ELM 666.2 - Employees are expected to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons or to create unpleasant working conditions.

I recall basically everything that he said. I never have a problem remembering what I hear. I might not remember what I read all the time but anything I heard I never forget.

5

....

I was more listening to him instead of Ms. Brown because, like I said, you couldn't help but hear him because he was standing right there screaming in my ear. [Transcript pages 317 - 319]

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Embry further testified that when Williams and Steele were talking loudly with each other on the floor they would not listen to her and she finally had to get between them, tell Williams to go back to work and tell Steele to leave the area; that Williams went back to work but she had to tell Steele that she was no longer asking him, she was directing him to leave the work area; that she radioed Hill in Steele's presence so that he knew that she was not playing; that then Steele walked away; and that in Hill's office Steele said

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that his MDO, Mr. Barrow, had told him upon hitting the clock at 11:00 o'clock to do his safety walk through and that we should check with Mr. Barrow because that is what he told him to do, which we did check with Mr. Barrow.

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And Mr. Barrow said, no, I told him to do it but not on Tour III's time. [Id. at 321]

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Additionally, Embry testified that she checked with Barrow that same night while they were standing at the base of the stairs because Barrow's office is upstairs with Hill's office¹⁸; that this was the first investigatory interview she attended; that it is not possible that Steele requested during the meeting to meet with Amerson, and Brown denied the request; and that Steele did not ask before the meeting and he did not ask during the meeting to first speak with Amerson.

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Supervisor Paula Denise Brown testified that in October 2004 she conducted an investigatory interview with employee Steele; that manager Hill asked her to help Embry since Embry had not conducted an investigatory interview before; that she was told that Steele was interrupting Embry's operation and she asked him to leave; that it was her understanding that Steele did not leave the area when Embry first told him to leave; that she told Embry to get the employee for the investigatory interview and she would get the steward; that at this point in time Steele had not indicated that he wanted a union representative at the interview; that she got steward Amerson, who was operating a forklift, and she told him that she had to do an

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investigatory interview with him; that Amerson told her that he had to get his notebook and clock in on union time; that she told Amerson to meet her upstairs for the interview; that as she went upstairs to Hill's office she saw Embry and Steele heading up the stairwell, and she joined them; that the three of them went to the office and waited for Amerson; that she did not start the interview while Amerson was not there; that during the wait Steele did not ask for a steward; that they waited for Amerson for about 5 to 10 minutes; that she then told Embry and Steele that

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she was going to see if she could find Amerson; that she found Amerson and he told her that

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¹⁸ According to Brown's memorandum, Respondent's Exhibit 14, Steele said that MDO Rawland Simmons told him to perform the safety check, and that "Investigation revealed however, that Mr. Simmons instructed you to perform a safety walk through only after Tour I had charge of the workroom floor and having received permission from your supervisor on Tour I to leave your assignment to do so."

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he wanted to talk to the MDO on his shift, Simmons; that she told Amerson no, she needed him to come upstairs so she could do the investigatory interview; that when Amerson again said that he needed to speak with Simmons she told Amerson that he could talk to Simmons later and right now she needed him to go upstairs; that Amerson told her she could not make him go upstairs, she could not make him go on union time, and he needed to talk with an MDO first; that both Tour II MDO Hill and Tour III MDO Simmons were walking toward them, and Amerson, who was Tour I walked over to the two MDOs; that she could not hear what was said between the two MDOs and Amerson; that Amerson came back over to her by the bottom of the stairwell; that she told him that they were going upstairs; that Embry and Steele were standing on the platform at the top of the stairwell; that she went up the stairs with Amerson, meeting Embry and Steele at the top; that neither Steele nor Amerson requested that they be allowed to meet before she conducted her business; that all four of them went into Hill's office; that she and Embry sat down in the office and Steele and Amerson stood notwithstanding her request for them to sit; that she told them that it was an investigatory interview and it would probably lead to some type of disciplinary action; that Steele asked why he was there and she told him that in was an investigatory interview; that Steele said that he was just doing his job; that she started to say what she wanted to talk about but Steele kept cutting her off saying that he was just doing his job; that Steele was loud, irate, rude, and he would not stop talking; that Steele said that she called the meeting but he was going to run it, he was the man, and he was the shop steward; that during the meeting Steele did not request a break to talk with Amerson privately; that Steele did not request to meet with Amerson before she began her business; that Amerson did not make any requests for the two of them to meet before she began her business; that during the meeting Amerson did not request for the two of them to be able to meet privately; and that Amerson did not say anything during the meeting while the four were together.

On cross-examination Paula Brown testified that after she told Amerson at his forklift that she needed him in Hill's office, she could not remember if she saw Steele and Embry at the bottom of the stairwell but she remembers going upstairs behind Embry and Steele; that she could not recall whether Embry or Steele was in front; that she tried to ask Steele questions during the investigatory interview; that Steele explained what he has been doing in that he told her that he was conducting a safety inspection; that Steele said that Rawland Simmons told him to conduct the safety inspections; that she was positive that Steele did not say that Barrow told him to perform the safety inspections; that she did not know why Embry would say that Steele said that Barrow told him to perform the safety inspections; that with respect to General Counsel's Exhibit 2, the above-described *Weingarten* notice, she has seen a document but she was not sure if General Counsel's Exhibit 2 was the one; that she saw the document in an e-mail and on the bulletin board at the Birmingham Annex; that the document she saw maybe sometime in 2004 was probably similar to General Counsel's Exhibit 2; that the notice which she read in 2004 on the bulletin board at the Birmingham Annex pertained to the rights and rule related to *Weingarten* and investigatory interviews; that she has attended 10 to 12 investigatory interviews as a supervisor; that in maybe 2 or 3 of her 10 to 12 investigatory interviews was there a request that the employee and steward be permitted to meet before the interview continued; and that she could not recall when these two or three requests occurred.

Analysis

Amerson and Steele testify that they both, with Steele asking first, asked Paula Brown that they be allowed to have a pre-interrogation consultation. Embry and Brown both testify that neither Amerson nor Steele asked for a pre-interrogation consultation. But Embry is not a reliable witness in that she changed her testimony about when she radioed Hill without explaining why she changed the testimony. Initially Embry testified that she radioed Hill after Steele left the scene. Subsequently, Embry testified that she radioed Hill in Steele's presence

so that he would know that she was not playing. Also, Embry testified that she checked with Barrow that same night as to whether he told Steele to do his safety inspection, and that basically she recalled everything that Steele said during the interview - "I never have a problem remembering what I hear." (transcript page 319) It is not clear why Embry would have checked with Barrow in that Brown testified that during the predisciplinary interview Steele said that MDO
 5 Simmons told him to conduct the inspections. Additionally, Embry testified that she walked up the stairs with Brown, Amerson, and Steele to Hill's office. Brown, on the other hand, testified that she walked up the stairs with Embry and Steele, she had to get Amerson later, and when she accompanied Amerson up the stairs Embry, along with Steele, was waiting at the top of the stairwell. As noted above, Brown saw the notice regarding *Weingarten* rights and investigatory
 10 interviews posted in the Birmingham Annex in 2004. Brown testified that the notice she saw was probably similar to General Counsel's Exhibit 2, which as here pertinent, specifies that

2. It is the employee's obligation to request representation of a union steward at the investigatory interview.

15 3. An employee facing an investigatory interview has the right to meet with his or her union steward *in advance of the interview* to prepare for the interview.

20 4. At the investigatory interview, the employee is entitled to a union steward's *assistance*. The Postal Service violates the employee's rights if it refuses to allow the steward to speak or tries to restrict the steward to the role of a passive observer.
 [Emphasis in original]

A United States Court of Appeals, in *United States Postal Service v. National Labor Relations Board*, 969 F. 2d 1064, 1073 (D.C. Cir. 1992) concluded that

25 In *Weingarten*, the Supreme Court approved as consistent with the NLRA [National Labor Relations Act] section 7 the Board's recognition of a right to a union representative's attendance at investigatory interviews. The NLRB has since determined that the right recognized in *Weingarten* and the statutory purposes underlying that
 30 decision are best effectuated by allowing employees to consult with their union representatives prior to the occurrence of an interview; and the Board has extended that protection to Postal Service employees whose conduct is subject to investigation by the Postal Inspection Service.

35 Noting the court's clear statutory authority to entertain NLRB enforcement petitions and our obligation to review the reasoning actually relied upon by the agency, we find the Board's decision a "permissible" and "reasonable" construction of section 7, one in no way foreclosed by the *Weingarten* decision.

40 There is no legally meaningful difference between an investigation by the Postal Inspection Service and a Postal Service supervisor. Indeed, the notice which we are focusing on herein, General Counsel's Exhibit 2, which was posted pursuant to a Consent Order which was entered approving a settlement between the Postal Service and the Board, does not limit the requirement that "[a]n employee facing an investigatory interview has the right to meet with his or her union steward *in advance of the interview* to prepare for the interview" to an investigation
 45 by the Postal Inspection Service. The notice, which is dated "2/18/04," specifies

Under that Consent order, the Postal Service is required to institute a nationwide educational program directed at all supervisors, acting supervisors, postal inspectors and managers with direct responsibility for bargaining unit employees, concerning

employee rights in investigatory interviews, otherwise known as Weingarten rights.
[Emphasis in original]

5 The fact that Respondent's supervisors supply a union steward without the employee who is
the subject to the predisciplinary first asking for this, does not relieve the Respondent of the
obligation to accord the employee the right to have the opportunity for a pre-interrogation
consultation. In effect, by denying the employee a pre-interrogation consultation, the
Respondent is limiting the role of the steward. The *Weingarten* notice which was posted in the
Birmingham Annex, as noted above, is dated "2/18/04." Brown knew exactly what she was
10 doing. Telling the employee and the steward that they could meet after the predisciplinary
meeting, even if the Respondent supplies the steward without being asked to, does not comply
with the requirements of *Weingarten*, supra. The testimony of Amerson and Steele is credited,
notwithstanding the fact that Amerson did not indicate in his affidavit or the grievance that
Steele asked for a pre-interrogation consultation. Respondent violated the Act on or about
October 26, 2004 as alleged in the complaint.

15 With respect to the involved Alabama interviews, Respondent on brief takes the position
that there were no violations in that no true interviews occurred since, collectively, no
substantive information was secured, no information was sought and provided, some of the
employees refused to answer questions, the interview did not come to fruition, the investigative
interview did not materialize, and no substantive information was actually elicited. As pointed
20 out by the Board in *United States Postal Service*, 241 NLRB 141 (1979)

25 Under *Weingarten*, once an employee makes ... a valid request for union
representation, the employer is permitted one of three options: (1) grant the request, (2)
discontinue the interview, or (3) offer the employee the choice between continuing the
interview unaccompanied by a union representative or have no interview at all. Under no
circumstances may the employer continue the interview without granting the employee
union representation, *unless* the employee voluntarily agrees to remain unrepresented
after having been presented by the employer with the choice mentioned in option (3)
above or if the employee is otherwise aware of those choices. [Footnotes omitted]
[Emphasis in original]

30 The Alabama incidents involve denials of requests for preinterrogation consultation with a union
representative. A denial of such request is similar to a denial of a request for a representation in
that the employer would be limiting the representative's role. If the employer chooses to deny
the employee's request for preinterrogation consultation with a union representative, then the
35 employer is faced with the three above-described options since the employer is denying the
employee full representation. Respondent's argument has no merit.

Respondent's Exhibit 6, according to one of Respondent's counsel, provides

40 those figures which reflect the number of steward hours which are used by the facilities
which are we understand to be under scrutiny in this Complaint which is to say the
Alabama Plant and Annex, the Rio Grande District and the Dallas District.

So it is a - - it is more of a micro examination of the use of steward hours within those area within which these complaints that you are adjudicating arise.^[19] [Transcript pages 255-256]

5 Respondent's Exhibit 9 is excerpts of portions of the National Agreement between the Postal Service and the Mailhandlers' Union which was effective from 2000 to November 20, 2004. One of Respondent's counsel stated that it demonstrates that the national agreement is capable of addressing the nature of the alleged violation which is raised here.

10 Respondent's Exhibit 10 is excerpts from the Contract Interpretation Manual of the Postal Service and National Mailhandlers' Union. One of the Respondent's counsel stated that the primary purpose of offering this document is in support of Respondent's argument for deferral and that the obligation of the Postal management to obey the law of the Board and particularly the law of *Weingarten* has been contractually adopted by the parties joint agreement, and that accordingly this contract does contemplate that this is the nature of matter which may be grieved within the parties grievance arbitration procedure; and that the parties agree that this is the controlling understanding of the National Agreement.

20 The Postal Service introduced Respondent's Exhibit 24 which is memoranda and attachments from William Brown, Vice President, Area Operations in the Southeast Area, and related memoranda from District Managers in the Southeast Area, concerning the applicable protocol for fulfilling union information requests. All but 2 of the 12 documents are dated in early 2006. One of the two exceptions is dated December 16, 2005 and the other is dated April 15, 2005.

25 Respondent's Exhibit 18 is a January 11, 2005 memorandum from the Manager, Human Resource, Alabama District, Elizabeth White, to staff, managers and Postmasters in Birmingham and Mobile, Alabama. It reads as follows:

SUBJECT: Providing Weingarten Rights for Investigatory Interviews

30 To ensure compliance with the Weingarten decision, the procedure for Investigatory Interviews is as follows:

1. Have the appropriate Union Representative available at the investigation location.
2. Bring the employee to the investigation location.

40 ¹⁹ The cover page of Respondent's Exhibit 6, which is signed by Respondent's Deputy General Counsel, reads, as here pertinent, as follows:

45 I hereby attest that the attached documents, National Payroll Summary Reports ... for the Southeast CS Area/Dist. 350 (Alabama Customer Service ("CS") District), Southeast PD Area/Dist. 351 (Birmingham Processing and Distribution Center ("P&DC"), Southwest CS Area/Dist. 752 (Dallas CS), Southwest CS Area/Dist. 780 (Rio Grande CS District), and Southwest PD Area, Dist. 753 (Dallas P&DC), are official documents of the United States Postal Service. I also attest I have examined the documents, the documents are true and accurate, and line 5 reflects the paid duty hours for the periods indicated of all stewards for all postal unions in the indicated district.

5 3. Advise the employee that you intend to conduct an investigative interview and that Weingarten allows a Union Steward to be present. If the employee does not want the Union Representative present, send the Steward back to work. If the employee does want the representative present, advise the nature of the investigation and ask them if they wish to have a brief time to consult privately. Leave the room if they chose [sic] to exercise that right.

4. Hold the Investigative interview.

10 It is critical that we are all clear about what the Weingarten rights allow. If you need further advice, please do not hesitate to contact any of the Labor Relations staff members.

15 It is noted that one of the "cc" recipients is John Oldenburg, who is one of Respondent's counsel in this proceeding. Donald Shields, who was Acting Manager of Labor Relations in the Birmingham district for about a 1-year period ending September 2005, testified that he prepared Respondent's Exhibit 18 for White's signature; that he became aware in early January 2005 or late December 2004 of a complaint that Respondent had violated *Weingarten* rights; that he prepared Respondent's Exhibit 18 to insure that they were never violated again; that Respondent's Exhibit 19 is a follow-up memorandum dated June 3, 2005 which speaks to situations where a steward is not available in house; that where there is no in house steward, a steward is provided only after the employee is told that there is going to be an investigatory interview, the employee is asked if he or she wants a steward present, and the employee is told that if they do, the investigatory interview will be delayed until the steward is available; and that before a supervisor can even decide if they are going to discipline, they have to have an investigatory interview.

25 On cross-examination Shields testified that he drafted Respondent's Exhibit 18 because Oldenburg, who was in Birmingham conducting depositions, told him what it was about; that he did not talk with any of the supervisors in question about the events which led up to the *Weingarten* allegations; that he did not speak with Nash about what had happened; that before discipline is issued in the Alabama District, a request for appropriate action form must be filled out, and one of the lines on the form calls for the date of the investigatory interview; that the request for appropriate action form has to be signed by the supervisor and concurred in by that supervisor's immediate boss, supervisor, manager, and normally the plant manager or the postmaster of the office will concur in the action; that then it is forwarded to labor relations to prepare the actual disciplinary notice; that the request for appropriate action form has to be completed in its entirety before a notice is prepared; and that the Postal Service does not have a list of offenses like, among others, conduct unbecoming a Postal employee.

40 According to the testimony of Shields, Respondent's Exhibit 20 is a printout of the joint training that was conducted in early 2005 with the American Postal Workers Union and it covered the Joint Contract Interpretation Manual (JCIM). Shields also sponsored Respondent's Exhibit 3 which is a Grievance and Arbitration Tracking System report showing the number of Step 2 discipline grievances appealed in fiscal year 2004 in the Postal Service.

45 Respondent's Exhibit 4 is a Grievance and Arbitration Tracking System report showing the number of Postal Service bargaining unit employees nationwide by performance cluster for the four main Postal Service unions. The printout indicates "Last Refreshed: 10/13/2005."

Respondent's Exhibit 21, which is dated March 6, 2006, is an email and attached letter reminder of *Weingarten* rights which was sent to all Alabama management employees by Albert Ward, a Labor Relations Manager with the Respondent in Birmingham.

5 Respondent's Exhibit 22 is a 71-page compilation of requested discipline for the Birmingham Plant and Annex from January 1, 2000 through September 30, 2005. All but one page of the printout is dated "3/20/2006." Ward, the sponsoring witness, testified that each one of these applications did not end up in the issuance of discipline; that not all of the discipline issued would have made it to the second step of the grievance procedure; that not all of these requests would be included in the grievance and arbitration tracking system; and that it is rare that applications come to the Labor Department without an investigatory interview being done. 10 The parties stipulated "that this exhibit gives no indication as to whether or not ... there were any violations on pre-disciplinary meetings that occurred that have not been the subject of the labor charges where the issue has joined and litigated." (transcript page 484)

15 Respondent's Exhibit 23 is a list, dated "03/21/2006," of the Birmingham supervisors who potentially could be subject to the special remedy that General Counsel is seeking.

B. Texas

20 Respondent's Exhibit 26 is excerpts of the National Agreement between the Postal Service and the National Postal Professional Nurses (NPPN) which was to expire in 2004 but was extended to August 18, 2006.

25 Respondent's Exhibit 27 is excerpts from the 2005 Joint Contract Administration Manual of the Postal Service and the National Association of Letter Carriers, AFL-CIO, dated November 2005.

Respondent's Exhibit 29 is excerpts of the National Agreement between the Postal Service and the National Association of Letter Carriers, effective from 2001 to 2006.

1. Annu Rajan

30 The complaint alleges that on or about October 15, 2004, Respondent, by Patricia Auerbach, at Respondent's DFW Turnpike facility, denied the request of employee Annu Rajan to be represented by the Postal Nurses Union during an interview; that Rajan had reasonable cause to believe that the October 15, 2004 interview would result in disciplinary action against her; that Rajan refused to attend the interview; and that about October 15, 2004, Respondent, 35 by Patricia Auerbach, ordered Rajan "off the clock," thereby suspending its employee Rajan because of her refusal to attend this interview without union representation.

40 Rajan, who has worked for the Respondent as an Occupational Health Nurse for about 19 years, testified that she takes care of employees if they are sick and she does pre hires; that she has worked at Respondent's Dallas, Texas facility at 401 DFW Turnpike for 17 years; that the Occupational Health Nurses at her facility are represented by the NPPN Union, and the Union steward, who has been at the involved Dallas facility for about 7 years, is Ajo James; and that Idell Mitchell, who works in Washington, D.C., is the President of NPPN.

45 Ajo James, who has worked for the Postal Service for more than 10 years as an Occupational Health Nurse, testified that she works at Respondent's DFW Turnpike facility; that she is a Union steward of the NPPN and she is Rajan's steward; that Doctor Patricia Auerbach is a contract Medical Officer; that she met with Auerbach and Kay Vinson, who is the training

supervisor, in Auerbach's office in May 2004; that when she was in Auerbach's office she was asked to explain her on-the-job injury case; and that the injury happened in January 2004 and she filed the claim in February 2004.²⁰

5 Rajan testified that in the Fall of 2004 (on September 7, 2004) her husband flew to India from DFW (Dallas - Fort Worth Airport); that she submitted a leave slip (form 3971) to U.S.P.S. to take a vacation day so that she could drive her husband to the airport; that at the time she had over 200 hours of accrued annual leave; that the leave slip was submitted to Doctor Auerbach, who was the physician for the medical unit and who became the supervisor for the medical unit because it did not have a supervisor at the time; that she explained to Auerbach that it was very important that she have the day off to take her husband to the airport; that when Auerbach denied the leave, she asked Auerbach to take four hours off in the afternoon; that Auerbach did not want to give her the four hours; that Auerbach called her into her office and supervisor Vinson was in Auerbach's office; that Auerbach asked her why she needed the four hours and she explained why in front of Vinson; that Vinson did not make any comments; that about 11 a.m. on the day her husband went to the airport she left the facility after placing a leave slip (form 3971) in Auerbach's box since she was not available; that she drove her husband to the airport; that while she was at the airport the nurse at her child's school telephoned her to tell her that her daughter was having an allergic reaction; that she told the nurse that she would come and pick her up; that she telephoned Auerbach and told her that she could not be back at work because she had to go pick up her child because she was sick; that Auerbach told her that she would have a pre-disciplinary when she returned to work; that she did not return to work that day because it was 3:30 or 4 p.m. when she picked her daughter up at school; and that the day she returned to work after taking her husband to the airport, she had a predisciplinary meeting with Debbie Edmonds, who is a labor relations person, present.

25 Rajan testified that in September 2004 Ajo James showed her General Counsel's Exhibit 12 which James told her that she found near the computer in the medical unit; and that she recognized the handwriting to be that of Linda Shockley, who was a contract nurse in the medical unit. General Counsel's Exhibit 12 reads as follows:

9-28-04

30 1) Employee here to RTW - upset Med. Unit was closed early last Fri. 9/24/04 @ 1530. Ann Rajan RN encouraged to file grievance against Med. Re: early closing. [Emphasis added]

Rajan testified that she

35 had talked to a patient that was very upset when he came in that the night shift was closed, and he could not return back to work that day, so he lost his work day that day. He was very angry. He expressed his anger to me. That's when I told him that he could either got [sic] his union ... representative ... and complain to them about the closure of the unit. [Transcript page 559]

45 ²⁰ General Counsel's Exhibit 15 is the suspension letter Ajo James received on May 6, 2004 for, among other things, participating "in the charting of documentation of the medical status of your own reported 'on the job injury' in a shadow file on seven different dates from February 4th through February 18th without ever notifying your supervisor." Ajo James wrote on the second page of the suspension letter "The above allegation is not true."

Counsel for General Counsel indicated that General Counsel's Exhibit 12 was not being offered for the truth of the matter asserted but rather that this is a document which had been reviewed by Rajan before her meeting with Auerbach on October 15, 2004, described below, and to show Rajan's state of mind and the reasonableness of it regarding the purposes of the meeting.

5 With respect to General Counsel's Exhibit 12, Ajo James testified that she found this document in the back computer in the medical unit on September 29, 2004 when she opened the unit; and that she gave the document to Rajan the same day in the medical unit, and Rajan told her that an employee came to the medical unit, he lost a work day because the unit was closed early that day, he was going to file a grievance, Rajan told him 'Yeah, you have a right to go and file a grievance,' and Shockley overheard this conversation.

10 Ajo James testified that she attended a predisciplinary interview with Rajan regarding her leaving work to take her husband to the airport; that she believed that this interview occurred on October 1, 2004; that about 30 minutes before the interview she saw Vinson leaving Auerbach's office after meeting with Debbie Edmonds; that she then told Rajan what she observed indicating that when Vincent was present with Auerbach in the latter's office in May 2004 questioning her about her on-the-job injury, she later had a discipline issued to her; and that she and Rajan discussed Auerbach using Vinson as a fact-finder to support the discipline.

15 General Counsel's Exhibit 13 is a letter of warning to Rajan dated October 5, 2004. The letter refers to the fact that on September 7, 2004 Rajan left work at about 11 a.m. without permission since Auerbach again denied her request for leave for September 7. The next-to-last paragraph of the letter reads:

20 Continued Unacceptable Work Performance, in this instance, unauthorized absence from work assignment, is a serious deficiency and will not be tolerated by the Postal Service. You must take immediate and positive steps to correct your performance in this area. Your failure to correct this deficiency may result in further disciplinary action being taken against you, up to and including your removal from the Postal Service. [Emphasis added]

25 On Friday October 15, 2004 Rajan worked in the medical unit with Shockley. Rajan testified that employee John Kurlish came into the unit and told her that he had filed a grievance; that she told Kurlish that was the right thing to do; that Shockley gave Kurlish a return slip so he could return to work; that after Kurlish left the unit Shockley also left the unit without telling her; that she looked out the door of the unit to see where Shockley was going; that she saw Shockley go straight to Auerbach's office; that this occurred about 3:15 p.m. and steward Ajo James leaves the facility about 3:30 p.m.; that about 3:20 p.m. she clocked out for lunch and while Ajo James was leaving she stepped out in the corridor to speak with James; that they walked out together and Ajo James stopped at Auerbach's office to pick up a slip; that she waited outside Auerbach's office for Ajo James; that she walked Ajo James to the exit and they saw Auerbach in the hallway looking at them; that Ajo James left and she started walking back; that when she passed Auerbach in the hall Auerbach said "Ann, can I see you in my office" (transcript page 546); that she told Auerbach that she was on her lunch break; that Auerbach told her that she would see her after lunch; that about 4 p.m. Auerbach telephoned her in the unit and told her to come to the office; that she told Shockley that she was going to Auerbach's office; that Auerbach and Michael James, who is a timekeeper, were in the office; that as she walked into Auerbach's office she was holding the door open; that Auerbach told her to sit down; that she asked Auerbach what this was all about; that Auerbach said "I want to speak with you. Just have a seat, Ann." (Id. at 547); that she asked Auerbach "Is this something

to do with my time" (Id.); that Auerbach said "No, it has nothing to do with your time." (Id.); that she said "Well, then why is Michael James here" (Id. at 548); that Auerbach said "He's my witness" (Id.); that she said "Well, I think I'm going to need a witness, too" (Id.); that Auerbach said "No, you don't" (Id.); that she said "Dr. Auerbach, I need a witness. You have a witness. I need a witness" (Id.); that Auerbach said "No, you don't. Please sit down, Ann" (Id.); that she
5 asked Auerbach "Where in the AG does it say that you can have a witness and I cannot have representation" (Id.); that Auerbach said "Ann, sit down" (Id.); that she said "Dr. Auerbach, I need a witness. I need representation" (Id.); that Auerbach said "I'm the supervisor. If you disobey, if you don't sit down, this is a failure to obey orders" (Id.); that she said "Dr. Auerbach, I need to call Idell Mitchell [who, as indicated above, is the President of the NPPN Union in
10 Washington, D.C.]" (Id.); that she went toward the telephone but Auerbach would not let her use the telephone; that Auerbach waited until Ajo James left the facility so she would not be available to be the representative; that Auerbach said "Ann, this is not a predisciplinary talk" (Id. at 550); that she said "Whatever it is, Dr. Auerbach, I need representation"; that Auerbach said "You know I'm your supervisor. And this is failure to follow instructions" (Id.); that she said "Dr. Auerbach, I can speak with you one-on-one without the presence of Mr. James here. I'm willing
15 to speak with you one-on-one. If you can have [Michael] James out of the room" (Id.); that Auerbach said "No. Go. Leave the room." (Id.); that she said "Dr. Auerbach, can you give me that in writing" (Id.); that Auerbach said "No. I said go. Clock out and you will be paid for the rest of the day." (Id.); that she was supposed to work from 9 a.m. to 5:30 p.m. that day; that her meeting with Auerbach and Michael James occurred somewhere between 4 and 4:30 p.m.; that
20 she and Michael James left Auerbach's office; that she returned to the unit and e-mailed Mitchell that she had been taken off the clock and needed representation; that Auerbach came into the unit and said "Ann, I told you to leave right now." (Id. at 551); that she took her bag, clocked out, and left; that Auerbach told her that she would have a predisciplinary meeting with Ajo James the next work day; that when she went to Auerbach's office on October 15, 2004 she took into consideration the fact that she saw Shockley go to the Auerbach's office after she, Rajan, told the employee that he had done the right thing by filing a grievance; that while she and Michael James were in Auerbach's office, Auerbach did not tell her the purpose of the meeting, Auerbach just told her that she wanted to talk with her, and Auerbach did not tell her the purpose of the meeting; that Auerbach did tell her that it was not a predisciplinary talk; and that she still insisted that she needed representation.

30 On cross-examination Rajan testified that the medical unit has put a wellness program together; that this is an active part of her program, and she is involved at times in setting up those programs; that she has set up breast cancer, prostate cancer, and other little talks with the employees during their health talk; that in October 2004 she set up a big wellness program
35 on prostate cancer which involved people from other agencies coming to the Postal Service and talking with the employees; that she set up where the employees could get free testing for prostate cancer; that on October 15, 2004 she suspected that when she went to Auerbach's office it was not good because Shockley had gone to Auerbach's office earlier; that Auerbach did tell her that the meeting was of a non-disciplinary nature; that while she left the medical unit when she was told to by Auerbach, she was paid for the day; and that if she had spoken with
40 Auerbach one-on-one she would not have had a steward present.

Ajo James testified that on October 15, 2004 she saw Shockley leaving Auerbach's office and go to the medical unit; that when she went into the medical unit Rajan told her that an employee, who was in the medical unit for a return to work, told Rajan that he filed a grievance
45 for early closing of the medical unit, and Shockley overheard the conversation; that about 3:20 p.m. while in the medical unit she received a telephone call from Auerbach who said that her leave slip was ready and she could pick it up; that while she was on the telephone with Auerbach she heard Auerbach tell someone "You stay here as a witness" (transcript page 579);

that at 3:30 p.m. she was leaving to go home and she stopped in Auerbach's office to pick up her leave slip; that Rajan was on her lunch break and Rajan walked with her as she was leaving work; that she told Rajan to wait outside of Auerbach's office while she went in to get her leave slip; that she saw Michael James in Auerbach's office and she asked him if he was there as a witness; that Michael James answered "Yes" to her question; that when she went to Rajan outside Auerbach's office she told Rajan that Michael James was in Auerbach's office as a witness; that as she and Rajan walked down the hallway she noticed Auerbach standing alone in the hallway looking at them; that she told Rajan and Rajan saw Auerbach standing there; that she told Rajan "Ann, if you need anything, just call me. You be careful." (Id. at 580); that about 5 p.m. "Ann contacted me over her cell phone and said events happened after I left the main post office. She wanted me to be her Union rep. because there was a pre-d scheduled on Monday at 9 o'clock." (Id. at 581); and that Rajan told her what happened in Auerbach's office that day.

On cross-examination Ajo James testified that Rajan told her that on October 15, 2004 (a) she was told it was not going to be a disciplinary meeting, (b) she told Auerbach if Michael James stayed she also wanted a witness, and (c) she offered to meet with Auerbach one-on-one.

Auerbach testified that she graduated medical school in 1992; that her contract with the Postal Service began in October 2002; that she resigned in January 2005; that she had a vague recollection of seeking in October 2004 to hold a meeting in her office with Rajan; that a training supervisor was in the office with her but she could not recall his name²¹; that to the best of her recollection, the purpose of the meeting was a wellness program discussion; that she could not recollect (a) why she was having a meeting about a wellness program, (b) why Michael James was present, or (c) the time of day of the meeting; that she did recall Rajan arriving at her office for this meeting; that Rajan "arrived at the door, and she would not enter the door" (transcript page 627) and Rajan "would not enter the door. She wanted a Union steward" (Id.); that she did not recall Rajan making any specific reference to Mr. James being in the office; that when Rajan asked for Union representation she told Rajan that it was not a disciplinary meeting, "please come into the office" (Id.); that Rajan did not come into the office after that; that she thought that Rajan was asked again to come into the office, again she told Rajan that it was not a disciplinary meeting, and Rajan did not come into the office; that she could not remember if there was any exchange between Rajan and Michael James at that time; that she thought that she said something about if she did not come in, it would be a failure to follow instructions; that Rajan continued not to enter the office; that she then told Rajan to go home; and that to the best of her recollection Rajan was told to clock out and she thought that Rajan would be on administrative leave, which meant that she was still paid even though she was not working.

On cross-examination Auerbach testified that Michael James is a training supervisor and she did not know if he had any medical training; that she did not recall what part, if any, Michael James was playing in the wellness program that the Postal Service was putting on; that the name Idell Mitchell is familiar to her, and she remembered her from the nurses union; that she vaguely remembered what a predisciplinary interview was; that she did not recall whether quite a bit of paperwork would ordinarily have to be filled out when she had a formal predisciplinary meeting; that to the best of her recollection she wanted to discuss a wellness program with Rajan on October 15, 2004; that she had no recollection regarding what specifically she wanted

²¹ One of Respondent's counsels supplied the name to her and she agreed that it was Michael James.

to talk with Rajan about in connection with the wellness program in Michael James' presence; that she could not remember any reason why a discussion with Rajan about the wellness program would in any way be enhanced or helped by the presence of Michael James; that she remembered that Rajan did not want to come into the office, she wanted a Union representative, and Michael James' presence was part of the reason; and that she did not remember if Rajan asked Michael if he was there as a witness, and she did not remember Michael James answering that question.

Michael James testified that as a HR Specialist in Respondent's Dallas facility he supervises the district's driver training program, teaches a number of classes, oversees the sign language interpretive program, and he handles the time and attendance for his unit; that in 2004 he was the time and attendance "go-to" person for the medical unit as well as his unit, namely the training unit; that he discussed time and attendance issues with the medical unit; that he remembered being in the medical unit for that purpose in October 2004; that he was in the medical unit on October 15, 2004 before noon for some time and attendance issues; that he was about to leave and Auerbach asked him to stay, she wanted him to witness a conversation that she was having with one of her employees; that he stayed; and that

A When she [Auerbach] asked me to stay, she looked outside the door. She called for Ms. Rajan to come into - - to step into her office. And at that point, Ms. Rajan did step into her office. And at that point, Ms. Rajan did step into the office.

....

A She advised Ms. Rajan that there were some medical unit issues of procedures that she wanted to - - I forget the exact phrase, issues or procedures, but she told her there [were] some medical unit issues that she wanted to discuss with her. At that point, Ms. Rajan looked at me and - - Ms. Rajan looked over at me and then she looked at Dr. Auerbach and asked 'Is Michael here as a witness?' And Dr. Auerbach said yes. And Ms. Rajan said, 'Well, I'd like to have a witness also.'

....

A And at that point, Dr. Auerbach told her that this [is] not a disciplinary - - this is not for disciplinary reasons. Then ... [Rajan] said, 'I still want a witness. If you have one, I want one as well.' Dr. Auerbach went on to say, 'No, you cannot have a witness.' [Rajan] ... said, 'Well, show me in ELM [(Employee Labor Relations Manual)] where this [is] written.

....

A And at that point, she asked to - - it went back again, she said no. And she asked her to sit down and take a seat, and she said no. And then ... [Rajan] asked her if she would call Idell.

....

A And then at that point, again, Dr. Auerbach said, no, she would not call Idell. She said, 'No, just have a seat.' And then she went further to say, 'If you're not going to have a seat, I'm going to have to ask you to leave for the rest of the day, and we will pay you for the rest of the day, and then be prepared to hold a pre-d on Monday.' [Transcript pages 711 and 712]

Michael James further testified that Respondent's Exhibits 30 and 31 demonstrate that while Rajan left work a little over 1 hour before the end of her normal tour, she was paid for the entire tour; and that he left Auerbach's office at the same time as Rajan. Michael James then gave the following testimony:

5 Q Mr. James, on that day, October 15, 2004, did Dr. Auerbach attempt to meet with Ms. Rajan earlier that day?

10 A Yes. Actually, I was in the office - - I initially came into the office around 3:15 initially. And that's when I was in there for my time and attendance issues for the medical unit. At that time - - that was actually the time that she looked outside the door and asked Ms. Rajan to step in, Ms. Rajan indicated to the doctor that she was on lunch. So the doctor looked back at me and said, 'Well, Mike, just come back about 4 o'clock.' She anticipated that Ms. Rajan was going to be off work by then. So that's when I came back into her office at 4 o'clock and I was just sitting in the office at that point, and that's when Ms. Rajan came in. That's when the conversation about ... we here for medical issues or
15 procedures. That's when they had the banter back and forth about - -

Q How do you remember so clearly it was 4 o'clock, Mr. James?

20 A Because I remember when she asked me to come back at 4:00, I kind of cringed because I knew - - I was getting off that day at 4:15, and I had something to do, and I just remember distinctly that I didn't want to be - - I didn't really want to go past 4:15 that particular day, and I just remember so distinctly that that was the time that she told me to come in. [Transcript pages 715 and 716]

25 On cross-examination Michael James testified that he did not recall Ajo James coming into Auerbach's office the first time he was in the office on October 15, 2004; that he did not recall anyone asking him if he was there as a witness on October 15, 2004 while he was in Auerbach's office other than Rajan asking the question when she came into the office; that he does not have any responsibilities with respect to medical care furnished by the medical unit of the Postal Service; that he does not have any medical training; that he does not participate in
30 any way in the Postal Service's administration of a wellness program through its medical unit; that he has not received any special training or information about the wellness program that is not made available on a general basis; that Auerbach told him the first time he was in her office on October 15, 2004 about 3:15 p.m. that she was going to speak with Rajan about some medical unit issues or procedures and Auerbach asked him if he would stay to witness the conversation; that if he had medical unit issues with their time and attendance Auerbach was
35 the "go-to" person for him; that Auerbach requested him to stay, it was not a direct order, and Auerbach asked him and he cooperated; that there had been no other occasions where Auerbach asked him to be present in a witness capacity during a conversation to occur between Auerbach and some employee; that he did not recall any other occasion where a supervisor or manager with the Postal Service asked him to witness a conversation between the supervisor
40 and an employee in a witness capacity; that Auerbach did not indicate to him what procedures, if any, she intended to discuss with Rajan; that the meeting between Auerbach and Rajan lasted about 5 minutes; that there is a telephone in Auerbach's office; that he did not recall Rajan walking toward the telephone to place a call during her meeting with Auerbach; that Rajan was inside Auerbach's office when she mentioned telephoning Idell; that the door to Auerbach's
45 office was closed when Rajan was in the office; that Auerbach told Rajan that she wanted to discuss medical unit issues and procedures; that then Rajan asked Auerbach 'Is Michael here as a witness' and Auerbach answered 'Yes, he's here as a witness for me' (transcript page 725); that when Rajan came in she "looked over at me and said, 'What is Michael doing here?' And

she [Auerbach] said, 'He's here as a witness'" (Id.); that Rajan then said 'If he's your witness, I need a witness as well. I need a witness also' (Id. at 726); that Auerbach then told Rajan 'This is not for discipline. This is not a discipline issue, so no, you cannot have a witness' (Id. at 727); that he recalled Auerbach saying "I'm not issuing discipline" (Id.); that he was confident that is exactly how Auerbach said it; that regarding statements or comments about discipline, he recalled only Auerbach saying I'm not issuing discipline and Auerbach at the end of the meeting telling Rajan she would have a predisciplinary meeting on Monday; that he did not recall the first time he was in Auerbach's office on October 15, 2004 that she telephoned someone and told them to come to her office and pick up a leave request form; and that he was fairly confident that did not happen.

On redirect Michael James gave the following testimony:

Q BY MS. DORLAN: Mr. James, while you were in Dr. Auerbach's office and Dr. Auerbach and Nurse Rajan were having an exchange, did Dr. Auerbach specifically tell Nurse Rajan that this meeting was not of a disciplinary nature?

A Yes. [Transcript page 730]

On recross Michael James testified that Auerbach told Rajan 'I am not issuing discipline' or 'I am not here to issue discipline' (transcript page 730); and that he recalled that Auerbach actually said "I'm not issuing discipline" (Id. at 731)

Subsequently Michael James testified that Auerbach did not say that this meeting is not of a disciplinary nature.

And on further redirect Michael James testified, after reviewing a statement he wrote, namely Respondent's Exhibit 25 which was subsequently placed in the rejected exhibit file, that Auerbach said that "she wasn't issuing discipline. They were there for a discussion" (transcript page 735); and that he remembered Auerbach mentioning that this meeting was not for discipline more than once. Michael James then gave the following testimony:

Q Mr. James, do you remember Dr. Auerbach saying that, 'Ann, this is not for discipline, only discussion'?

MR. DOYLE: Object. The question is leading.

JUDGE WEST: Overruled.

A BY THE WITNESS: Yes. [Transcript pages 735 and 736]

Analysis

In my opinion, Rajan is a credible witness. Her testimony with respect to what was said and what happened on October 15, 2004 is very detailed. The testimony of Auerbach is just the opposite. Auerbach testified that (a) she had a vague recollection of seeking the meeting, (b) to the best of her recollection the purpose of the meeting was a wellness program, (c) she could not recollect (1) why she was having a meeting about a wellness program, (2) why Michael James had to be there, and (3) the time of the day. Auerbach impressed me as being a very calculating person. Her equivocation served a purpose, namely with it she tried to obfuscate what really happened. Taking the last first, Auerbach waited until steward Ajo James left the facility before asking Rajan to come into her office. Auerbach wanted to talk with Rajan when

5 Rajan would not have access to union steward Ajo James. Michael James was there because Auerbach wanted him present as her witness. Michael James had come to Auerbach's office regarding a time and attendance matter earlier on October 15, 2004. But Michael James made a special trip to Auerbach's office to be a witness for Auerbach later in the day when she met with Rajan. Auerbach had never asked Michael James before October 15, 2004 to be a witness for her when she met with an employee. Indeed Michael James could not recall ever having been asked by any other supervisor or manager of the Respondent to be a witness for them when they met with an employee. It is not obvious why Auerbach would go to such lengths to have Michael James be her witness to the conversation if it related to a wellness program. It was not shown that Michael James had any education, training, experience, or interest regarding an unspecified wellness program. Auerbach was not going to discuss a wellness program with Rajan. The wellness program rationale is nothing more than a post hoc rationalization.

15 As noted above, on or about October 5, 2004 Rajan received a warning letter advising her that she could be subject to further disciplinary action up to and including her removal from the Postal Service.²² In view of this, and in view of (a) General Counsel's Exhibit 12 (Shockley's above-described September 28, 2004 note), (b) Shockley's immediate departure from the medical unit after Rajan spoke with the employee who filed the grievance, (c) Shockley's failure to tell Rajan where she was going, (d) Rajan observing Shockley's going into Auerbach's office, (e) Ajo James's warning about Auerbach's use of witnesses, (f) the fact that Auerbach tried to have the meeting immediately after she saw steward Ajo James leave the building, (g) Auerbach's insistence on having Michael James remain as her witness without explaining to Rajan why this was necessary, and after responding to Rajan's inquiry that the meeting had nothing to do with time and attendance - which was Michael James's only connection to the medical unit, and (h) the fact that Auerbach would not explain the purpose of the meeting even though it was more than obvious that Rajan was trying to ascertain its purpose and, under the circumstances, she was entitled to know the purpose of the meeting, it is understandable how Rajan would be concerned about the possibility of being disciplined as a result of her meeting with Auerbach. Add to this mix the fact that Auerbach insisted on having Michael James there as her witness and Auerbach refused to speak with Rajan alone. Notwithstanding the fact that Rajan understood Auerbach to say that this was not a predisciplinary talk, this statement was not made until after (1) Rajan asked Auerbach what it was all about and Auerbach did not tell her the purpose of the meeting, (2) Rajan asked Auerbach if it had something to do with her time and Auerbach said that it did not have anything to do with her time, (3) Rajan asked Auerbach why Michael James was there if it had nothing to do with her time, and Auerbach said that Michael James was her witness, (4) Rajan told Auerbach that she would need a witness also, (5) Auerbach refused Rajan's request to have representation, (6) Rajan asked Auerbach where in the employee manual it indicates that a supervisor can have a witness and the employee cannot have representation, (7) Auerbach ordered Rajan to sit down, (8) Rajan did not sit down, and (9) Auerbach refused to let Rajan telephone Union President Mitchell. In other words, Auerbach did not make this statement until it was more than obvious that Rajan was not going to be coerced or intimidated into participating in the meeting without representation when Auerbach was refusing to tell her the purpose of the meeting. Only then did Auerbach in effect say well it didn't involve discipline. As indicated above, Auerbach impressed me as being a very calculating individual. Auerbach realized she was not going to be able to coerce Rajan into participating without representation. Only then did Auerbach take the position that the meeting

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²² Auerbach herself refers to this discipline in her discipline regarding the October 15, 2004 meeting.

did not involve discipline. If it did not involve discipline, what exactly did it involve? Auerbach did not say on October 15, 2004. When she testified at the trial herein Auerbach equivocated about the real purpose of the meeting. Why did Auerbach need Michael James to be present as her witness if she did not believe that there was a possibility that the meeting might lead to discipline? Why did Auerbach take the position that Rajan did not come into Auerbach's office when the two other people present testified that Rajan did come into Auerbach's office? Michael James testified that Auerbach told him and later Rajan that she was going to discuss with Rajan medical unit issues and/or procedures. Auerbach does not corroborate Michael James. And Rajan credibly testified that while she and Michael James were in the room, Auerbach did not tell the purpose of the meeting and Auerbach only said that she wanted to talk with her.

Respondent fails to offer up a reason why if Auerbach was going to discuss medical unit issues and/or procedures, and such discussion would not involve the possibility of discipline, Auerbach needed to have Michael James there as her witness. Additionally, "medical unit issues and/or procedures" could involve many things including asking Rajan if she encouraged an employee to file a grievance against the medical unit and on what basis she did so.²³ Rajan's testimony that Auerbach never told her the purpose of the meeting on October 15, 2004 is credited.

Michael James's testimony that Auerbach told Rajan that the meeting was about medical unit issues and procedures is not credited. Rajan reasonably believed that discipline could result from her meeting with Auerbach on October 15, 2004. There is no question but that Rajan was entitled to representation in view of what occurred before the meeting and as long as Auerbach did not explain the purpose of the meeting and insisted on having Michael James there as her witness. Also, Rajan would have been entitled to representation if Auerbach agreed to meet with Rajan without Michael James present and then started to discuss something which Rajan would have reasonable cause to believe could result in discipline.²⁴ Respondent violated the Act on October 15, 2004 as alleged in the complaint.

2. Ajo James

The complaint alleges that on or about October 18, 2004, Respondent, by Mitchell Barron, at Respondent's DFW Turnpike facility, by directing Postal Nurses Union Representative Ajo James to remain quiet throughout the meeting, denied the request of its employee Annu Rajan to be represented by the Nurses Union during an interview; that Annu Rajan had reasonable cause to believe that the October 18, 2004 interview would result in disciplinary action against her; that Barron conducted the interview with Rajan even though the Respondent had denied the employee's request for union representation; and that about October 18, 2004 Respondent issued a seven-day suspension to Rajan because she refused to attend the October 15, 2004 interview without union representation.

On Monday October 18, 2004 Rajan and Ajo James were told to report to Auerbach's office at 9 a.m. Rajan testified that she and Ajo James went to Auerbach's office at 9 a.m., waited for her for 15 minutes, and then returned to the unit; that between 12 noon and 1 p.m. Auerbach came to the unit with a new acting Occupational Health Nurse Administrator and introduced her; that at that time Auerbach told her and Ajo James to be at her office at 1 p.m.;

²³ As noted below, Mitch Barron, who when he testified herein had been in charge of the Medical Unit as a Labor representative for about 1 year, testified that there had been issues in the medical unit in that there was a lot of grievance activity

²⁴ On brief, Counsel for General Counsel contends that since there is no dispute about motivation, the shifting burden analysis of *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981) cert denied 455 U.S.989 (1982) does not apply. I agree.

that she and James reported to Auerbach's office at the designated time; that Mitch Barron, a Postal Labor Relations person, was with Auerbach in her office; that Auerbach said "Okay, Ann, explain what happened on Friday" (transcript page 556); that Ajo James then said "Dr. Auerbach, why is she having this pre-d today" (Id.); that Auerbach said "I called her in for a meeting for a discussion, and she refused to come" (Id.); that she said "Dr. Auerbach, I was standing right here" (Id.); that Ajo James said "She was standing right here" (Id.); that Barron said "Shoosh, be quiet, Ajo. Don't speak." (Id.); that Auerbach said "Okay. Then what happened" (Id.); that she described what occurred on October 15, 2004; that Ajo James said according to Rule 16 when there is a discussion it should be between the employer and the employee, and there should not be a witness present; that Barron said "Ajo, be quiet. Shoosh, be quiet. Don't say anything. Just let Ann speak" (Id. at 557); and that Barron interrupted Ajo James two or three times, he would not let her talk.

Ajo James testified that on Monday October 18, 2004 a predisciplinary interview was scheduled for 9 a.m. with Rajan and Auerbach; that she and Rajan went to Auerbach's office at 9 a.m. and waited for 15 to 20 minutes for Auerbach, who never showed up; that she and Rajan went back to the medical unit; that about 11:30 a.m. Auerbach came to the medical unit and told her that the predisciplinary meeting was rescheduled for 12 o'clock; that Rajan was at lunch so the meeting was rescheduled for 1 p.m.; and that she, Rajan, Auerbach, and Barron were present for the predisciplinary meeting in Auerbach's office at 1 p.m. Ajo James gave the following testimony regarding what happened at the meeting:

So ... they told us to have a seat. Then Dr. Auerbach asked Ann to explain what happened on Friday. I asked Dr. Auerbach why are we here for. Dr. Auerbach replied, 'I called Ann for a discussion, and she refused to come.' Then Ann said, 'I did not refuse to come.' And Dr. Auerbach argued that with Ann, that she refused to come.

So interfered [sic] and I said, 'Dr. Auerbach, she came.' Then Mitch Barron was sitting there. He said, 'Ajo, be quiet. Let Ann continue. It's between Dr. Auerbach and Annu Rajan.'

Then Dr. Auerbach continued her - - sorry. Annu Rajan continued to explain what happened on Friday. Then in between, I wanted to say something, and then Mitch Barron put his index finger on his mouth and said, 'Shoosh.'

So I waited for Ann to finish explaining. Afterwards, I asked Dr. Auerbach what Article ... or what rules did she violate. And I also mentioned - - then Mitch Barron said, 'Ajo, be quiet.' And I said, 'According to Article 16.02, the meeting should be discontinued - - this discussion should be held in private.' And Mitch Barron said, 'I am here as a witness, now you listen.' So they did not - - he did not allow me to talk at all.

Then Ann and Dr. Auerbach continued and then we finished. [Transcript pages 583 and 584]

On cross-examination Ajo James testified that she did not file a grievance with respect to the *Weingarten* violation that she thought occurred when Barron interfered with performance as a steward; and that Mitchell told her that a charge would be filed with the Board regarding the *Weingarten* rights.

On redirect Ajo James testified that Rajan told her the following:

She told me the event happened just around 3:15 that afternoon, that employee when he came and told Ann about filing a grievance - - that he filed a grievance. And so Linda Shockley went to her office, Dr. Auerbach's office, and informed her of that, and her concern was that this discussion may be related to this Union grievance procedure that she encouraged this employee. [Transcript page 602]

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Ajo James further testified that Article 16.02 of the collective bargaining agreement between National Postal Professional Nurses (NPPN) and the Postal Service, Respondent's Exhibit 26, specifies that a discussion should be conducted between the supervisor and the employee and must be private; and that at the October 18, 2004 predisciplinary meeting she said that according to Article 16.02 the October 15, 2004 meeting should have been conducted in private, the discussion should have been conducted in private; and that Barron then told her that it was between Auerbach and Rajan and to be quiet.

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Auerbach testified that she did not have any recollection of there being an investigatory meeting held with Rajan concerning her refusal to enter Auerbach's office when Michael James was there; and that her recollection was not refreshed by reading a document with an Employee's Explanation on it.²⁵

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Barron, who works at Respondent's Cappel, Texas facility - which is about 30 miles from Respondent's DFW Turnpike facility, testified that as a supervisor he received Labor Relations training and part of that training was that "if we were going to discipline an employee, we would have to have a steward present during the interview, prior to" (transcript page 691); that he has had predisciplinary meetings with employees; that presently he is a Labor Relations Specialist; that he has both received and given *Weingarten* training; that the medical unit is his responsibility; that in October 2004 he was told by his manager, Eric Fryda, that Dr. Auerbach, who was the supervisor in the medical unit, wanted to hold a predisciplinary meeting with a nurse; that he attended a meeting in Auerbach's office with Auerbach, Rajan, and her representative, Ajo James; that Auerbach opened the meeting telling everyone what the meeting was about, it was a predisciplinary meeting and she wanted to get the facts of the case; that Auerbach started to ask Rajan why she didn't follow her instructions; that Ajo James, who had a contract, a notebook, and a pen, said "We shouldn't be in here. This is a violation of the contract" (transcript page 694); that Ajo James went on and on and she was getting louder and louder; that Auerbach tried three or four times to ask Rajan a question; that he told Ajo "Why don't you let her [Auerbach] ask her question. She wants to give her side of the story" (Id. at 695); that Ajo James stopped and said "okay" (Id.); that Auerbach asked her question and Rajan replied with a fairly long explanation, saying that she was being harassed and she did not like a witness at the prior meeting; that they discussed rules and regulations and stuff about the nursing unit; that while Rajan was talking to Auerbach, Ajo James was taking notes; that then Ajo James asked a couple of questions, he did not remember what they were, and Auerbach said "I'll get back with you" (Id.) and Rajan and Ajo James left; that at the time he had been in

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²⁵ Auerbach testified that with respect to the information which one of Respondent's counsel wanted to have read into the record as a past recollection recorded, she did not remember if she typed the statement or if she provided the information to someone else who typed it but it was her unequivocal testimony that she adopted the statement when she signed that document; and that she did not have any recollection of drafting or adopting Respondent's Exhibit 25, which is dated October 20, 2004, has her signature on the second page, and was identified but not offered into evidence.

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charge of the Medical Unit as a Labor representative for about 1 year; and that there had been issues in the medical unit in that there was a lot of grievance activity.

5 On cross-examination Barron testified that he arrived at Auerbach's office early and she told him that the meeting was about failure to follow instructions; that he thought that Auerbach wanted to discuss some procedures in the medical unit, and she wanted to talk to Rajan or meet with her, and that was all he remembered; that he did not recall that Auerbach provided any information to him regarding what it had been that Auerbach was saying she wanted to discuss with Rajan on the earlier occasion; that Ajo James was loud and agitated when she was speaking at this meeting; that, as he recalled, he spoke to Ajo James one time before she stopped speaking; that when he spoke to Ajo James it was not a directive; that it is not true that every discipline that issues at the Dallas/Fort Worth facility is cleared before its issuance by a Labor Relations Specialist there; that quite a bit of discipline is issued without a Labor Relations Specialist looking at it; that a supervisor has the authority to issue discipline, namely letters of warning, and 7-and 14-day suspensions without a Labor Specialist ever seeing it; that for removal or proposed removal there has to be Labor Relations clearance for that; that a Labor Relations Specialist will become involved in a disciplinary process only if it is something beyond suspension that is being contemplated; that he had his *Weingarten* training as a supervisor some years ago and as a Labor Relations Specialist in 2005; that while Ajo James had a copy of the collective bargaining agreement with her during this meeting, she did not cite a particular provision of the contract in the context of her statements during this meeting; that Ajo James did not cite Section 16.02 relating to official discussions; that during the meeting Ajo James said "we shouldn't be in here and this was a violation of the contract, and basically that on and on and on" (transcript page 704); that he did not remember Ajo James citing some provision of the contract; that it was not his understanding that Ajo James was claiming that there was some type of problem which should be addressed before the meeting continued; that the role of the Labor Relations representative customarily during a predisciplinary interview is as a witness; that a supervisor requests if they want a Labor Relations Specialist present at a meeting and the request would have to be approved by the manager, Eric Fryda; that Auerbach did not give any indication during her meeting with Rajan that he attended as to what procedures she had wanted to discuss with Rajan on the prior occasion; that Auerbach just asked Rajan why she did not follow her instructions; and that when Auerbach said that the meeting pertained to failing to follow instructions he did not recall Ajo James ask if she could have more details about what the purpose of the predisciplinary meeting was.

35 General Counsel's Exhibit 14, which is dated October 20, 2004, is a seven day suspension given to Rajan for "Unsatisfactory Work Performance - Failure to Follow Instructions." As here pertinent, the document reads as follows:

40 On October 15, 2004, I instructed you to report to my office for a meeting. Instead of reporting to my office, you stated "I will need a witness also." I informed you at this time that it was not proper for a union representative to be present at this meeting, and I repeated the instructions to you. I explained that the meeting was not for any disciplinary issues. You repeated to me that you still would not report to the meeting and said that if Michael James, Training Supervisor, was going to be present, then you wanted someone to be present for you as well. You failed to report to the meeting after being repeatedly instructed to do so. You were given an opportunity to explain your reason for failing to follow my repeated instructions, in a pre-disciplinary interview. In the pre-disciplinary interview you failed to provide an acceptable reason for not following my instructions.

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In addition, the following element of your past record was considered in arriving at this Seven (7) day suspension.

5 You were issued a Letter of Warning on October 5, 2004 for Unacceptable Work Performance Resulting in Absence Without Official Leave, AWOL.

....

10 On cross-examination Rajan testified that she filed a grievance over this discipline; that the discipline was removed; and that she was fully compensated for any lost wages due to the suspension.

15 On cross-examination Ajo James testified that two grievances were filed with respect to what happened on October 15, 2004, namely one alleging a *Weingarten* violation and the other one spoke to the suspension Rajan received for failing to follow instructions when she would not engage in the meeting with Auerbach; and that Rajan told her that she received her back pay for the seven day suspension.

Analysis

20 Rajan and Ajo James impressed me as being credible witnesses, and I credit their testimony with respect to what was said and what occurred at their meeting with Auerbach and Barron on October 18, 2004. As indicated above, I find Auerbach to be a very calculating witness. I do not credit her testimony that she did not have any recollection of the involved meeting. Barron also is not a credible witness. I do not credit his testimony that he recalled speaking to Ajo James only one time before she stopped speaking and what he said to Ajo James was not a directive. Ajo James impressed me as being the type of person who would stand up for her rights and the rights of a person she represented. As Barron concedes, Ajo came to the meeting with a copy of the involved collective bargaining agreement, a notebook and a pen, and Ajo James took notes of what was being said between Rajan and Auerbach. In other words, Ajo James was taking a conscientious approach to her job as a representative of Rajan at this meeting. As noted above, Barron testified that that while Ajo James had a copy of the collective bargaining agreement with her during this meeting, she did not cite a particular provision of the contract in the context of her statements during this meeting; that Ajo James did not cite Section 16.02 relating to official discussions; that during the meeting Ajo James said "we shouldn't be in here and this was a violation of the contract, and basically that on and on and on" (transcript page 704); that he did not remember Ajo James citing some provision of the contract; and that it was not his understanding that Ajo James was claiming that there was some type of problem which should be addressed before the meeting continued. Contrary to the testimony of Barron, Ajo James, as testified to by her and Rajan, cited Section 16 of the collective bargaining contract that she had with her.²⁶ Also contrary to the testimony of Barron,

40 _____

45 ²⁶ Rule 16.02 of the involved collective bargaining agreement, Respondent's Exhibit 26, reads "For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable." In view of this, it is understandable why Rajan would have reasonable cause to believe that Auerbach's need to have a witness present on October 15, 2004 meant that the meeting involved something more serious than a discussion.

Ajo James would not stop speaking on Rajan's behalf - would not stop representing Rajan, unless and until she was directed to by a supervisor. Contrary to the testimony of Barron, that is exactly what occurred. Barron directed Ajo James to stop talking at this meeting. In taking this action, Barron denied the request of Rajan to be represented by the Nurses Union during this interview. Rajan had reasonable cause to believe that the October 18, 2004 interview would result in disciplinary action since she was told beforehand by Auerbach that the meeting was a predisciplinary meeting. And, as indicated above, the October 18, 2004 interview was conducted even after Ajo James was told by Barron not to speak. As pointed out by Counsel for General Counsel on brief, when an employer permits a union representative to attend an interview but forbids the representative to be anything more than a silent observer, the employer interferes with the employee's rights in violation of the Act, *United States Postal Service*, 347 N.L.R. B. No. 89 (2006), citing *Bernard College*, 340 NLRB 934, 935 (2003). The Respondent violated the Act on October 18, 2004 as alleged in the complaint.

3. Deloris Snyder

The complaint alleges that on or about January 19, 2005, Respondent, by Gary Guderian, at Respondent's Groesbeck facility, denied the request of employee Deloris Snyder to be represented by Letter Carriers Branch 404 during an interview; that Deloris Snyder had reasonable cause to believe that the January 19, 2005 interview would result in disciplinary action against her; and that Guderian conducted the interview with Snyder even though the Respondent had denied the employee's request for union representation.

Deloris Snyder, who has worked for the Respondent since 1996 and is a city letter carrier, testified that she works at Respondent's Groesbeck facility; that the city letter carriers at Groesbeck are represented by the National Association of Letter Carriers; that she has been a member of that Union since 1998, the secretary of Branch 404 since 2004, and a shop steward at Groesbeck since 2002; and that shortly after December 17, 2004 she mailed the following, General Counsel's Exhibit 9, to all the Postmasters, Station Managers, and Officers in Charge:

W. Charles Johnson, President
National Association of Letter Carriers
Branch 404
P.O. Box 8623
Waco, TX 76714-8623

December 17, 2005 [sic]

Postmasters, Station Managers, Supervisors, Officers-in-Charge:

This is to inform you that the position of Vice-President, in NALC Branch 404 has the responsibility of the Associate Offices. In addition to that, any Steward or Member of Branch 404 who contacts that office for representation, at any time, is entitled to be represented by the Vice-President.

Sincerely,

W. Charles Johnson
dcs
cc: Officers, Trustees, Stewards

Snyder further testified that she typed the above-described letter, and had Johnson sign it; that the year 2005 on the letter is a typographical mistake and it was a stressful time; and that Johnson was not President of Branch 404 on December 17, 2005 in that his term expired the first Tuesday of December 2005 (December 5, 2005).

5 Additionally, Snyder testified that on January 19, 2005 when she arrived at work at 7:30 a.m. Postmaster Gary Guderian called her into his office; that Guderian told her that Mark Smith was there on a higher level; that Smith is a rural carrier who, on occasion, serves as Post Office Administrator on a higher level; that no one other than her, Guderian, and Smith were present; that she asked Guderian if this was leading to discipline and Guderian responded that it was; 10 that she then asked for representation under *Weingarten*, and she asked for Chuck Owen, who is the Union Branch President; that Guderian asked her if she was a steward and she told him that she was but she still gets to have representation; that she and Guderian "kind of argued back and forth as to whether I would receive representation" (transcript pages 504 and 505); that Guderian asked her if she was refusing to cooperate and she told him that no, she would cooperate once Guderian got Owen at the Groesbeck facility; that Guderian said "okay, I 15 understand. Now let me ask you a question" (Id. at 505); that Guderian then asked her if he had instructed her to follow the M-41 and she told him that he did but his instructions were not clear; that they argued back and forth about that because Guderian would not explain to her exactly what he wanted her to do; that she repeatedly asked for representation during this interview; that finally she and Guderian argued about whether she was working efficiently, and he told her 20 to go back to work; that she told Guderian that she would go back to work but she was stopping to telephone Owen; that the meeting lasted about 5 to 10 minutes; that she made an audio recording of her meeting with Guderian, General Counsel's Exhibit 10²⁷; that she has listened to the audio recording and it accurately depicts the events of the January 19, 2005 meeting with Guderian; and that within two weeks of the meeting she made a transcription, General 25 Counsel's Exhibit 11, from the tape. The tape recording was played more than once on the record at the trial herein. The following is the court reporter's transcription of the tape recording:

GARY GUDERIAN: Mark is in here on a higher level right now.

30 DELORIS SNYDER: Is this leading to discipline?

GARY GUDERIAN: Yes, it is.

35 DELORIS SNYDER: Then I request representation from Chuck Owen under the Weingarten Act.

GARY GUDERIAN: Deloris, you are the steward. I need to ask you a few questions.

40 DELORIS SNYDER: I respectfully refuse to answer anything on the grounds that I have requested representation. You have a letter stating that I can request representation at any time.

45 ²⁷ According to Snyder's testimony, the Olympus recorder she used to record her conversation with Guderian downloads to a computer and Owen took it to his house, downloaded it onto his computer, and he made a tape. Snyder testified that she was present when Owen downloaded it but she was not present when he made the tape.

GARY GUDERIAN: You don't get representation. You are the steward.

DELORIS SNYDER: I am a steward, yes.

GARY GUDERIAN: I need to ask you a few questions.

5 DELORIS SNYDER: Well, as soon as you contact Chuck Owen and he comes over, I'll be happy to help you.

GARY GUDERIAN: Are you refusing to speak with me?

10 DELORIS SNYDER: I am refusing to speak with you on any disciplinary action without representation.

GARY GUDERIAN: Are you refusing to speak to answer me?

15 DELORIS SNYDER: I am refusing to answer you without representation.

GARY GUDERIAN: I am going to ask you a question. You can [At transcript pages 755 and 756 Counsel for General Counsel and the Respondent stipulated that the correct transcription for the words "You can" is "unintelligible word and audible interruption."²⁸] either respond to it or not. I already got your response yesterday. Did I instruct you, okay, to complete your office duties in accordance with the M-41?

20 DELORIS SNYDER: Yes you did. And have you read the M-41? Because you have not instructed me properly.

25 GARY GUDERIAN: That is your responsibility.

DELORIS SNYDER: I have read the M-41, and you are in violation of Article 3, Article 19, M-41, M-39, and the Groesbeck Local.

30 GARY GUDERIAN: I am going to ask you a question, okay? Now did I tell you to perform your office duties according to the M-41?

DELORIS SNYDER: Yes, you did, and I have read the M-41.

35 GARY GUDERIAN: Okay. You are using improper work techniques.

DELORIS SNYDER: Explain to me what you feel are improper work techniques.

GARY GUDERIAN: You were given a list.

40 DELORIS SNYDER: And I am following the list.

GARY GUDERIAN: You are not.

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²⁸ Although not covered by the parties, this would mean that the last two words on page 525 line 3 and on page 680 line 4 of the transcript, namely "You can" should also be modified.

DELORIS SNYDER: Yes, sir, I am.

GARY GUDERIAN: No ma'am, you are not.

5 DELORIS SNYDER: You may contact Chuck Owen on this.

GARY GUDERIAN: I am - -

DELORIS SNYDER: No, no. Contact Chuck Owen on this because he is representing me on this.

10 GARY GUDERIAN: You are wrong, okay?

DELORIS SNYDER: Tell me what I did wrong.

15 GARY GUDERIAN: You aren't casing the letter right.

DELORIS SNYDER: Yes?

20 GARY GUDERIAN: You weren't pushing up the letter with your thumb. I watched you. You were casing flats. You picked up six flats out of that phone booth. That's improper.

DELORIS SNYDER: In what manner?

25 GARY GUDERIAN: That is improper. It's six to eight inches. I gave you a list. I spoke with you yesterday, and your response was that you didn't have to do the proper work methods unless you were being counted.

DELORIS SNYDER: What I told you was that that was in M-41. I followed the M-41.

30 GARY GUDERIAN: No ma'am.

DELORIS SNYDER: Yes, sir.

35 GARY GUDERIAN: You were using improper work techniques. I am assuming that since this is the third time, I will take further action. Then if you want representation, that's fine. If the Union is going to pay for him to come out, that's fine.

DELORIS SNYDER: No, you will pay for the Union to come out here.

40 GARY GUDERIAN: No, I will not.

DELORIS SNYDER: Yes, you will, and I will file on this, too, because you refused me representation.

45 GARY GUDERIAN: Now, are you going to follow my instructions or not?

DELORIS SNYDER: Yes, I will follow your instructions.

GARY GUDERIAN: Will you use the proper work techniques?

DELORIS SNYDER: Yes. I am following the M-41 because I read it last night.

GARY GUDERIAN: No, you are not.

5 DELORIS SNYDER: Yes, I am.

GARY GUDERIAN: No, you are not.

10 DELORIS SNYDER: I am. Read the M-41. I read it. I read all of it, all of the office procedures.

15 GARY GUDERIAN: I'm not arguing with you anymore. I have statements right here from people who were on the floor yesterday that heard you say that you didn't have to do proper work techniques unless you were counted. Now those were your exact words.

DELORIS SNYDER: And I actually said that - -

GARY GUDERIAN: Now, you did.

20 DELORIS SNYDER: What I told you was that you could not tell if I am casing efficiently or not.

GARY GUDERIAN: No, I didn't say - -

25 DELORIS SNYDER: You said I was not - - yes, you did.

GARY GUDERIAN: I said properly.

DELORIS SNYDER: You said efficiently. You said efficiently, and I - -

30 GARY GUDERIAN: Go back to your case.

DELORIS SNYDER: I will. I will. And on my way, I'm stopping, I'm calling Chuck Owen, and I am filing on this as well.

35 GARY GUDERIAN: You have five minutes.

DELORIS SNYDER: It won't take me that long. [Transcript pages 514-518 and 524-528]

40 On cross-examination Snyder testified that she recorded her January 19, 2005 conversation with Guderian on an Olympus digital tape recorder and Chuck Owen used his computer to make a copy of the digital recording²⁹; that she has worked in Respondent's Groesbeck office for about 6 years; that she filed a grievance on this discipline; and that the

45 ²⁹ Respondent characterized this portion of cross-examination as voir dire but since the recording and transcript were already admitted into evidence and voir dire goes to admissibility, it was really cross-examination.

outcome of the grievance was that the Postmaster could not deny her her *Weingarten* rights and the discipline was reduced to an official discussion which (a) is not discipline in itself, (b) cannot be used for purposes of discipline in the future, and (c) which has no consequences on her discipline record.

5 Mark Smith testified that he works for the Respondent as a rural carrier out of the Groesbeck Post Office; that when the Postmaster is off for the day he used to cover the office for him; that the Postmaster is Guderian; that on January 19, 2005 Guderian asked him to be Postmaster relief in that he asked him to be a witness; that Guderian asked him to come into his office; that Guderian then brought Snyder into the office; and that

10 When they both walked back in, Deloris [Snyder] asked if this was a disciplinary hearing. Gary told her no, that it was a discussion. She asked for union representation. He told her that that was fine, she could have union representation, but that he did want to discuss this with her.

15

He [Guderian] told her that he had a question to ask her and she could either answer it now or wait for union representation.

20

Then he asked the question next. He asked her if she understood the instructions he had given her the day before. She said yes, she did, but she was not on her route inspection or route count, so she didn't have to follow it. [Transcript pages 617 and 618]

25 On cross-examination Mark Smith testified that he did not speak during the meeting; that he heard Snyder request a union representative; that he did not remember hearing Snyder respectfully refusing to answer until she had union representation; that Guderian told Snyder that she could either answer the question or she could wait until the Union representative was there; that he did not recall anything being said with respect to paying for the Union
30 representative; and that, after listening to the recording made of the meeting [seconds 43 through 96 of General Counsel's Exhibit 10(b)] and looking at the transcript of the recording, he had no doubt that the audio recording accurately reflects what Snyder said during that meeting.

On redirect Mark Smith gave the following testimony:

35 Q BY MS. DORLAN: Were you able to hear the tape, Mr. Smith?

A I just heard without representation is all I can make out of that. [Transcript page 623]

40 Smith gave this testimony after listening to that portion of the tape after second 96, including a second or two transition.

45 Guderian testified that he has been the Postmaster of Groesbeck since December 2000; that Respondent's Exhibit 28 is the instruction and office observation of improper work methods of Snyder on January 13, 2005; that Snyder was going to come to work late the day he was going to give her the documents and he had an appointment so he wrote her the letter, addressed it, put it in a penalty envelope, and put it in her case; that on January 18 or 19, 2005

he observed Snyder using improper work methods again; that Snyder told him that she did not have to use the proper work methods unless she is being examined³⁰; that he asked rural carrier Mark Smith, who had served as his relief, "[w]ould you please come in with me with Deloris [Snyder]. I need to bring her in and talk to her about the work methods and the instructions I gave her" (transcript page 653); that Smith had served as his relief perhaps one day every two weeks but Smith has since asked him to find someone else; that he thought that he got both Smith and Snyder at the same time; that Snyder came to his office and she asked for Union representation; that he told Snyder that she was a designated steward at the office and she was also an officer of the Branch; that Snyder continued to ask for representation; and that

.... She had asked for a steward. I was trying to alleviate any type of disciplinary action. I was trying to work it out with a discussion. She did, and I asked her a question when she was adamant about having a steward. I believe that I said, 'I have a question to ask you. You can answer it or not.' [Transcript pages 655 and 656]

Guderian further testified that he did ask his question and Snyder did answer it; and that the meeting ended with him giving Snyder five minutes to contact another officer of the Branch, namely Vice President Frederick (Chuck) Owen; and that Owen came to the office, there was a discussion regarding whether Snyder was required to follow his instructions, and the meeting with Snyder and the Union representative "was another opportunity ... to see if we could work it out without any type of corrective action" (Id. at 657).

On cross-examination Guderian testified that he has conducted about four predisciplinary meetings; that most of the time the paperwork is filled out at the meeting; that there is a guideline with respect to the paperwork that must be filled out during the predisciplinary meeting; that each district, each facility, sometimes make their own form; that most of the time the form is generated by Labor, which is the form he has used; that carriers typically spend up to 2 hours casing their mail at the Groesbeck facility before they deliver the mail to the Postal customers; that Respondent's Bellmead, Texas station, which is where Owen works, is about 45 miles or 45 to 60 minutes from Groesbeck; that most of the time when he requests Owen he has to go through Owen's supervisor and manager to see if he is available; that during his meeting with Snyder, with Mark Smith present, Snyder did ask for a steward; that he could not remember verbatim what Snyder said regarding that she did not want to go forward with the meeting unless there was a steward there; that Snyder was adamant about having a steward; that since he could not remember exactly what Snyder said, he could not refute an assertion that Snyder respectfully refused to answer until there was a steward; that he did not recall Snyder asking him at the beginning of the meeting "is this leading to discipline" but she may have; and that he could not deny that she asked this question because he did not remember what Snyder said verbatim. Guderian then gave the following testimony:

Q And do you recall telling her [Snyder] that it was possibly leading to discipline?

A To be honest, I don't remember if she asked me that question. I may have said it could. I really don't remember. [Transcript page 671]

³⁰ A carrier's proficiency can be checked by a formal inspection for a period of four or five days where the carrier counts their mail, and one day they have a certified route examiner count the mail for the carrier, observe the office practices, and then go out and observe the street practices and evaluate how the route is delivered.

5 Guderian further testified on cross that he could not deny the accuracy of testimony that Snyder asked him if this is leading to discipline and he answered yes; that normally it is his practice to have someone else present when he has to shut the office door with a female employee in his office; that he recalled telling Snyder that Mark Smith was there on a higher level, meaning that there was a certain confidentiality on a higher level; that this was the only occasion when he had Mark Smith present on a higher level when he spoke with an employee; and that on one other occasion when he spoke with a female employee he had someone else present.

10 Subsequently Guderian testified that he saw General Counsel's Exhibit 9 before; that he had no idea if the date on the letter, namely December 17, 2005 should be December 17, 2004; that he did not recall specifically discussing who would pay for the Union steward to come out in that he did not recall verbatim what was said in that room; and that getting Owen to come to Groesbeck

15 It's more of a matter of expediency and seeing if he's available. Now he has come out on his days off before, and he has told me that, and I've paid him for it, if I'm not mistaken. To my recollection, I have, or he has done it on his own time. [Transcript page 683]

20 Portions of the audio recording Snyder made of her meeting with Guderian and Mark Smith were played for Guderian, and he was shown Snyder's transcript of the recording. Guderian did not take the opportunity to deny the accuracy of the recording. (transcript pages 677 - 683)

25 Jeffrey Dean Dalton, who is an Area Labor Specialist who represents the Postal Service with respect to its collective bargaining agreement with the National Association of Letter Carriers (NALC), testified that, as indicated in Respondent's Exhibit 27, page 17-5, which is the NALC-USPS Joint Contract Administration Manual (JCAM), pursuant to an 1980 Step 4 agreement the Postal Service is not responsible for the payment of outside stewards for their travel time while serving a different installation; that by application the Postal Service has applied those same provisions for *Weingarten* rights or rights were stewards have to travel between installations in order to represent an employee; that with respect to the Snyder situation described above, the travel time between the installation that the steward leaves and the installation to which he has traveled is not compensable by the Postal Service; and that pursuant to the understandings that follow from the JCAM, only the time the steward is on the clock representing the employee is compensable by the Postal Service, and Owen would not have been compensated by the Postal Service for the time he spent traveling to and from Groesbeck.

35 Pages two and three of Respondent's Exhibit 32 is a warning letter, dated January 27, 2005 from Guderian to Snyder. As here pertinent, it reads, in part, as follows:

40 **Charge: Unacceptable Performance - Failure to Follow Instructions**

45 On January 13, 2005 I instructed you on the proper work methods for a carrier as outlined in the M41. I outlined specific deficiencies I observed you doing which included working efficiently at your case. On January 18, 2005 I instructed you to return to your case, and case your mail. You disregarded my clear instruction and stated you only had to follow the M41 during route count and inspection. When asked about this incident you stated you were not required to use proper work methods unless you were being counted. Your response is unacceptable.

Therefore, for your actions described above you are charged with 'unacceptable conduct - failure to follow instructions.'

....

... I must warn you that future deficiencies will result in more severe disciplinary actions, including suspensions or removal from the Postal Service.

You have the right to file a grievance under the grievance - arbitration procedure set forth in Article 15, Section 2 of the National Agreement within 14 days of your receipt of this notice.

Page one of Respondent's Exhibit 32 is a "USPS-NALC Joint Step A Grievance Form." It indicates that (a) Snyder is the grievant, (b) the "01/27/2005" letter of warning was reduced to "Official Discussion," (c) Owen was the steward, and (d) Guderian signed the form. Guderian testified that an official discussion is not citable as a discipline and it does not go into the employee's personnel folder.

Owen testified that he works at Respondent's Bellmead Station; that he is President of NALC, Branch 404; that Snyder brought a small digital recorder to him because she was having problems with her computer; that he installed the software that came with the recorder on his computer and he unsuccessfully burned a CD; that he then purchased a patch cable and ran it from the "audio out" on the digital recorder to the "microphone in" of a standard table top cassette recorder, hit the record button, and made the audio cassette that way; that the hard drive on the computer that he used has since crashed and he lost the involved program; that he made the tape and gave it to Snyder; that Snyder was not present when he made the magnetic tape but she was there when he installed the software and tried to make the CD; that she left the digital recorder with him and he then purchased the cable he needed; that he then gave Snyder the digital recorder back, along with the tape he made; and that his computer is a Compaq Presario, model number 5834, which was purchased in 1999.

As noted above, the proceeding was continued from March 29, 2006 to July 24, 2006 to accord the Respondent the opportunity to have its expert review the Snyder tapes and the equipment utilized to make them. Respondent's expert, James Foye, testified that he examined two audio tapes to see if they were altered; and that one of the tapes [which was the tape which Owen made, namely General Counsel's Exhibit 10(a)] was electronically edited or there were electronic events in that the continuation of conversation, as demonstrated by Respondent's Exhibit 36, is interrupted,³¹ and there was also a mechanical event on this tape; that the other tape [which is the tape Snyder made, namely General Counsel's Exhibit 10(b)], which in terms of the involved conversation is shorter (12 seconds) than the first tape, has also been electronically edited; and that tape 10(b) it is not a faithful reproduction of tape 10(a) since it does not start and finish the involved conversation in the same time frame.³²

³¹ With respect to one of the edits or events, subsequently Foye answered "correct" when asked if "this is an editing that occurred before we are actually in any of the recorded conversation" on the first tape. (transcript page 763)

³² Foye's report was received at the trial herein as Respondent's Exhibit 38. Respondent's Exhibits 34, 35, 36, and 37 are printouts of audio or frequency tests conducted by Foye.

On cross-examination Foye testified that tape B has automatic gain control starts and since "it was not a continuous recording, I could not waste any more time [resolving the effect of this]. I had other cases to do." (transcript page 797); and that he could not come up with a reasonable explanation for the electronic events on the tapes other than to conclude that they were caused by manipulation.

5

On redirect Foye testified that it is possible that any one of the involved electronic events could have been caused unintentionally if a person "is not familiar with the software, they could have slipped or break or make [sic] a mistake" (transcript page 842).

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Subsequently, Foye testified that the following portion of the transcript of the trial herein, which is a transcript of what is on tape 10(a), is reliable and pretty consistent:

GARY GUDERIAN: Mark is in here on a higher level right now.

15

DELORIS SNYDER: Is this leading to discipline?

GARY GUDERIAN: Yes, ... [ma'am].

DELORIS SNYDER: Then I request representation from Chuck Owen under the Weingarten Act.

20

GARY GUDERIAN: Deloris, you are the steward. I need to ask you a few questions.

25

DELORIS SNYDER: I respectfully refuse to answer anything on the grounds that I have requested representation. You have a letter stating that I can request representation at any time.

GARY GUDERIAN: You don't get representation. You are the steward.

30

DELORIS SNYDER: I am a steward, yes.

GARY GUDERIAN: I need to ask you a few questions.

DELORIS SNYDER: Well, as soon as you contact Chuck Owen and he comes over, [then] I'll be happy to help you.

35

GARY GUDERIAN: Are you refusing to speak with me?

DELORIS SNYDER: I am refusing to speak with you on any disciplinary action without representation.

40

GARY GUDERIAN: Are you refusing to speak to answer me?

DELORIS SNYDER: I am refusing to answer you without representation.

45

GARY GUDERIAN: I am going to ask you a question. [Transcript pages 514 and 515]

Respondent does not deny that Guderian then proceeded with the interview.

50

5 On rebuttal Owen testified that prior to his computer crashing in March or April 2005, he had been downloading music and he was having problems burning CDs; that when he tried to create a CD of the involved Olympus digital recording with his computer using Snyder's Olympus program, no files showed on the CD; that he then purchased some blank cassettes and he ran a patch cable from the ear piece of the Olympus recorder to the microphone in on his cassette tape recorder and made a cassette tape of the recording; that he did not open editing on the Olympus program; and that he made no effort to alter, change, or modify the content of any of the involved recordings. On cross-examination Owen testified that before he attempted to make a CD from the involved Olympus recorder he had been experiencing problems with writing CDs; that when he was downloading music he was letting his computer run all night and he experienced problems burning CDs; that he did not engage in editing when the Olympus file was on the hard drive of his computer; and that he did not have any explanation for any electronic or mechanical events or electronic editing on the tape which is General Counsel's Exhibit 10(a). On redirect Owen testified that he did not edit any audio files and he did not edit anything with the Olympus recorder. On recross Owen testified that he was not aware of an editing function on the Olympus software. Owen testified that he was mistaken when he earlier testified that he purchased a cable to make the tape since he already had the cable he used. As noted above, Owen did not have cassette tapes and he had to purchase them to make a tape of the involved Olympus recording.

20 On rebuttal Snyder testified that she is technologically challenged; that she did not read the operation manual which came with the Olympus digital recorder; that she unsuccessfully tried to load the recording onto her computer when she got everything back from Owen; that she did not know that the Olympus software provided for editing; that she did not try to alter the content of the involved recording; that she was with Owen when he unsuccessfully tried to transfer the recording to a CD; that she left the recorder and software with Owen to make a tape; that she made a copy of the cassette tape that Owen gave her; that she had to listen to the tape when she made the transcript and she would stop and rewind the tape as she typed the transcript; and that she mailed the second tape to the Fort Worth office of the Board.³³ On cross-examination Snyder testified that she began using a recorder (in December 2004) because, regarding a previous grievance, Guderian told the President of her Union, Johnson, that Snyder was throwing fits on the floor; that such conduct would be considered violence in the workplace by the Postal Service, and since a postal employee could lose their job if they engage in violence in the workplace, she decided that she had to start recording while she was in the Groesbeck facility; that she had the recorder on from just before getting to work up to the time she left to do her route; that she stopped recording in April, 2006³⁴; that after the involved tape was made, the Olympus recorder got wet from the rain and she did not have it repaired because she felt that it would be cheaper to buy another recorder; that the day she gave the Olympus recorder to Counsel for General Counsel to turn over to the Respondent for analysis, she realized that the Olympus recorder was working and she erased what she recorded that day

33 This Board office is located in a Federal Building.

40 34 The transcript originally read, as here pertinent, "I stopped recording when Derrick Gregorian had me in the office on April 1st." (transcript page 916, lines 9 and 10) Actually, Snyder testified that she stopped recording when Gary Guderian was removed from office on April 3. On March 28, 2006 Guderian testified at the trial herein that he was Postmaster of Respondent's Groesbeck facility. Consequently, his removal would have occurred subsequently, namely on April 3, 2006, the first Monday following his testimony at the trial herein. Lines 9 and 10 of transcript page 916 have been amended to read "I stopped recording when Gary Guderian was removed from office on April 3rd."

and saw that nothing else was on the recorder; that she used tape #1 [General Counsel's Exhibit 10(a)] to transcribe, which was the tape Owen gave her with his handwriting on it; that on March 17, 2006 she mailed tape #2, [General Counsel's Exhibit 10(b)] which she made and which has her handwriting on it, to Linda Reeder at the Board's Fort Worth office; that she did not wrap the tape in aluminum foil or take any special measures to protect the tape which she mailed to a Federal building; that she was not sure if she tried to load the recording on her computer before or after she went to Owen; and that she did not know how any of the events on the two tapes occurred.

Analysis

In my opinion, while the tapes may not be perfect quality and they have events, it has not been shown that any defects or electronic or mechanical events were intentional or are so substantial that they render the entire recording untrustworthy. Defects and events such as the ones cited by Respondent's expert go to the weight to be accorded the recording rather than its admissibility. Additionally, Respondent's expert testified, after listening to the recording while on the witness stand at the trial herein, that the portion of the recording (page 514, line 6 to page 515, line 4, excluding the words "You can" at the end of the line, as set forth above) which focuses on the issue at hand herein, namely that portion which indicates that (a) Guderian said yes when Snyder asked him if the interview could lead to discipline, (b) Snyder asked for union representation, and (c) Guderian, after denying Snyder's request, continued to conduct the interview, is reliable and consistent. The credible testimony of Snyder, even without the recording, demonstrates that (1) Snyder had reasonable cause to believe that the January 19, 2005 interview would result in disciplinary action against her, (2) Snyder asked for union representation, and (3) Guderian conducted the interview with Snyder even though he denied Snyder's request for union representation. The recording is icing on the cake. It is not necessary to rely on it. Snyder's credible testimony alone is sufficient. Guderian did not refute Snyder's testimony but rather took the "I do not remember or "I do not recall" approach. Guderian did, however, admit that Snyder was adamant about having union representation, and that he gave her time at the end of the meeting to contact her union representative. Obviously, Guderian conducted the interview after refusing to grant Snyder's request to have a union representative. And since Guderian does not dispute that he himself told Snyder that the meeting could lead to discipline, all of the necessary elements are present. Guderian is not a credible witness.

Mark Smith is not a credible witness. According to his testimony, while Guderian told Snyder that the meeting was not disciplinary in that it was a discussion, Guderian told Snyder that she could have union representation and he would wait for union representation. Article 16.2 of the involved collective bargaining agreement, Respondent's Exhibit 29, specifies

For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. [Emphasis added]

If the meeting could not result in discipline, why would Guderian agree to allow Snyder to have a union representative present? As Guderian advised Snyder at the outset, the meeting was leading to discipline, and Guderian proceeded with the interview after refusing Snyder's

adamant demands to have a union representative present.³⁵ I find that General Counsel has shown that Respondent violated the Act on January 19, 2005 as alleged in the complaint.

Conclusions of Law

5 1. The Board has jurisdiction over the Respondent pursuant to Section 1209 of the Postal Reform Act.

 2. The involved Unions are labor organizations within the meaning of Section 2(5) of the Act.

10 3. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

 (a) On or about April 14, 2004, Respondent, by Leon Nash, at Respondent's Birmingham Annex facility, by denying the request of employee David Callens and Mailhandlers Local 317 Steward Edward Steele to meet and confer prior to the commencement of the interview, denied the request of its employee David Callens to be represented by Mailhandlers Local 317 during an interview; that Callens had reasonable cause to believe that the April 14, 2004 interview would result in disciplinary action against him; and that Nash conducted the interview with Callens even though the Respondent had denied the employee's request for union representation.

 (b) On or about April 16, 2004, Respondent, by Leon Nash, at Respondent's Birmingham Annex facility, by denying the request of employee William Amerson and Mailhandlers Local 317 Steward Edward Steele to meet and confer prior to the commencement of the interview, denied the request of its employee William Amerson to be represented by Mailhandlers Local 317 during an interview; that William Amerson had reasonable cause to believe that the April 16, 2004 interview would result in disciplinary action against him; and that Nash conducted the interview with Amerson even though the Respondent had denied the employee's request for union representation.

 (c) On or about April 21, 2004, Respondent, by Diane Crenshaw, at Respondent's Birmingham Plant facility, by denying the request of employee Tommy Jones and Mailhandlers

35 ³⁵ On brief Respondent contends that Snyder chose to answer Guderian's questions and, therefore, Guderian did not violate Snyder's *Weingarten* rights by continuing with additional questions. A waiver of the right to representation must be clear and unmistakable; it will not be lightly inferred. There was no waiver here. Moreover, as indicated above, the Board in *United States Postal Service*, 241 NLRB 141 (1979) concluded as follows:

 Under *Weingarten*, once an employee makes ... a valid request for union representation, the employer is permitted one of three options: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or have no interview at all. Under no circumstances may the employer continue the interview without granting the employee union representation, *unless* the employee voluntarily agrees to remain unrepresented *after* having been presented by the employer with the choice mentioned in option (3) above or if the employee is otherwise aware of those choices. [Footnotes omitted] [Emphasis in original]

Guderian did not comply with the above-described requirements.

Local 317 Steward Douglas Cash to meet and confer prior to the commencement of the interview, denied the request of its employee Tommy Jones to be represented by Mailhandlers Local 317 during an interview; that Tommy Jones had reasonable cause to believe that the April 21, 2004 interview would result in disciplinary action against him; and that Diane Crenshaw conducted the interview with Tommy Jones even though the Respondent had denied the employee's request for union representation.

(d) In or about July 2004, Respondent, by Leon Nash, at Respondent's Birmingham Annex facility, by denying the request of employee William Amerson and Mailhandlers Local 317 Steward Byron Wesley to meet and confer prior to the commencement of the interview, denied the request of its employee William Amerson to be represented by Mailhandlers Local 317 during an interview; that William Amerson had reasonable cause to believe that the July 2004 interview would result in disciplinary action against him; and that Nash conducted the interview with Amerson even though the Respondent had denied the employee's request for union representation.

(e) On or about August 11, 2004, Respondent, by Sharon Davis, at Respondent's Birmingham Annex facility, by denying the request of employee Tyrone Hendrix and Mailhandlers Local 317 Steward William Amerson to meet and confer prior to the commencement of the interview, denied the request of its employee Tyrone Hendrix to be represented by Mailhandlers Local 317 during an interview; that Tyrone Hendrix had reasonable cause to believe that the August 11, 2004 interview would result in disciplinary action against him; and that Sharon Davis conducted the interview with Tyrone Hendrix even though the Respondent had denied the employee's request for union representation.

(f) On or about October 26, 2004, Respondent, by Paula Brown, at Respondent's Birmingham Annex facility, by denying the request of employee Edward Steele and Mailhandlers Local 317 Steward William Amerson to meet and confer prior to the commencement of the interview, denied the request of its employee Edward Steele to be represented by Mailhandlers Local 317 during an interview; that Edward Steele had reasonable cause to believe that the October 26, 2004 interview would result in disciplinary action against him; and that Paula Brown conducted the interview with Edward Steele even though the Respondent had denied the employee's request for union representation.

(g) On or about October 15, 2004, Respondent, by Patricia Auerbach, at Respondent's DFW Turnpike facility, denied the request of employee Annu Rajan to be represented by the Postal Nurses Union during an interview; that Rajan had reasonable cause to believe that the October 15, 2004 interview would result in disciplinary action against her; that Rajan refused to attend the interview; and that about October 15, 2004, Respondent, by Patricia Auerbach, ordered Rajan "off the clock," thereby suspending its employee Rajan because of her refusal to attend this interview without union representation.

(h) On or about October 18, 2004, Respondent, by Mitchell Barron, at Respondent's DFW Turnpike facility, by directing Postal Nurses Union Representative Ajo James to remain quiet throughout the meeting, denied the request of its employee Annu Rajan to be represented by the Nurses Union during an interview; that Annu Rajan had reasonable cause to believe that the October 18, 2004 interview would result in disciplinary action against her; that Barron conducted the interview with Rajan even though the Respondent had denied the employee's request for union representation; and that about October 18, 2004 Respondent issued a seven day suspension to Rajan because she refused to attend the October 15, 2004 interview without union representation.

(i) On or about January 19, 2005, Respondent, by Gary Guderian, at Respondent's Groesbeck facility, denied the request of employee Deloris Snyder to be represented by Letter Carriers Branch 404 during an interview; that Deloris Snyder had reasonable cause to believe that the January 19, 2005 interview would result in disciplinary action against her; and that Guderian conducted the interview with Snyder even though the Respondent had denied the employee's request for union representation.

4. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act:

(a) About October 15, 2004, Respondent, by Patricia Auerbach, ordered Rajan "off the clock," thereby suspending its employee Rajan because of her refusal to attend the October 15, 2004 interview without union representation.

(b) About October 18, 2004 Respondent issued a 7-day suspension to Rajan because she refused to attend the October 15, 2004 interview without union representation.

5. The above-described labor practices affect commerce within the contemplation of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended Annu Rajan, it must make her whole for any loss of earnings and other benefits, computed on a quarterly basis for the periods of suspension, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³⁶

General Counsel requests as a part of the remedy that Respondent be required, on request of the involved union, to repeat the interviews of each of the above-named employees, except Rajan, afford the employees their full rights of union representation, reconsider any disciplinary action taken, and if it is determined that the action was unwarranted or that a mitigation of the penalty is warranted, rescind, modify and expunge the discipline and make the employee whole for any losses suffered. Additionally, General Counsel requests that Respondent notify the involved employee of the results of the reconsideration and, if relevant, afford them any appeal or grievance rights that may exist under the collective bargaining agreement, law or regulation. And finally, General Counsel requests that Respondent be required to provide each and every supervisor at the facilities involved in these proceedings a copy of any court order that enforces any Board order in these matters; that each and every Respondent supervisor at the facilities involved herein sign a written acknowledgment of receipt of said court order, that they understand the court order and that they understand that any future violations of an employee's *Weingarten* rights might result in contempt proceedings against them personally.

³⁶ As pointed out by the Board in *Taracorp Inc.*, 273 NLRB 221, at 223 note 12 (1984) a make-whole remedy is appropriate if the employee is disciplined for asserting the right to representation. It is noted that there is testimony of record that Rajan was already compensated for any lost wages due to her suspension. Nonetheless, this remedy remains appropriate.

5 First, there was no discipline with respect to certain of the incidents described above. It is not clear, therefore, what General Counsel seeks to achieve by repeating those interviews. Second, taking into consideration that Rajan is not included in General Counsel's requests, it is not alleged that any of the involved employees was disciplined for requesting union
10 representation or to be allowed to consult with a union representative before the investigatory interview began. Third, an employee is not entitled to have a written warning expunged absent a demonstration of the nexus between the wrongful denial of full representation (including pre-investigatory consultation with the union representative) and discipline, *United Postal Serv.*, 314 NLRB 227 (1994). Fourth, a make-whole remedy is not appropriate where the employee is
15 disciplined for misconduct unrelated to assertion of *Weingarten* rights. A make-whole remedy is appropriate only if the employee is, as here pertinent, disciplined for asserting a *Weingarten* right. Fifth, it does not appear that any of the involved employees was disciplined based on information obtained at the unlawful interviews. Indeed, at least two of the involved employees basically refused to answer the supervisor's questions at the investigatory interview. In light of this, General Counsel's requests that Respondent be required, on request of the involved union,
20 to (1) repeat the interviews, (2) afford the employees their full rights of union representation, (3) reconsider any disciplinary action taken, and if appropriate, rescind, modify and expunge the discipline and make the employee whole for any losses suffered, and (4) notify the involved employee of the results of the reconsideration, are denied.

25 General Counsel additionally requests that Respondent be required to (1) provide all supervisor at the involved facilities with a copy of any court order that enforces any Board order in these matters, and (2) have them sign a written acknowledgment (a) of receipt of said court order, (b) that they understand the court order, and (c) that they understand that any future violations of an employees' *Weingarten* rights might result in contempt proceedings against them personally. Only three of the supervisors at the Birmingham Annex, Nash, Davis and Brown, one at the Birmingham Plant, Crenshaw, two at the DFW Turnpike facility, Auerbach and Barron, and one at the Groesbeck facility, Guderian, are involved in this proceeding. Auerbach no longer works for the United States Postal Service. While Barron was at the DFW Turnpike facility for Rajan's predisciplinary meeting, he works in Cappell, which is about 30 miles from Respondent's DFW Turnpike facility. And Guderian has been removed as Postmaster at
30 Respondent's Groesbeck facility. Nonetheless, in view of the fact that these types of violations continue and some of the involved supervisors pleaded ignorance of the law at the time of the occurrence, it is more than apparent that Respondent is not getting the message out to supervisors and managers (at least not the message that directs them to obey the law) notwithstanding that Respondent advised a United States Court of Appeals that it would institute a nationwide educational program directed at, as here pertinent, supervisors, acting
35 supervisors, and managers. In these circumstances, I believe that General Counsel is justified in requesting that the Respondent be required to provide all supervisors at the involved facilities with a copy of any court order that enforces any Board order in these matters and have the supervisors sign an acknowledgment that they received the copy of the court order. Said acknowledgment should be placed and maintained in the personnel file of the supervisor just like an employee's acknowledgment of receipt of an employee handbook is kept in the employee's personnel file. This should pretty much preclude a supervisor from pleading
40 ignorance of the law in the future. However, I have a problem with the remainder of the request, namely that supervisors acknowledge that they understand the court order, and they understand that any future violations of an employee's *Weingarten* rights might result in contempt proceedings against them personally. Acknowledging notice is sufficient. It is neither necessary nor desirable that a supervisor acknowledge that he or she understands the court order.
45 Similarly it is neither necessary nor appropriate for the Board to advise supervisors that a

violation of an employee's *Weingarten* rights might result in contempt proceedings against them personally.³⁷

Order

5 The Respondent, United States Postal Service, its officers, agents, successors, and assigns, shall

1. Cease and desist from

10 (a) Denying the requests of employees at its Birmingham Annex facility located at 4500 1st Avenue South, Birmingham, Alabama and at its Birmingham Plant facility located at 351 24th Street North, Birmingham, Alabama to meet and confer with a union representative prior to the commencement of an investigatory interview, when the employee has reasonable cause to believe that the interview will result in disciplinary action against him or her, and conducting the interview with the employee even though the Respondent had denied the employee's request
15 for union representation.

 (b) Denying the request of employees at its facilities located at 401 DFW Turnpike, Dallas, Texas and 112 South Dr. J.B. Riggs Drive, Groesbeck, Texas to be represented at an interview when the employee has reasonable cause to believe that the interview would result in disciplinary action against her, and conducting the interview at Groesbeck even though
20 Respondent had denied the employee's request for union representation.

 (c) Directing a union representative at its facility located at 401 DFW Turnpike, Dallas, Texas to remain quiet throughout an interview of an employee, thereby denying the request of
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30 ³⁷ Interestingly, as noted above, Respondent originally argued that the alleged denials of *Weingarten* rights are matters that may and should be deferred to an arbitrator under the involved collective bargaining agreements. It is noted that MDO Hill did not testify at the trial herein to deny Amerson's testimony that Hill told him that if the Union "wanted to file grievances, I'll show [you] how to fight. He is sick of us filing grievances or wanting union time" (transcript page 147); and that the Union has filed an unfair labor practice charge regarding Hill's statements. Amerson also testified that during 2004 the Union was experiencing frustration with the grievance procedure both at the Birmingham Annex and at the Plant since supervisors would not allow union time, they would not meet with the stewards, and they would not give the requested information. It appears from this case and from other Board decisions that
35 Respondent is doing all that it can get away with to undermine arbitration. See note 19 in the Board's decision in *Postal Service*, 345 NLRB No. 25 (August 27, 2005). It appears that Respondent has been hoisted by its own petard in that any thought of deferral to arbitration would have to take into consideration the fact that the Postal Service itself has been attempting to undermine arbitration. It is indeed ironic that the Postal Service here sought deferral to a process which has been compromised due to the Postal Service's own actions. Neither Board nor United States Court of Appeals decisions have convinced the Postal Service that it should take the employees' *Weingarten* rights seriously. While paying lip service to these rights, apparently the Postal Service continues to view them as nothing more than a nuisance. Normally supervisors take their cue or direction from management. The following footnote appears on page 60 in Respondent's brief: "Respondent has determined not to continue to urge the deferral argument raised as a defense in the Answer and presented to the full Board by summary judgment motion."
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the employee to be represented by a union representative during her interview, when the employee had reasonable cause to believe that the interview would result in disciplinary action taken against her, and conducting the interview even though Respondent had denied the employee's request for union representation.

5 (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

10 (a) Permit an employee to be represented by a union representative at an interview which the employee believes reasonably could result in disciplinary action.

(b) Permit an employee and a union representative to consult privately in advance of an interview to prepare for the interview which reasonably could result in disciplinary action.

15 (c) Permit a union representative to speak at a predisciplinary meeting with the employee and at all other interviews with employees which reasonably could result in disciplinary action.

20 (d) Make Annu Rajan whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

25 (e) Within 14 days from the date of the Board's Order, remove from its files any reference to the above-described unlawful discipline of Annu Rajan, and within 3 days thereafter notify the employee in writing that this has been done and that the discipline, including the two suspensions will not be used against her in any way.

30 (f) Provide all supervisors at the involved facilities with a copy of any court order that enforces any Board order in these matters and have the supervisors sign an acknowledgment that they received the copy of the court order. Said acknowledgment should be placed and maintained in the personnel file of the supervisor.

35 (g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

40 (h) Within 14 days after service by the Region, post at its facilities at 4500 1st Avenue South, Birmingham, Alabama, 351 24th Street North, Birmingham, Alabama, 401 DFW Turnpike, Dallas, Texas, and 112 South Dr. J.B. Riggs Drive, Groesbeck, Texas copies of the attached notice marked "Appendix."³⁸ Copies of the notice, on forms provided by the Regional

45 ³⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 14, 2004.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 20, 2006.

John H. West
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

15

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

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WE WILL NOT deny your request to be represented at an interview when you have reasonable cause to believe that the interview would result in disciplinary action against you, and WE WILL NOT conduct the interview even though we have denied your request for union representation.

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WE WILL NOT deny your request to meet and confer with a union representative prior to the commencement of an investigatory interview, when you have reasonable cause to believe that the interview will result in disciplinary action against you, and WE WILL NOT conduct the interview with you even though we denied your request for union representation.

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WE WILL NOT direct a union representative to remain quiet throughout an interview with you, thereby denying your request to be represented by a union representative during your interview, when you have reasonable cause to believe that the interview would result in disciplinary action taken against you, and WE WILL NOT conduct the interview even though we have denied your request for union representation.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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WE WILL permit you to be represented by a union representative at an interview which you believe reasonably could result in disciplinary action.

WE WILL permit you and a union representative to consult privately in advance of an interview to prepare for the interview which reasonably could result in disciplinary action.

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WE WILL permit a union representative to speak at a predisciplinary meeting with you and at all other interviews with you which reasonably could result in disciplinary action.

WE WILL make Annu Rajan, of Dallas, Texas, whole for any loss of earnings and other benefits resulting from her suspensions, plus interest.

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WE WILL within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful suspensions of Annu Rajan, and WE WILL within 3 days thereafter notify her in writing that this has been done and that the discipline, including the two suspensions will not be used against her in any way.

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United States Postal Service

(Employer)

Dated _____ By _____
(Representative) (Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlr.gov.

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233 Peachtree Street NE, Harris Tower, Suite 1000
Atlanta, Georgia 30303-1531
Hours: 8 a.m. to 4:30 p.m.
404-331-2896.

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER, 404-331-2877.

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