Pacific Southwest Airlines, Inc. *and* Airline, Aerospace and Allied Employees Local Union No. 2707, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 32-CA-353

June 14, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On October 17, 1978, Administrative Law Judge Robert B. Holmes issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed exceptions and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge as modified herein.

The complaint alleges that Respondent violated Section 8(a)(3) of the Act by discharging employees Keith Ingalls and Michael Sharpe and Section 8(a)(1) of the Act by refusing to permit a union steward to be present during a telephone interview with the two employees. We agree with the Administrative Law Judge that the 8(a)(3) allegations should be deferred to arbitration under the *Spielberg* principles.[2] Contrary to the Administrative Law Judge, however, we would also defer the 8(a)(1) allegations to the arbitrator's award.

The facts, as outlined below, are fully set forth in the Administrative Law Judge's Decision and the arbitration award attached thereto [omitted from publication]. At the hearing herein the parties stipulated that the factual findings of the arbitrator as set forth in the award would be binding on the parties and would constitute the factual basis for the 8(a)(3) allegations. Ingalls and Sharpe were among the witnesses to an on-the-job drinking incident which occurred in June 1977. On the basis of its interviews with Ingalls, Sharpe, and Gary Greene,[3] Respondent discharged the two employees involved in the incident. At a meeting to settle the grievance involving the incident, the Union, which had talked to the witnesses, stated that Respondent had acted on incorrect information and that it had witnesses, including Ingalls and Sharpe, who would testify that Respondent had previously condoned such conduct.

On August 23, 1977, the day before the scheduled arbitration hearing on the drinking incident discharges, Respondent's attorney sought to interview Ingalls and Sharpe (and Greene) to prepare for arbitration and to review Respondent's position. Ingalls was the first to be called, and at his request a steward was present. Respondent asked him about the drinking incident. After considerable discussion including phone calls to the union office and with the approval of the steward, Ingalls said he was instructed not to answer the questions. Respondent told Ingalls that if he persisted in his refusal he could be discharged. Ingalls refused and was suspended. Sharpe, who was later summoned, also refused to be interviewed and was suspended.

The next day, August 24, 1977, Ingalls and Sharpe went to the office to turn in their passes and identification papers and were told that the station manager wanted to see them. Ingalls, who was first, requested a steward and was refused. Respondent's operations director was on the phone and asked Ingalls if he now wanted to answer the questions. Ingalls replied that his answer was the same. Sharpe was summoned, requested a steward, and was refused. The operations manager asked Sharpe if he had changed his mind, and Sharpe said he could not give an answer at that time. Immediately afterwards, Sharpe and then Ingalls went to the station manager's office where, at Respondent's request, a steward was present. The station manager expressed regret at what he had to do, gave each an opportunity to change his mind, and terminated them.

Ingalls and Sharpe filed grievances which the Union pursued through arbitration. The arbitration opinion and award, appended to the Administrative Law Judge's Decision, concluded:

> The Award is that the Company violated the Agreement when it terminated Keith Ingalls and Michael Sharpe on August 24, 1977. It shall reinstate them within twenty-four (24) hours of its receipt of this Award without loss of seniority or other benefits, but without any retroactive compensation.

In brief, the arbitrator found that Respondent was acting within its rights in attempting to interview Ingalls and Sharpe, that Ingalls and Sharpe should have submitted to the interviews, but that because Ingalls and Sharpe "got caught in the middle of a struggle between two organizations" their discharges shall be converted to suspensions.

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

[2] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

[3] Greene was not a subject of this proceeding or of the arbitration proceeding.

The Board has long held that it will defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. (*Spielberg, supra* at 1082.) The General Counsel contends that the award is clearly repugnant to the Act, basically because, in his view, Respondent was attempting to interfere with those who sided against it in the processing of grievances, to retaliate against employees for their apparent desire to testify favorably to their fellow employees, and to improperly discover what the testimony favorable to the Union would be.

A close look at the award shows that the findings of the arbitrator support his conclusions and demonstrates that he considered and rejected the contentions of the General Counsel. The arbitrator found that Ingalls and Sharpe (and Greene) were the witnesses to the drinking incident whose interviews had been the basis of Respondent's action to the incident; that, as an almost routine practice, a party to arbitration interviews its witnesses in preparation for the hearing to permit, as here, its attorney to view the evidence first hand and to assess the evidence in light of a possible settlement; that Respondent sought to question on-duty employee witnesses about the conduct of other on-duty employees during the drinking incident; and that therefore Respondent had the right to expect good-faith cooperation. The arbitrator also found that Respondent did not seek disclosure of what Ingalls and Sharpe would testify to at the hearing or the details of the Union's position; that Respondent did not go beyond legitimate inquiry into job-related conduct; that the interviews were not coercive;[4] and therefore Respondent did not wrongfully intrude upon or interfere with the grievance procedure. For the above reasons and those set forth in detail by the Administrative Law Judge, we find that the arbitration award with respect to the suspensions of Ingalls and Sharpe is not repugnant to the purposes and policies of the Act and fully meets the *Spielberg* standards for deferral. Accordingly, we adopt the Administrative Law Judge's dismissal of this allegation of the complaint.

The Administrative Law Judge did not defer the independent 8(a)(1) allegations of the complaint to the arbitration decision; instead he found that Respondent's telephone conversations with Ingalls and Sharpe, which were conducted without the presence of a union representative as requested by Ingalls and Sharpe, violated the Act under the principles explicated in *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975). We do not agree. In our opinion the arbitrator's discussion of both the contractual and statutory issues and his resolution of the matter meets the *Spielberg* standards for deferral.[5]

A steward was present on August 23 when Respondent sought to question Ingalls and Sharpe and on August 24 when Ingalls and Sharpe were fired. The only time a steward was refused was during the telephone conversations in which Respondent, in essence, asked each employee if he had changed his mind. In discussing Respondent's refusal, the arbitrator stated:

> The Union urged that the failure of the Company to allow Union representation during the August 24 telephone conversations should invalidate the Company's actions. It's true that the Company should have allowed representation on August 24 in those talks because obviously the prospect of discipline was a central reality despite the ingenuous statement of the station manager that this was not so. The two were discharged immediately following them. This contractual obligation of representation is routine in this type of situation. It remains so even though its allowance on August 23 had had dismal consequences. If the Company had withheld that right of representation on August 23, had pursued the questioning it did, and then had discharged these employees, as here, they would in all likelihood have been reinstated in this proceeding.
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> But in this August 24 telephone situation, all that the two employees did was to repeat their insistance—mistakenly—on a right not to respond which they had formulated and persisted in the day before while given not only the presence of Union representation but also periodic opportunities to bolster that representation by telephone calls to the Union. So, although the failure of the station manager to allow the presence of a Union representative in a disciplinary setting did violate the Agreement—and quite possibly the statute, as interpreted in *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251 (1975)—the violation in this context was not a material one and should be given no significance in this proceeding. In no way did it disadvantage these two employees. Indeed, had the presence of a Union

[4] We agree with the Administrative Law Judge that the General Counsel's reference to *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), is not relevant here. That case set out safeguards that an employer must observe in questioning employees with regard to verification of a union's majority status and preparation of a defense to an unfair labor practice charge. That case does not apply to all employer interviews of employees and does not apply here.

[5] Chairman Fanning would affirm the Administrative Law Judge on this issue and would issue the remedial order the Administrative Law Judge recommended.

> representative been afforded in these August 24 telephone conversations it is quite evident that their tenor and result, at least as to these two of the three employees involved, would clearly not have changed what was said by them.

In sum, the arbitrator found that although Respondent's refusal to permit the presence of a steward was improper, the violation was not material and does not invalidate Respondent's action.

In consideration of all the circumstances, we find that the arbitration award with respect to the *Weingarten* issue is not clearly repugnant to the Act. In doing so, we do not condone Respondent's refusal of union representation, and we neither approve the arbitrator's nor reject the Administrative Law Judge's analysis of *Weingarten*. Instead we find that the arbitration award does not do substantial violence to the *Weingarten* principles[6] or to the purposes and policies of the Act and is therefore not clearly repugnant under the *Spielberg* standards. Accordingly, we shall also dismiss his aspect of the complaint and, thus, the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

[6] In this connection we note that the Administrative Law Judge stated that the arbitrator's position "has a great deal of logic behind it."

DECISION

ROGER B. HOLMES, Administrative Law Judge: The unfair labor practice charge in this proceeding was filed on August 29, 1977, by Airline, Aerospace and Allied Employees Local Union No. 2707, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union.

The charge was initially filed with Region 21 of the National Labor Relations Board, herein called the Board, and the charge was initially docketed as Case 21-CA-15992. (See G.C. Exh. 1(a).) On August 31, 1977, the General Counsel of the Board issued an order transferring the case from Region 21 to Region 20. (See G.C. Exh. 1(d).) The charge was then redesigned as Case 20-CA-13335. Thereafter, the Board established a new Region 32 to render service to a portion of the geographic area formerly handled by Region 20. At that point in time, the charge was again redesignated as Case 32-CA-353.

On October 20, 1977, the Regional Director for Region 32 advised the parties by letter that he was deferring action on the investigation of the unfair labor practice charge pending the completion of the arbitration proceedings in accordance with the policy of the Board enunciated in *Dubo Manufacturing Corporation*, 142 NLRB 431 (1963). (See G.C. Exh. 2.)

Thereafter, the Regional Director for Region 32 issued on May 25, 1978, a complaint and notice of hearing against Pacific Southwest Airlines, Inc., herein called the Respondent. The General Counsel's complaint alleges that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. The Respondent filed an answer to the complaint, and at the hearing the Respondent also filed an amended answer to the complaint. The Respondent denied the commission of the alleged unfair labor practices and raised certain affirmative defenses. (See Resp. Exh. 1.)

The hearing in this proceeding was held before me on August 8, 1978, at San Jose, California. Both counsel for the General Counsel and the attorneys for the Respondent timely filed persuasive briefs by the due date of September 25, 1978.

FINDINGS OF FACT

I. JURISDICTION

The Respondent has been, at all times material herein, a California corporation with an office and principal place of business located in San Diego, California. The Respondent has a facility located in San Jose, California, where it is engaged in the airline transportation of passengers within the State of California.

During the 12 months preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, derived gross revenue in excess of $500,000, and during the same period of time, the Respondent purchased and received goods or services valued in excess of $5,000 which had originated outside the State of California.

Upon the foregoing facts, and upon the entire record in this proceeding, I find that the Respondent has been, at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It was admitted in the pleadings that the Union has been, at all times material herein, a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that fact to be so.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Witnesses*

In alphabetical order, the following six persons testified at the hearing in this proceeding:

David Owen Bernier is the director of operations for the Respondent. He began his employment with the Respondent in 1969 as a passenger service agent. He held the positions of station supervisor in San Francisco, California; sales representative; assistant station manager; station manager at Burbank, California; director of southern sta-

tions; and then his present position with the Respondent for approximately 1-1/2 years at the time of the hearing.

Fred Peter Coors is an air freight agent for the Respondent at its San Jose, California, facility. He has held that position since June 1978. Previously, from 1974 to June 1978, Coors was a ramp service agent. In addition, Coors has served as the union steward on the afternoon shift at the San Jose facility.

Russell Keith Ingalls is a passenger service agent for the Respondent at the San Jose Municipal Airport. He was initially hired by the Respondent in August 1968. Ingalls is one of the two alleged discriminatees in this proceeding. He was terminated by the Respondent on August 24, 1977. He was reinstated by the Respondent on or about December 29, 1977, but without backpay.

Ronald R. Segers was not employed by the Respondent at the time of the hearing. Segers was formerly the assistant station manager at the Respondent's San Jose facility, and Segers held that position in August 1977.

Michael Lee Sharpe is a passenger service agent for the Respondent at the San Jose Municipal Airport. He was originally employed by the Respondent on March 4, 1970. Sharpe is one of the two alleged discriminatees in this proceeding. Sharpe was also terminated on August 24, 1977. He was reinstated by the Respondent on or about December 29, 1977, but without backpay.

Richard Volzing was not employed by the Respondent at the time of the hearing. Volzing formerly held the position of station manager at the Respondent's San Jose facility, and Volzing occupied that position in August 1977.

B. *The Stipulations*

As Joint Exhibit 1, the parties introduced a copy of the opinion and award of Arbitrator Edgar A. Jones, Jr. The document is 19 pages long and is typewritten single-spaced. The hearing before the arbitrator was held on October 13 and 14, 1977; Arbitrator Jones issued his opinion and award on December 29, 1977. Arbitrator Jones concluded:

> The Award is that the Company violated the Agreement when it terminated Keith Ingalls and Michael Sharpe on August 24, 1977. It shall reinstate them within twenty-four (24) hours of its receipt of this Award without loss of seniority or other benefits, but without any retroactive compensation.

The parties stipulated that the factual findings of Arbitrator Jones, as set forth in his opinion and award, which relate to the occurrences on August 23, 1977, would be binding upon the parties in this proceeding. The parties stipulated that they would offer additional testimony at the hearing in this case only as to occurrences on August 24, 1977. However, the arbitrator's findings from the entire record of the events on August 23, 1977.

The parties further stipulated that they were not contesting the fact that a statutory issue relating to the validity of the Respondent's questioning of employees was the subject of a *Dubo* deferral by the Regional Director for Region 32. Evidence had been presented on that matter; the Respondent had argued and briefed the matter, and the arbitrator had considered that subject. The parties stipulated that the sole ground for the refusal to defer to the arbitration award is the General Counsel's contention that the award failed to satisfy the requirements of the Board's Decision in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), in that the General Counsel contends that the award is repugnant to the purposes and policies of the Act.

In view of the foregoing, and the importance and significance of the opinion and award of Arbitrator Jones, I have attached that document as Appendix A [omitted from publication]. In accordance with the stipulation of the parties referred to above, I hereby adopt in this proceeding the factual findings set forth by Arbitrator Jones in his opinion and award.

C. *The Events on August 24, 1977*

As noted in the previous section of this Decision, the pertinent facts relating to the occurrences on August 23, 1977, are contained in Appendix A. We turn now to the events which happened on the following day. While there are some findings of fact related in Appendix A regarding the events on August 24, 1977, the occurrences on that day were the subject of the testimony of the six witnesses who testified in this proceeding.

As to what occurred on August 24, 1977, I shall rely on the testimony given at the hearing in this proceeding by Ingalls and Sharpe. Although I have read and considered the testimony of the other four witnesses, I was persuaded that Ingalls and Sharpe were relating accurately and reliably the events which occurred on that day. Considering their demeanor on the witness stand and the criteria set forth by the Board in *Northridge Knitting Mills, Inc.*, 223 NLRB 230, 235 (1976), I have credited their versions of these events.

There were some variations among the accounts which were given by the other four witnesses. While some of those variations may be considered to be minor points, I was not convinced that they had better recollections of these events than did Ingalls and Sharpe who appeared to be credible witnesses. Consequently, I have based the findings of fact in this section on the testimony given by Ingalls and Sharpe whose versions have been accepted and credited.

1. Ingalls and Sharpe return to the Respondent's facility

About 2 p.m. on August 24, 1977, Ingalls and Sharpe returned to the Respondent's facility in order to turn in their identification papers and "silver passes," which entitle an employee with more than 5 years of company service to receive transportation on PSA without cost to the employee. Ingalls explained that he thought that he had been terminated the previous day following his late afternoon conversations with Director of Operations Bernier. Sharpe shared a similar opinion. He testified, "My understanding was that I had been fired August 23rd."

Ingalls and Sharpe gave their identification papers and "silver passes" to Mickey Reynolds, who was an employee of the Respondent and also an alternate shop steward. This took place at the airfreight building. Reynolds then got into an airfreight van and departed toward the area where the station manager's office is located.

About 15 minutes later, Reynolds returned to the airfreight building and told Ingalls and Sharpe that Station

Manager Volzing wanted them to hand in their identification papers and passes to him, and that Volzing wanted to talk with them. Therefore, about 2:30 or 3 p.m., Ingalls and Sharpe got into an airfreight van with Reynolds and drove to the station manager's office, which was approximately one-quarter of a mile away.

Ingalls and Sharpe walked into the office with Reynolds following behind them. Volzing came out and asked Ingalls and Sharpe which one of them wanted to be first. Ingalls spoke up and said that he would. At that point Ingalls asked Volzing if he could have a shop steward present. Volzing replied that he did not want any shop steward in the office.

Sharpe then left the office and looked for Gary Green, whom Sharpe had observed in the office with Volzing at the time that Sharpe and Ingalls arrived at the operations office. Sharpe found Green at the counter about 200 yards from the operations office. Sharpe asked Greene what was going on, but Green would not talk to him.

2. The telephone conversation between Ingalls and Bernier

Ingalls went into Volzing's office and Volzing closed the door. Volzing informed Ingalls that Bernier was on the telephone, and that he would like to talk to Ingalls.

Ingalls said that the telephone receiver was lying on the desk, so he picked it up. Bernier introduced himself and told Ingalls that he would give him another chance, if Ingalls wanted to answer the questions. Bernier stated that he would make arrangements for Ingalls to come down to San Diego, and Ingalls could answer the questions there.

Ingalls replied that his answer would be the same; that he would be glad to answer any other questions the next day at the arbitration hearing, but as far as answering questions before that as to what his testimony was going to be, Ingalls was going to have to decline to do that.

Bernier said that he regretted that Ingalls still felt the same way, and that Ingalls left him with no other alternative, if Ingalls still refused to answer the questions which Bernier wanted to pose to him. Bernier then asked that Ingalls put Volzing back on the telephone. Ingalls said that Bernier did not tell him what the alternative would be.

During the conversation between Ingalls and Bernier, Volzing was listening on the extension telephone in the office. Volzing next instructed his secretary, Ms. Jewel, to take Ingalls to the office of Assistant Station Manager Segers.

Ingalls and Jewel then went to Seger's office where Jewel waited with Ingalls for about 20 minutes.

3. The telephone conversation between Sharpe and Bernier

Sharpe heared his name being paged over the intercom, so he went to the operations office. Volzing asked Sharpe to go into his office. Sharpe asked for a shop steward to be present. Volzing replied, "We're not going to have any of those in here today."

In the office Volzing shut the door and told Sharpe that Bernier would like to talk to Sharpe on the telephone. Sharpe sat down at Volzing's desk and picked up the telephone. Volzing picked up the extension telephone from the secretary's office and listened during the conversation between Sharpe and Bernier.

Bernier asked Sharpe how he was, and Sharpe replied that he had not slept very well. Bernier then said that he did not sleep too well either.

Bernier next asked Sharpe if he would like to change his mind and answer the questions which they had put to him the day before, or the questions that they had wanted to put to Sharpe the day before.

Sharpe stated that he would like to talk to a union representative first. Bernier responded that Sharpe had had 24 hours to do that, and Bernier would like his answer now. Sharpe said that he could not give Bernier an answer now.

Bernier stated, "So you're noncommittal." Sharpe agreed and said the Bernier could call it that. Bernier then stated that he was going to take Sharpe's noncommittal answer as a "no." Sharpe replied, "It's not a no. It's noncommittal." Bernier responded that it was a "no" to him. Sharpe said, "You can take it that way if you want." Sharpe said that it had been nice talking to him, and then he hung up the telephone.

Volzing remained on the telephone extension for a few minutes and then hung up the extension telephone.

4. The final conversation in which Sharpe is terminated

Volzing called Sharpe back into his office, and Volzing also called in a secretary and Shop Steward Fred Coors.

Volzing told Sharpe that he had to terminate him. Volzing asked the secretary to type up the necessary forms. She then left the office.

While the secretary was preparing the papers, Volzing told Sharpe that he regretted that he had to do this. Then they discussed an earlier incident involving Bill Brill and Gary Isaac. (See Appendix A regarding that matter.)

The secretary brought the papers into the office and handed them to Volzing, who handed the papers to Sharpe. After Sharpe looked at the papers, he gave them to Shop Steward Coors to look over. Coors examined the papers, and then he nodded his head to Sharpe and gave the papers back to him. Sharpe signed the papers and asked for his final check. Volzing said that he could not give him his final check until he turned in his uniform.

5. The final conversation in which Ingalls is terminated

After waiting approximately 20 minutes in Segers' office, Ingalls was called back into Volzing's office. In addition to Volzing and Ingalls being present in the office, Shop Steward Coors was also called into the office by Volzing. Ingalls explained that he did not ask for a union steward at that point in time because, "Mr. Volzing asked for one before I had a chance to ask for one." Ingalls was not certain as to whether or not Assistant Station Manager Segers was present in Volzing's office.

Volzing told Ingalls that he thought that Ingalls and he had communication, and he did not know how this had gotten as far as it had. Ingalls responded that he thought they could communicate in the past.

Volzing told Ingalls that he regetted having to do what he was going to have to do. Volzing said that, if Ingalls wanted

to change his mind, it still would not be too late to call up Bernier and set up a question session in San Diego. Ingalls thanked Volzing for his concern. Ingalls said that he had made his stand; he was going to stand by the issue which he stood on, and that he was not going to answer any questions. Thereupon, Jewel passed some papers through the office window, and Volzing told Ingalls to sign the papers, turn in his uniform, and he would have his final check when he turned in his uniform.

Ingalls stated at the hearing that Coors did not say anything during the time that he was in Volzing's office with him.

6. Events that day after the termination

When Ingalls left the office, he saw Sharpe waiting in the hall. Ingalls told him, "Well, it's final now. I've been terminated." Sharpe replied, "Well, so was I." Then the two persons went back to the airfreight building where Reynolds was typing up a new grievance form, which they signed, and then they went home.

Ingalls picked up his uniform at the cleaners and turned it in to Volzing that day. Volzing gave Ingalls his check, but there was no further conversation between the two persons at that time.

Sharpe also obtained his uniform from the cleaners, and he took his uniform back to the facility. Sharpe also was given his final check at that time.

D. *Conclusions*

In *The Kansas City Star Company*, 236 NLRB 866, 867 (1978), the Board reiterated its policy:

> The Board, however, holds that it will defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Spielberg Manufacturing Company*, 112 NLRB 1080, 1082 (1955).

The Board concluded in its Decision in *The Kansas City Star Company*, *supra* at 867:

> For the above reasons, we find that the arbitrator's award herein is not repugnant to the policies of the Act; is, on its face, the fair and regular; and was reached by a procedure to which the parties have agreed to be bound. Accordingly, we conclude that it will effectuate the purposes of the Act to give conclusive effect to the grievance award and, on that basis, we shall dismiss the complaint in its entirety.

Further guidance is given in the concurring opinion of Board Member Truesdale who stated, *supra* at 869:

> The majority reviews the record evidence, sees no irregularities in the proceedings and no facial errors in the arbitrator's factual findings and then examines the arbitrator's legal conclusion to see if, on the facts he has found, it is consistent with Board law.

With the foregoing Board precedents in mind, I conclude that the opinion and award of Arbitrator Jones, which is attached hereto as Appendix A, meets fully all of the Board's criteria for deferral as enunciated in the Board's *Spielberg* decision and as restated in the Board's *The Kansas City Star Company* decision. Therefore, I conclude that the Board should defer to the arbitration award of Arbitrator Jones with regard to the termination of Ingalls and Sharpe.

There is no question that the proceedings before Arbitrator Jones have been fair and regular, and that all parties had agreed to be bound. The sole contention raised is that the arbitrator's decision is clearly repugnant to the purposes and policies of the Act. After examining the decision of Arbitrator Jones, I conclude that that contention is not meritorious. In partial summary of his conclusions, the following points may be noted:

> (1) It is an almost routine practice for a union or an employer advocate to interview witnesses a day or two prior to an arbitration hearing in preparation for that hearing.
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> (2) It is not unusual that this prehearing interview will be the first time the advocate has had the opportunity to hear "first-hand accounts of witnesses." This was the situation here involving Attorney Rickard who had not been present at the earlier investigation of the Brill-Isaac incident.
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> (3) Such prehearing preparation is "simply not in itself a 'dirty pool" situation," but instead an important part of the administration of the grievance procedure. It is not unusual for cases to be settled on the day of the arbitration hearing because of the "advocate's last-minute, eye-opened assessment of the significance of these prehearing contacts."
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> (4) An advocate could go beyond the parameters of legitimate inquiry into the job-related conduct of the employee and fellow workers, or the interview could be conducted in a coercive manner, but that was not the situation involved herein.
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> (5) The employees whom the company attorney sought to question were the three witnesses to the Brill-Isaac incident, and their earlier disclosures to the Company had been the basis on which the Company had acted to terminate Brill and Isaac.
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> (6) The Union's advocate had previously informed the Company that these witnesses had "to some undisclosed extent repudiated or retracted all or parts of their June statements that had been the factual foundation for the two discharges."
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> (7) The prehearing interviews by the company attorney were of on-duty employees who were being questioned about the conduct of other on-duty employees. "The employer has the right to expect from them good-faith cooperation and honest answers."
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> (8) The questions asked pertained to what had happened in the break room on June 6, 1977, and the questions did not seek disclosure of what the witnesses would testify to at the hearing or any tactical details of the Union's presentation. These were proper questions concerning what these witnesses had earlier observed.

(9) There was no "wrongful intrusion" by the company attorney into the Union's processing of the grievances to arbitration.

(10) Ingalls and Sharpe did not enjoy a right to refuse to answer proper questions in these circumstances. However, Ingalls and Sharpe were "caught in the middle of the struggle between two organizations," and additionally this was "a case of first instance" between the Company and the Union. Therefore, the arbitrator provided for immediate and full reinstatement of Ingalls and Sharpe, but without backpay to them.

I have considered the Board's decision in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enforcement denied 344 F.2d 617 (8th Cir. 1965), and the other cases cited by the counsel for the General Counsel in his brief. In *Johnnie's Poultry, supra* at 774-775, the Board held:

> Despite the inherent danger of coercion therein, the Board and courts have held that where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring Section 8(a)(1) liability. The purposes which the Board and courts have held legitimate are of two types: the verification of a union's claimed majority status to determine whether recognition should be extended, involved in the preceding discussion, and the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case.
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> In allowing an employer the privilege of ascertaining the necessary facts from employees in these given circumstances, the Board and courts have established specific safeguards designed to minimize the coercive impact of such employer interrogation. Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the question must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he losses the benefits of the privilege.

After studying the Board's decision in *Johnnie's Poultry*, and the numerous Decisions which follow it, I conclude that the safeguards which the Board said must be observed in *Johnnie's Poultry* are applicable to Board proceedings under the Act. That is, events which take place after the filing of an unfair labor practice charge, or events which take place after the issuance of a complaint by the General Counsel. In those circumstances, the Board's rationale in *Johnnie's Poultry* and related cases appears to be an accommodation between the protection of employee's rights under Section 7 of the ACt and the protection of the Board processes from abuse or coercion, while at the same time "allowing an employer the privilege of ascertaining the necessary facts from employees in these given circumstances . . . ." I am not persuaded that the Board meant to extend these *Johnnie's Poultry*, safeguards to the prearbitration hearing preparation which was engaged in by the company attorney in this case.

After considering the foregoing, I conclude that the decision of Arbitrator Jones is not "clearly repugnant to the purposes and policies of the Act," and that the Board should defer to the decision of Arbitrator Jones in accordance with the Board's Decisions in *Spielberg* and *The Kansas City Star Company*.

We turn now to the question of whether the telephone conversation between Ingalls and Bernier and the telephone conversation between Sharpe and Bernier on August 24, 1977, which were conducted without the presence of a union representative, as requested by Ingalls and Sharpe, violated Section 8(a)(1) of the Act under the legal principles explicated by the Supreme Court in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

In *Certified Grocers of California, Ltd.*, 227 NLRB 1211, 1212 13 (1977), the Board commented with regard to the Supreme Court's *Weingarten, supra*, decision:

> The Supreme Court in *Weingarten, supra*, cited with approval the Board's decisions in *Quality Manufacturing Company* [195 NLRB 197 (1972)] and *Mobil Oil Corporation* [196 NLRB 1052 (1972)], indicating that the Board had set forth in those cases the basis of the statutory right of an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his being disciplined. The Supreme Court, citing relevant language in *Mobil, supra*, and *Quality, supra*, found that (1) the right inheres in the Section 7 guarantee of the right of employees to act in concert for mutual aid and protection; (2) the right arises only in situations where the employee requests representation, i.e., the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative; (3) the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action; (4) exercise of the right may not interfere with legitimate employer prerogatives and the employer need not justify his refusal and may leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from such interview; and (5) the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview.
>
> After finding that the Board's holding is permissible construction of concerted activities, the Court went on to state that the action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal meaning of Section 7 of the Act. This is true even though the employee alone may have an immediate stake in the outcome. The union representative is safeguarding not only the particular employee, but also the interests of the bargaining unit, and his presence is an assurance to other employees in the bargain-

> ing unit that they, too, can obtain his aid and protection if called upon to attend a like interview.
>
> Requiring a lone employee to attend an investigatory interview which he reasonably believes may resulting the imposition of discipline perpetuates the inequality the Act was designed to eliminate and Bars recourse to the safeguards provided by the Act. Such statutory right, the Court found, is in full harmony with actual industrial practice.

With the foregoing precedents in mind, I conclude that the telephone conversations in question here fit squarely within the Supreme Court's *Weingarten* decision. Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act when it conducted the telephone interviews of Ingalls and Sharpe on August 24, 1977, without the presence of a union representative, as each one had requested.

While I have weighed and considered the cases cited and the arguments advanced by the attorneys for the Respondent in their brief, I am not persuaded nor convinced that these two violations of the Act were *de minimis* violations, nor were they remedied by the fact that a union representative was present during the earlier interviews of Ingalls and Sharpe on August 23, 1977, and also at their subsequent final interviews on August 24, 1977. In my view, the fact that a union representative was present during the interviews held *before* the telephone conversations and during the interviews held *after* the telephone conversations does not negate the right of Ingalls and Sharpe to have had a union representative present *during* the telephone conversations.

I note that Arbitrator Jones commented in concluding his opinion:

> So, although the failure of the station manager to allow the presence of a Union representative in a disciplinary setting did violate the Agreement—and quite possibly the statute, as interpreted in *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251 (1975)—the violation in this context was not a material one and should be given no significance in this proceeding. In no way did it disadvantage these two employees. Indeed, had the presence of a Union representative been afforded in these August 24 telephone conversations it is quite evident that their tenor and result, at least as to these two of the three employees involved, would clearly not have changed what was said by them.

The rationale of Arbitrator Jones has a great deal of logic behind it, and the rationale presents a practical approach to the *Weingarten, supra*, issue under the particular facts of this case. However, in reviewing numerous Board Decisions and court decisions, I have not ascertained that a question of whether a *Weingarten, supra*, type of violation has occurred can be determined by what might have occurred if a union representative had been present during the interview. Accordingly, I conclude that violations did occur during the telephone conversations involved herein, whether or not the presence of a union representative during those telephone conversations would have altered the responses given by Ingalls and Sharpe.

I further conclude that a remedial order is necessary to reassure the employees of the Respondent of their rights under the Act. In determining an appropriate remedy in this case, I am mindful of the fact that this is not a case where employees were terminated because they requested a union shop steward to be present during their interviews, nor is this a case where employees were terminated because they refused to participate in such interviews without the presence of a union representative. Cf. *Brown & Connolly, Inc.*, 237 NLRB No. 48 (1978).

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By requiring that employees participate in interviews with the Respondent without union representation, where such representation has been requested by the employees, and where the employees have reasonable grounds to believe that the matters to be discussed may result in their being the subject of disciplinary action, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Since I have found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in those unfair labor practices.

I shall also recommend to the Board that the Respondent take certain affirmative action in order to effectuate the policies of the Act.

[Recommended Order omitted from publication.]