

**United States Postal Service and Ralph Bell. Case
32-CA-4640(P)**

April 29 1988

DECISION AND ORDER

**BY MEMBERS JOHANSEN, BABSON, AND
CRACRAFT**

On April 21, 1983, Administrative Law Judge Russell L. Stevens issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed limited exceptions and supporting briefs, and the Charging Party filed an answering brief, as did the Intervenors.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United States Postal Service, Fremont, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Violating Section 8(a)(1) of the Act by refusing to permit the Union's representative to confer with the Respondent's employees prior to an investigatory interview and by refusing to permit the Union's representative to participate in the interview."

2. Substitute the following for paragraph 2(a).

"(a) Post at its Mission San Jose Post Office copies of the attached notice marked 'Appendix.'¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed

¹ On January 17, 1985, the Board granted the motions to intervene submitted by the American Postal Workers Union and the National Association of Letter Carriers. The Intervenors filed a joint brief.

² The judge stated incorrectly in his findings that the Respondent is an employer within the meaning of the Act. We find instead, as the judge stated in his conclusions of law, that the Respondent is subject to our jurisdiction by virtue of Sec. 1209 of the Postal Reorganization Act, 39 U.S.C. § 1209.

³ The Charging Party and the General Counsel except to the judge's recommended Order in that it refers only to Sharon Wall rather than to employees generally. We agree and modify the Order accordingly. We have also modified the recommended Order to narrow the scope of the notice-posting requirement to apply only to the post office where the unfair labor practice occurred, in accordance with established Board policy.

by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT violate Section 8(a)(1) of the Act by refusing to permit the Union's representative to confer with our employees prior to an investigatory interview and by refusing to permit the Union's representative to participate in the interview.

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.

UNITED STATES POSTAL SERVICE

Ariel L. Sotolongo, Esq., for the General Counsel.
John H. Arbuckle (Western Regional General Counsel), of San Bruno, California, for the Respondent.
Mary H. Mocine, Esq., of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge. This case was tried in Oakland, California, on February 28, 1983. The complaint,¹ issued September 17, 1982, is based on a charge filed July 2, 1982, by Ralph Bell, an individual. The complaint alleges that United States Postal Service (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, Respondent, and the Charging Party.

¹ As amended at trial, to make minor changes.

On the entire record, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Postal Reorganization Act² provides, inter alia, that the United States Postal Service shall be subject to the provisions of the National Labor Relations Act, to the extent not inconsistent with provisions of the Postal Reorganization Act.

I find that Respondent is an employer engaged in commerce within the meaning of the National Labor Relations Act.

II. THE LABOR ORGANIZATION INVOLVED

The East Bay Area Local, American Postal Workers Union, AFL-CIO (the Union) is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent's³ facility involved in this controversy is located in Fremont, California, and is referred to as Mission San Jose Post Office.

The current bargaining agreement between the parties, effective July 21, 1981, to July 20, 1984, provides in article 17.3, inter alia:

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s) supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

If an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted. All polygraph tests will continue to be on a voluntary basis.

Investigation of possible violations of Federal law within the Postal Service is within the authority of the chief postal inspector, whose office is in Washington and who reports to the postmaster general. The western region of the inspection service encompasses 11 western States, including Alaska and Hawaii. The western region has three divisions, with headquarters in Seattle, San Francisco, and Los Angeles. Each division has domiciles at various locations. Postal inspectors are not under the supervision or direction of postal supervisors or manag-

ers. The San Francisco division of inspectors and all other inspection divisions have responsibility for audits, internal crimes, fraud, and external crimes. Inspectors do not recommend or participate in any disciplinary action. Events involved in this case were under the supervision of Onyx Richard Metz, assistant regional chief inspector responsible for criminal investigations within the western region, who reports to the regional (western) chief inspector. Mark Aasmundstad and Robert Isaac are postal inspectors⁴ assigned to the San Francisco inspection division and were involved in events discussed.

Sharon Wall, a member of the Union, has worked for Respondent approximately 15 years and at times relevant was a postal clerk at the Mission San Jose Post Office. Prior to November 1981 Wall's accounts for cash and stamps occasionally were in error and, on one occasion, her wages were garnished for an account shortage. In addition, Respondent has received complaints from customers allegedly because they had been short changed by Wall. Respondent instituted an investigation of Wall's work conduct and on October 28 Wall was given an investigatory "test," she was issued \$650 worth of stamps that were not reflected in any of the documentation that customarily accompanies the transfer of stamps to clerks' accounts. Normal procedure requires that any discrepancy such as that involved in the "test" be reported, but Wall failed to make such a report. On November 16, Aasmundstad and Isaac interviewed Wall concerning the extra stamps and the apparent discrepancy, but she stated that she always counts stamps transferred to her and immediately reports any discrepancies. The matter was not pursued further and the extra stamps were left with Wall pending further developments. Wall thereafter was observed intermittently, but she was not further interviewed or audited until April 5, 1982.

At approximately 9:30 or 10 a.m. on April 5, Aasmundstad and Isaac called Wall into an office for an interview and, before going in, Wall asked to have Ralph Bell, a postal clerk who was the union steward, present. Bell was summoned and the four individuals went into the office. Aasmundstad asked Wall some preliminary questions of a general background nature, such as birth date and education, and then advised her of her rights under the *Miranda* opinion of the United States Supreme Court.⁵ Aasmundstad read the *Miranda* rights to Wall from a standard governmental form, gave Wall a copy to read along with him, and asked her to sign the form, which she declined to do. Aasmundstad explained the reason for the investigation, which involved the extra stamps earlier delivered to Wall on October 28, as described above. Bell then asked that he be given an opportunity to talk privately with Wall before the interview commenced and Aasmundstad denied that request.⁶

⁴ Respondent admits that Aasmundstad and Isaac are its agents within the meaning of the Act.

⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁶ This chronology of events is from the testimony of Aasmundstad. All four individuals testified somewhat differently concerning the chronology up to this point in the interview, but those differences do not affect any finding or conclusion, and Aasmundstad's version is accepted as accurate.

Isaac took notes of the interview, but did not participate in the questioning of Wall.

² 39 U.S.C. § 1209.

³ This background summary is based on stipulations of counsel and on credited testimony and evidence not in dispute.

Aasmundstad then interviewed Wall relative to the substance of the Postal Service's concern about what appeared to be her wrongdoing. Wall denied taking any Postal Service stamps or money for her own use and denied knowledge of receiving extra stamps that she did not report as a discrepancy in her account. During the latter portion of the interview, Aasmundstad asked Wall if she would submit to a polygraph test and Wall agreed. Bell objected, however, and said he wanted to check into that matter with the Union's attorney before Wall took the test. Bell had a private telephone conversation and after a few minutes reported to Aasmundstad that Wall was not to take the test. The interview continued another 30 or 40 minutes until approximately 12:30 p.m., after which Aasmundstad, Isaac, Wall, and Ellen Williams, who then took Bell's place, went to the post office in order to audit Wall's account. Thereafter, Aasmundstad and Isaac signed an investigative report dated April 9, 1982,⁷ and sent it to the Fremont Postmaster. No recommendation was made. The report states, *inter alia*, "Wall's accountability was audited April 5, 1982, by Inspector Isaac and was within tolerance."

Issues.

The principal issue is whether Respondent violated Wall's Section 7 rights as enunciated in *Weingarten*⁸ and later cases flowing therefrom. That issue primarily depends on whether Respondent unlawfully precluded Bell from talking privately with Wall prior to the interview of April 5 and whether Bell was precluded from participating in the interview.

A. The Preinterview Matter

The fact that Bell was denied by Aasmundstad an opportunity to talk privately with Wall prior to Wall's interview with Aasmundstad and Isaac, is not in dispute.

Weingarten rights are brought into play if an employee, when required to undergo an interview, has a reasonable belief that discipline may result therefrom, and request representation. Wall requested Bell's participation in the interview. The circumstances show that Wall's "aprehension," to which she testified, was reasonable.⁹ Earlier she had been given an interview and her account had been audited. Aasmundstad and Isaac were postal inspectors, not postal managers. Her interview was a private one and it clearly involved a matter that could lead to discipline. Although inspectors only report to postal authorities and do not make recommendations relative to discipline, their reports can be, and are, used as a basis for disciplining employees. Further, criminal charges may result from the reports. Because reports are based, at least in part, on interviews with suspected employees, it is clear that the interview with Wall was a factfinding interview, not an interview to announce disciplinary measures. Wall testified that she did not anticipate discipline when she first went into the interview because she felt she had done nothing wrong, but that, approximately

halfway through the meeting when Aasmundstad accused her of stealing, she became apprehensive of discipline. However, whether Wall actually believed that discipline or criminal charges could, or would, result from the interview is irrelevant, because it was objectively apparent that such results could follow from the interview. This same factual circumstance was present in *Weingarten*, where the employee was said not to be "afraid of her job," and the respondent's argument there was rejected by the administrative law judge, with concurrence by the Board and, subsequently, by the United States Supreme Court.

Respondent contends that its denial of Bell's request for a preinterview meeting with Wall was lawful and proper, based on section 2.19 of the postal inspection confidential field manual that precludes such preinterview meetings and on the requirements of safety, preservation of evidence, and security prior to and during such interviews.

But for circumstances involved, *i.e.*, the fact that Wall's interview involved a criminal investigation by the Postal Service rather than an employer-employee meeting concerning work conditions or employer-employee relationships, legal principles would not be in dispute. The right of employees to such a preinterview meeting was discussed at length and firmly entrenched in Board law, in *Climax*.¹⁰ The fact that court enforcement was denied in *Climax* is not considered controlling because there the court stated, *inter alia*:

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.¹¹

Here, no such opportunity was afforded Bell and Wall. To the contrary, Aasmundstad testified, albeit impliedly, that a preinterview meeting between Bell and Wall intentionally was precluded by, *inter alia*, not setting the time of interview in advance and thereby giving Bell and Wall an opportunity to suppress or fabricate evidence. In any event, *Climax* described the right of employees to preinterview consultation with their representative and that right has not been rescinded or modified.

Respondent argues, however, that the *Climax* rule is inappropriate in criminal investigatory interviews such as the one involved, and should not be applied in such circumstances. Aside from the fact that this administrative law judge has no authority to avoid Board law by making exceptions thereto, the Board has stated and, thereby implicitly has precluded, the exception sought that *Weingarten* rights are not subservient to Federal criminal proceedings, even when *Miranda* rights have been accorded those accused of violations of law.¹²

⁷ G C. Exh 1

⁸ *NLRB v. J. Weingarten*, 420 U.S. 251 (1975)

⁹ *Roy H. Park Broadcasting*, 255 NLRB 229, 232 (1981); *General Electric Co.*, 240 NLRB 479, 481 (1979).

¹⁰ *Climax Molybdenum Co.*, 227 NLRB 1189 (1977), *enf. denied* 584 F.2d 360 (10th Cir. 1978)

¹¹ *Id.* at 365.

¹² *Postal Services*, 254 NLRB 703 (1981); *Postal Service*, 241 NLRB 141 (1979).

Further, the Board specifically has denied requests for the exception sought. In *Pacific Telephone*,¹³ in which an employee allegedly had engaged in theft of property, the Board stated:

... that the *Weingarten* right is ineffective without prior consultation since the representative is precluded from performing his envisioned role as a knowledgeable representative. Prior consultation, and the "knowledge" which resulted therefrom, enables the representative to "assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident." (420 U.S. at 263.) At the same time it enables the representative to counsel and assist the employee who may be "too fearful or inarticulate to relate accurately the incident being investigated." (*Id.*) As the Board stated in *Climax*, "knowledge is a better basis than ignorance for the successful carrying on of labor-management relations." Also the representative can provide the "aid for protection" which the employee seeks.

Respondent has added one argument to its arguments in earlier cases on this subject, and contends that the dangers of preinvestigatory interview consultations resulting in possible flight collusion, and personal safety to interviewees and other persons, resulted in the promulgation several years ago of regulation 2.19 mentioned above. However, that regulation was not introduced into evidence, or reviewed in camera, and is not before this administrative law judge. On the state of this record it cannot be concluded that the regulation, whatever it may state, supersedes Board law on this subject. Further, there is no evidence of any threat by Wall or Bell to, or of any reasonable belief by, Respondent that Wall or Bell would flee, collude, conceal evidence, or otherwise interfere with any criminal investigation or proceeding.

It is found that failure of Respondent to permit a requested preinterview consultation between Bell and Wall violated Wall's Section 7 rights as enunciated in *Weingarten* and subsequent cases, as alleged in the complaint.

B. The Interview

Board law on the extent of the right of an employee's representative to participate in an interview with the employer if discipline is anticipated is summarized in *Texaco, Inc.*,¹⁴ in which the Board stated, inter alia:

We have recently addressed this issue in *Southwestern Bell Telephone Company*, 251 NLRB No. 61 (1980). There we held that the Court in *Weingarten* intended to strike a balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role of the representative present at such an interview. While we noted the Court's admonition that the presence of a representative "need not transform the interview

into an adversary contest," we nevertheless recognize that the Court limited the employer's right to regulate the role of the representative at the interview. In short, such regulation cannot exceed that which is necessary to ensure the "reasonable prevention of such a collective-bargaining or adversary confrontation with the statutory representative." In *Southwestern Bell* the employer also demanded the silence of the union's representative at the outset of the interview. We held that in so doing the employer had gone beyond the bounds of regulation reasonably necessary to avoid such a confrontation with the statutory representative. Accordingly, in agreement with the Administrative Law Judge, we likewise hold here that Respondent violated Section 8(a)(1) of the Act by denying to Deutsch the assistance of his union representative.

Permissible extent of participation of representatives in interviews thus is seen to lie somewhere between mandatory silence and adversarial confrontation. Respondent contends in this case that Bell did not participate within the meaning of Board law but, rather, that he engaged in confrontation to the extent that he interfered with Respondent's right to conduct an orderly interview.

Aasmundstad testified that after he talked briefly with Wall about the interview to be conducted:

I also made a brief presentation to Mr. Bell, the union steward. I told him that he was there at Ms. Wall's request and that his duties or job were to appraise her of any situation regarding her employment with the Postal Service, her job rights. I asked Mr. Bell if he was an attorney. He said he was not. And I suggested to him that he should try and refrain from giving legal advice because it could cause bad advice to be given.

Soon thereafter, as Aasmundstad was getting started in the interview, Bell "started out by really asking me questions, Wall, did you talk to the other clerks, did you count all the credits, did you review the security yourself." Aasmundstad answered those questions and, because he felt that Bell was interrupting him in order to divert him from Wall, he asked Bell to refrain from interrupting and to permit Wall to answer the questions directed to her. Between 15 and 30 minutes later, when Aasmundstad's interrogation approached a sensitive area, Bell again commenced to interrupt him with challenging questions, and Aasmundstad again asked Bell not to interrupt, and "told him that if he continued to do that, I would have to ask him to leave the interview because I felt he was impeding my questioning of Mrs. Wall." Ten or fifteen minutes later, when Aasmundstad asked Wall if she would take a polygraph test, Bell said, "Wait a minute, sit down you're not going to take the polygraph, don't take the polygraph, or words to that effect." Aasmundstad then ordered Bell out of the room because he was impeding an official investigation and Bell apologized. Bell assured Aasmundstad he would not interrupt again, whereon Bell was allowed to stay in the room and they further discussed a possible polygraph test, at the

¹³ *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982). See also an earlier case that embodies the same reasoning, *Illinois Bell Telephone Co.*, 221 NLRB 989 (1975)

¹⁴ 251 NLRB 633 (1980)

close of the interview, Bell apologized for interrupting Aasmundstad, and the apology was accepted. Aasmundstad denied ever telling Bell that he had to sit silently and not speak during the interview.

Isaac generally corroborated Aasmundstad.

Bell testified that Aasmundstad was rude and hostile in his questioning of Wall, and sometimes profane, and derisive of her answers. On one occasion Bell "took a stand for [Wall's] credibility," and challenged Aasmundstad's intimation that Wall was a dishonest employee. Bell testified:

At about that time I was asked to—well, I was told I was interfering with the investigation and that any further conduct such as that I would be kicked out. And I said, well, I'm just representing my client and that—them Mr. Aasmundstad then replied well, my job is just to sit there and take notes. That's it.

And then about that time, I said, well, I'm just trying to represent my client. And he said, he kind of like got really mad and raised his finger over his shoulder like an umpire does or someone, and said, now, get out of here. And he stood up and I stood up. And I started to walk towards the door and I said something to the effect that I believe that this should be handled in a more professional manner or something like that. And he kind of like—the tone of the conversation changed a great deal at that time and the next thing I know is I'm sitting down and he asked me to sit back down again and the investigation proceeded at that time, after he had actually told me to leave.

Bell denied that he interrupted Aasmundstad on several occasions and stated that, toward the end of the meeting, he and Aasmundstad argued about Wall possibly taking a polygraph test.

Wall characterized the interview somewhat differently from Bell. She testified that Aasmundstad was very friendly until they reached the point at which she would not admit to being a thief, whereon Aasmundstad "started getting irritated about it." He talked in a loud voice and became profane, but his profanity appeared to be directed toward Bell. Wall stated:

Well, at one point he spoke up and asked could he say something in my behalf, or he just wanted to say something. And he said yes, and Ralph got about two sentences out and he told him he would have to shut up and stop interfering and just take notes.

Aasmundstad told Bell that if he did not stop interfering, he would have to leave the room. Wall testified that Aasmundstad was threatening on several occasions, and insisted that she had to remain for the interview, even though she wanted to leave.

Discussion

None of the four accounts of the interview seemed totally reliable. However, some facts seem quite clear,

based on the testimony of all four witnesses to the meeting. (a) Aasmundstad was completely in charge of the interview, and his manner was accusatory, hostile, suspicious, and sometimes profane.¹⁵ (b) Aasmundstad twice threatened to eject Bell from the interview and threatened to see that disciplinary or retaliatory action may be taken against Wall. (c) Bell attempted to defend Wall, or to protect her, on only three occasions, and each time, Aasmundstad quickly silenced him.

It is apparent that Aasmundstad did not want any interruption of his questioning of Wall, and that he expected Bell to be a witness, rather than a participant, in the interview. He denied telling Bell to sit quietly and only take notes, but that denial is given little credence in view of his full control of, and his demeanor during, the interview. Possibly he did not tell Bell in so many words to be quiet and only take notes, but it is clear that such conduct was his desire. Bell's interruptions did not appear to be those of an obstructionist. Rather, they appeared to be reactions to Aasmundstad's accusations that Wall had engaged in unlawful conduct, and to apparent pressure on Wall (the polygraph test). It seems that Bell was trying to participate, and to assist and protect Wall, but that he was frustrated in that attempt by Aasmundstad's insistence on complete and exclusive control of the entire proceeding. Bell's efforts in Wall's behalf seem to have been low key and conciliatory—he even apologized on two occasions for his interruptions. Because he spoke up on only three occasions, and each time was accused of interrupting the interview, a logical inquiry is—could he say anything without such an accusation? It appears that he could not.

It is found that Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint, by denying the right of Bell to participate in Wall's interview.

CONCLUSIONS OF LAW

1. The National Labor Relations Board has jurisdiction over this matter by virtue of section 1209 of the Postal Reorganization Act.

2. The East Bay Area Local, American Postal Workers Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by refusing to permit the Union's representative to confer with Respondent's employee Sharon Wall prior to an investigatory interview; and by refusing to permit the Union's representative to participate in the interview.

THE REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, it will be recommended that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action necessary to effectuate the policies of the Act.

¹⁵ Aasmundstad acknowledged that he made profane statements.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation¹⁶

ORDER

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

1. Cease and desist from

(a) Violating Section 8(a)(1) of the Act by refusing to permit the Union's representative to confer with Respondent's employee Sharon Wall prior to an investigatory interview; and by refusing to permit the Union's representative to participate in the interview.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

(a) Post at its place of business in 32, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁷ 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."