UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOWARD INDUSTRIES, INC., TRANSFORMER DIVISION	*	
and	*	**Case No. 15-CA-18637**
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1317	*	

General Counsel's Exceptions to the Administrative Law Judge's Supplemental Decision

October 9, 2012

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NOW COMES the Acting General Counsel, through the undersigned Counsel for the General Counsel, in the above captioned case, and files these Exceptions to the Supplemental Decision issued by the Administrative Law Judge (ALJ) on November 20, 2009, and transferred to the Board on the same date. The Acting General Counsel excepts to the following:

Exception No. 1

The ALJ erred by concluding that Howard Industries, Inc., Transformer Division (Respondent) acted within the its rights by instructing a steward, James Chancellor, to close a notebook he was using during an investigative interview (Findings located on page 3 of the ALJ's Supplemental Decision, relevant Transcript page nos. 27-30, 45-46, 84-85, 97, 101 and 128-133).

Exception No. 2.

The ALJ erred by concluding that Respondent acted within its rights by instructing a steward, James Chancellor, to remove a notebook he was using during an investigative interview from the room (Findings located on page 3 of the ALJ's Supplemental Decision; relevant Transcript page nos. 27-30, 45-46, 84-85, 97, 101 and 128-133).

Exception No. 3

The ALJ erred by not concluding that Respondent violated the Act by threatening a steward, James Chancellor, with suspension for assisting an employee during an investigatory interview (Findings located on page 3 of the ALJ's Supplemental Decision; relevant Transcript page nos. 27-30, 45-46, 84-85, 97, 101 and 128-133).

Exception No. 4

In addition to the above, the ALJ failed to remedy the unfair labor practices committed by Respondent, and to order Respondent to cease and desist from its unlawful action and to take certain affirmative action designated to effectuate the policies of the Act.

Respectfully submitted this 9th day of October, 2012.

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General Counsel's Memorandum in Support of the Exceptions to the Administrative Law Judge's Supplemental Decision

NOW COMES the Acting General Counsel, through the undersigned Counsel for the General Counsel, who files this Memorandum in Support of the Exceptions to the Supplemental Decision issued by the Administrative Law Judge.

I. Procedural History

On December 22, 2008, the General Counsel, through the Acting Regional Director of Region 15, issued a Consolidated Complaint in the case referenced above and Case No. 15-CA-18772. On January 2, 2009, Respondent filed its Answer.

On July 6, 2009, a hearing on the matter was held before Administrative Law Judge George Carson, III, in Laurel, Mississippi. After hearing the evidence, the ALJ issued a bench decision found at pages 128 through 133 of the Transcript.[1]

On July 28, 2009, the ALJ issued his formal Decision and the case was transferred to the Board. While the ALJ found merit to the allegation contained in Case No. 15-CA-18772, the ALJ found no merit to the allegation contained in the current matter. Case No. 15-CA-18772

[1] Cites to the Transcript will be noted as "Tr. [page no.]."

alleged that Respondent removed a steward from its facility for engaging in union activity; the current matter alleged that Respondent threatened a steward with suspension for engaging in union activity.

On August 24, 2009, the General Counsel filed Exceptions to the Decision of the ALJ as it pertained to the current matter (which were joined by the International Brotherhood of Electrical Workers, Local Union 1317, hereinafter called Union). No exceptions were filed regarding Case No. 15-CA-18772.

On October 22, 2009, the Board issued its Order. The Board severed Case No. 15-CA-18772 from the current matter and adopted the ALJ's recommendations in Case No. 15-CA-18772. The Board remanded the current matter back to the ALJ to "prepare… a supplemental decision containing credibility resolutions, findings of fact [and] conclusions of law" regarding whether Respondent threatened a steward with suspension and, if so, for what reason.

On November 20, 2009, the ALJ issued his Supplemental Decision recommending that the Complaint, as it pertains to the current matter, be dismissed. However, the General Counsel did not receive a copy of the Supplemental Decision.

On January 13, 2010, the Board issued a Supplemental Order adopting the Supplemental Decision and dismissing the Complaint as it pertains to the current matter, noting that no exceptions had been filed.

On January 27, 2010, the Union and General Counsel filed a Joint Motion to Rescind the Board's Supplemental Order.

On September 11, 2012, the Board issued an Order rescinding its Supplemental Order and giving the General Counsel until October 9, 2012, to file exceptions to the ALJ's Supplemental Decision. Consequently, Counsel for the General Counsel files these Exceptions.

II. The Relevant Unfair Labor Practice Allegations

The unfair labor practice allegation at issue in the Exceptions is Paragraph 7 of the Consolidated Complaint, which alleges:

> On or about April 7, 2008, Respondent, by Brent Stringer, at Respondent's facility, threatened [James Chancellor] with discipline for using notes while representing [Dasmeon Caraway] during investigatory interviews.

III. The Facts as Determined by the ALJ[2]

The incident at issue occurred on April 7, 2008, at Respondent's facility. Dasmeon Caraway, a painter, was directed to report to Respondent's Human Resources office. He requested the presence of a union steward, specifically James Chancellor. When Steward Chancellor arrived, he and Caraway met privately to discuss the possible reasons Caraway was being called into the office. Both Caraway and Steward Chancellor knew the meeting was to be an investigative interview. One of the reasons speculated by Caraway and Steward Chancellor to be the cause of the interview was Caraway's failure to use a "breakdown pad" during a particular procedure. During the discussion, Caraway said he had not been trained to perform that procedure and Steward Chancellor wrote Caraway's comments in his notebook: "I never was actually trained to do that job. I only filled in when he needed me. I'm actually a pay rate 17 painter."[3] The notebook page contained only these three sentences, and no other entries.

The investigative interview was conducted by Brent Stringer, Human Resources Generalist (HR Stringer). Also present was Rufus McGill, Caraway's supervisor.[4] HR Stringer asked Caraway various questions about what Caraway did on the job in question and what he had

[2] The ALJ made such fact determinations in either his Decision or Supplemental Decision. Cites to the Decision will be noted as "Dec. p. #, ln. #," and cites to the Supplemental Decision will be noted as "Supp. Dec. p. #, ln. #."
[3] The notebook page was entered into evidence as General Counsel's Exhibit 2.
[4] McGill neither spoke during the interview nor testified during the hearing.

been told about when breakdown pads should be used. Caraway fully cooperated in the investigation, answering all questions. Steward Chancellor did not interrupt the questioning. After Caraway finished answering HR Stringer's questions, Stewart Chancellor tried to remind Caraway to state that he had not been trained. Steward Chancellor held the notebook page containing Caraway's earlier statement so Caraway could see it and tapped it, bringing it to Caraway's attention. Caraway read the note, as described above, aloud. HR Stringer asked Steward Chancellor to close the notebook. Steward Chancellor did not immediately close the notebook but, instead, questioned the instruction, claiming he needed the notebook "as a tool" to represent Caraway. HR Stringer then threatened Steward Chancellor, "[g]et the notebook out of here before I suspend you."[5] Steward Chancellor complied and took the notebook out of the room. The meeting then continued but ended shortly thereafter.

IV. The ALJ's Findings

The ALJ dismissed Paragraph 7 of the Complaint concluding that Respondent did not violate the Act. In making his decision, the ALJ noted that the meeting in question was an investigative interview as opposed to a grievance meeting. Consequently, and citing *United States Postal Service*, 351 NLRB 1226, 1227 (2007) (hereinafter referred to as *Postal Service 1*), the ALJ found that HR Stringer was "free to insist … [upon] hearing the employee's own account of the matter under investigation."[6] The ALJ found that HR Stringer "reasonably believed" that Caraway was going to continue reading from the notebook and, because Steward Chancellor did not comply with HR Stringer's instruction to close the notebook, HR Stringer was justified in threatening Steward Chancellor with discipline if he did not close the notebook and remove it from the room.

[5] Supp. Dec. p. 3, ln. 2.
[6] Supp. Dec. p. 3, ln. 11.

Further, in reaching his conclusion, the ALJ noted that Steward Chancellor was not prohibited from using or taking notes during the meeting,[7] and that Steward Chancellor did not complain that he needed the notebook to do so, only that he needed it "as a tool."[8] Finally, the ALJ noted that Steward Chancellor was allowed to use notes in subsequent meetings.[9]

However, for the reasons explained more fully below, the ALJ erred in his findings.

V. Argument

The ALJ erred by finding that HR Stringer did not violate the Act by instructing Steward Chancellor to remove the notebook from the room and threatening him with suspension if he did not do so.

The basis of the ALJ's decision is that during an investigative interview an employer is within its rights to hear the employee's own account of the events. Consequently, if that right is being interfered with by another employee, an employer is within its rights to instruct that employee to stop his interference and to enforce its instruction with discipline if the employee does not cease. However, while it might be true that an employer is within its right to hear the employee's own account of the events, at the same time, however, an employee's rights under *Weingarten* must also be protected and balanced against the employer's rights. Consequently, given the trifling nature of Steward Chancellor's conduct, Respondent's rights were in no danger and HR Stringer's threat of suspension was excessive and violated the Act.

A. Permissible Conduct of a *Weingarten* Representative

As noted above, the Board has held that an employer is free to insist on hearing an employee's own account of a matter under investigation; however, it is undisputed that an

[7] Supp. Dec. p. 3, ln. 3. Though, how Steward Chancellor would be able to use or take notes while his notebook was not in the room remains a mystery.
[8] Supp. Dec. p. 3, ln. 17.
[9] Supp. Dec. p. 3, ln. 39.

employee is entitled to assistance from another employee/steward during an investigative interview, with some of the functions of that other employee/steward being to help clarify the facts, raise extenuating circumstances, or suggest other employees who may have knowledge of them. See *NLRB v. Weingarten*, 420 US 251 (1975), and its progeny. Moreover, the steward's involvement *during* the investigative interview is crucial to the rights of the employee. In *Weingarten*, in response to the employer's argument that union representation during an investigative interview is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final, the Supreme Court noted, "[a]t that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished." *Id*. at 263.

In *Southwestern Bell Telephone Company*, the Board construed these two divergent rights of the employee and the employer to mean that the Supreme Court (in *Weingarten*) "intended to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role to be played by a statutory representative who is present at such an interview." 251 NLRB 612, 613 (1980), enforcement denied by *Southwestern Bell Telephone Company v. NLRB*, 667 F2d 470 (5th Cir. 1982). Further:

> While we noted the [*Weingarten*] Court's admonition that the presence of a representative "need not transform the interview into an adversary contest," we nevertheless recognized 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.

Id. (emphasis added). In *Southwestern Bell*, the Board found that an employer who told a steward to remain silent during an investigative interview deprived the employee of his rights under *Weingarten*. By instructing the steward to remain silent, the employer undercut the steward's ability to "assist the employee," to "clarify the facts," and to "suggest other employees who may have knowledge of them." *Id*.

In a second case involving the Postal Service, *United States Postal Service*, 288 NLRB 867, 864 (1988) (*Postal Service 2*), the Board, citing *Southwestern Bell*, *supra*, noted that the "[p]ermissible extent of participation of representatives in interviews thus is seen to lie somewhere between mandatory silence and adversarial confrontation." In the case, the Board found that a steward did not act outside the bounds allowed by *Weingarten* even though he asked the interviewer "challenging" questions during the interview and advised the employee to not take a polygraph test when asked.[10]

In *Postal Service 1*, the case cited by the ALJ, above, the Board found that a steward who interrupted an employee while the employee was answering a question did not overstep his bounds. The Postal Service was investigating an employee who failed to deliver certain pieces of mail. During the investigative interview, the interviewer asked the employee if he was aware of the penalties for willfully delaying the mail. While there was disagreement over the manner in which he did it, and his exact words, all witnesses agreed that the representative spoke up and objected to the question. The interviewer told the representative to be quiet and to let the employee answer the question, which he did. Both before and after the question, the representative was allowed to fully participate in the meeting and this was the only time the representative was told to be quiet.

[10] Notably, the interviewer in the case was a member of the Postal Inspector's office who was conducting a criminal investigation into allegations that the employee was stealing.

During the hearing on the matter, the interviewer acknowledged that if the employee had responded to her question that he knew the penalty for willfully delaying the mail, she would have taken that as an admission that he willfully delayed the mail (which would have likely resulted in the employee's termination). The administrative law judge in the case likened the interviewer's question to asking someone if he is "still beating his wife;" in other words, it was a loaded or unfair question. The Board noted that instances such as this are the ideal time for a *Weingarten* representative to speak up. "The moment of maximum usefulness may arrive, as it did here, in the middle of the employer's questioning— particularly when one considers, as did the *Weingarten* Court, that the employee under investigation 'may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors.'" *Id*. at 1227, quoting *Weingarten*, 420 US at 263. Consequently, the interviewer's instruction to remain silent, even though it was just for that moment, was a violation of the Act.

Similarly, in the current matter, the ideal time for Steward Chancellor to remind Caraway to note the fact that he had not been trained was after HR Stringer asked Caraway about any instructions given to him by his supervisor. Before the interview, Steward Chancellor and Caraway discussed the matter and Caraway pointed out to Steward Chancellor that he had not been trained to perform that particular task and for which he might be disciplined. Steward Chancellor recognized the lack of training as an extenuating factor that should be taken into consideration by Respondent during its investigation. Thus, during the meeting, when HR Stringer asked about instructions given to Caraway by his supervisor, Steward Chancellor indentified it as the perfect time for the information to be presented. After Caraway answered HR Stringer's question, Steward Chancellor tapped on the notebook to remind Caraway about

what Caraway told Steward Chancellor earlier – that he had not been trained for that particular job.

Nothing that Steward Chancellor did in this moment *disrupted* Respondent's investigation or turned the interview into an adversarial or collective-bargaining confrontation. On the contrary, by HR Stringer's own admission, Steward Chancellor helped provide Respondent with information that it wanted. HR Stringer acknowledged that Caraway not only answered all of his questions but was providing "extra information."[11] Further, HR Stinger testified that he was interested in such extra information.[12] Comparing Steward Chancellor's conduct with the representatives in the cases cited above, which the Board had ruled was protected by *Weingarten*, it is inescapable that Steward Chancellor was fulfilling his role as defined (and protected) by *Weingarten* and he did not overstep his bounds.

B. Was the Discipline Unlawful?

There appears to be only one Board case involving a *Weingarten* representative who was disciplined during an investigative interview, *New Jersey Bell Telephone Company*, 308 NLRB 277 (1992). Respondent will likely cite the case because the Board found the Employer did not violate the Act. However, as described more fully below, Steward Chancellor's actions were vastly different than those of the representative in *New Jersey Bell*.

In *New Jersey Bell*, the employer conducted a series of interviews after a ladder was rigged to fall on one of the employer's supervisors. The interviews, at which union officials were present, were conducted by security specialists. During one such interview, the interviewers asked the employee the same questions multiple times, to which the employee often responded that he did not know. After being asked the same questions a third time, the employee

[11] Tr. 84-85.
[12] Tr. 84.

refused to respond, saying he already answered the questions. After the interviewers persisted in asking the questions, the union official objected to the repeated questions and asked that "new" questions be asked. The interviewers continued repeating questions and both the employee and the union official "vehemently" objected throughout.

During a subsequent interview with another employee, the employee requested the same union official to be his representative. After the first round of questions, the interviewers determined the employee's answers were vague and the interviewers warned the employee that they had information of his direct involvement and that it was his duty to cooperate. After beginning a second round of questioning (the same questions as before), the union official objected that the questions had already been asked. The interviewers attempted to repeat their questions but both the employee and union official continued to interrupt the questions on the basis that they had been previously asked. The interviewers warned both the employee and the union official that they could be disciplined if the interruptions continued. After a subsequent interruption, the interviewers asked the union official to leave and said that another union official would take his place. When the union official refused to leave, the employer called the police and the union official was arrested for trespassing.

Despite not getting permission from the employer to be on the premises, the same union official showed up to represent a third employee at an interview but was told to leave the premises. When he refused, he was again arrested for trespassing and subsequently fired. The administrative law judge determined the termination violated the Act but the Board disagreed.

The Board agreed with the administrative law judge's initial observation that the "[p]ermissible extent of participation of [*Weingarten*] representatives in interviews is seen to lie somewhere between mandatory silence and adversarial confrontation." However, the Board

rejected the administrative law judge's findings that a *Weingarten* representative may advise against answering questions that are reasonably perceived by the representative as abusive, misleading, badgering, confusing, or harassing. The Board noted that the Supreme Court specifically stated that the presence of a representative should not transform the interview into an adversary contest or a collective-bargaining confrontation, and that the exercise of the *Weingarten* right must not interfere with legitimate employer prerogatives. The Board further noted that it is within an employer's legitimate prerogative to investigate employee misconduct in its facilities without interference from union officials. The Board also noted that repeating questions was a common investigative technique. Based on this, the Board found that the union official's frequent interruptions and attempts to limit the interviewer's questions exceeded his role under *Weingarten* and the employer's subsequent actions (leading to the representative's termination) were not unlawful.

In the current matter, however, the conduct of Steward Chancellor is closer to that of the representative in *Postal Service 1* and far from that of the union official in *New Jersey Bell*. Steward Chancellor did not repeatedly interrupt the interviewer and did not attempt to limit the questions asked, as did the union official in *New Jersey Bell*. Arguably, Steward Chancellor's conduct was even less intrusive than the representative in *Postal Service 1*. The representative in *Postal Service 1* acted to prevent the employee from answering a question while Steward Chancellor acted merely to provide additional information *after* the question was answered. And, as noted above, not only was it the kind of information that *Weingarten* envisioned a representative would provide (extenuating circumstances) but it was information that HR Stringer claimed he was interested in.

HR Stringer's only stated concern was that he was not getting Caraway's "own account" and, instead, that Caraway was reading a script provided by Steward Chancellor; but, he was mistaken. In his Supplemental Decision, the ALJ noted that HR Stringer did not see or ask to be shown the writing on the notebook page and was thus "unaware that Caraway's recitation relating to lack of training was complete at the point that he directed Steward Chancellor to close his notebook."[13]

While the ALJ found that HR Stringer's belief was reasonable, when the ALJ found that HR Stringer's actions (based on that mistaken belief) were reasonable and did not violate the Act, he erred. It has long been a violation of the Act for an employer to threaten to discipline employees who engage in protected activity even if the employer has a good faith, though erroneous, belief that the employees engaged in wrongful conduct. *Publix Supermarkets*, 347 NLRB 1434 (2006), applying *NLRB v. Burnup and Sims*, 379 US 21 (1964). In *Burnup*, the Supreme Court held:

> Section 8(a)(1) is violated if it is shown that the [disciplined] employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the [discipline] was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

Id. at 23. The Court found that this rule appropriately guarded the immunity of protected activity; otherwise, the example of employees who are disciplined on false charges would, or might, have a deterrent effect on other employees. *Id*.

In *Publix Supermarkets*, *supra*, the employer disciplined two employees who accompanied another employee to what they believed was an investigative interview being

[13] Supp. Dec. p. 3, ln. 14. It should be noted that this entire matter would have been avoided if HR Stringer had asked what Caraway was doing instead of blindly lashing out at Steward Chancellor.

conducted by the department head. Because of a misunderstanding by the employees' supervisor, the department head subsequently came to believe the two employees lied to their supervisor about their reason for wanting to leave the work area and threatened the employees with discipline. The department head later realized, and the employer conceded during the hearing, that the employees did not lie. The Board, citing *Burnup*, determined the employer violated the Act by threatening the employees even though the department head had a good faith reasonable belief that the employees lied. Moreover, the Board found the Employer to be in violation of the Act even though, as it turned out, the meeting was not an investigative interview and the employer did not even have an obligation to allow the employees to attend the meeting in the first place.

Similarly, in the current case, HR Stringer was mistaken when he concluded that he was not getting Caraway's own account. As noted above, the writing on the page, though written down by Steward Chancellor, was Caraway's own account. Further, there was nothing more written on the page. Consequently, HR Stringer was mistaken in concluding that he was not getting Caraway's own account. Further, HR Stringer was mistaken in believing that Caraway was going to be reading from a script. The ALJ's conclusion that the Act was not violated because HR Stringer's belief was reasonable is contrary to *Burnup*, *supra*, which holds that en employer who threatens an employee engaged in protected concerted activity under the mistaken belief that the employee was also engaged in wrongdoing, violates the Act.

As with the situation in *Burnup*, Steward Chancellor was engaged in protected activity, of which HR Stringer was aware; HR Stringer threatened Steward Chancellor for an alleged wrongdoing he believed Steward Chancellor was doing (or would continue to do); but Steward

Chancellor was not, in fact, doing it (or was not going to continue doing it). Consequently, HR Stringer's threat to close and remove the notebook or face suspension violated the Act.

C. In Any Event, HR Stringer Overreacted

Finally, even if the Board remains unpersuaded by the above and concludes that Steward Chancellor was interfering with the interview, and that HR Stringer had the right to instruct Steward to *close the notebook*, the Board must nevertheless find that Respondent violated the Act by telling Stringer to *remove the notebook* from the room or be suspended. Even if Steward Chancellor were providing Caraway with a script and closing the notebook (or at least not showing it to Caraway) was a reasonable instruction, nothing in Steward Chancellor's conduct justifies an instruction to remove the notebook from the room, and enforcing that order with a threat of discipline violated the Act.

The ALJ seems to recognize the wrongdoing of HR Stringer's actions but tries to diminish it by noting that, in subsequent meetings, Steward Chancellor was allowed to use his notebook. The ALJ also seems to find significant that Steward Chancellor did not tell Stringer that he needed the notebook to "make, take or personally use notes," only that he was using it "as a tool." The General Counsel is confused as to why the ALJ distinguishes between using a notebook to take or review notes and using it as a tool; a notebook has only two uses, taking and reviewing notes. In any event, the "no harm no foul" reasoning implicit in the ALJ's findings is baseless because there was, in fact, harm: an employee was threatened with suspension if he did not cease his protected activity. The fact that Steward Chancellor was allowed to use the notebook on subsequent meetings is little consolation.

Moreover, it cannot be argued that this was an isolated incident. In Case No. 15-CA 18772 (the case originally consolidated with the current matter), the Board found that

Respondent violated the Act by removing a steward from its facility simply because he objected to a supervisor interrupting his meeting with another supervisor. While two incidents might not be sufficient to establish that Respondent is engaging in a pattern of conduct of interfering with stewards performing their lawful and protected function, it is enough to establish that the incident in the current matter is not isolated.

Conclusion

The ALJ erred by finding that Respondent did not violate the Act by threatening Steward Chancellor with suspension if he did not close and remove his notebook from the room. Steward Chancellor was performing a function protected by *Weingarten* and he did nothing to disrupt HR Stringer's interview justifying the instruction to close and remove the notebook from the room or be suspended. Therefore, the Acting General Counsel asks that the Board grant the exceptions and find that Respondent violated the Act.

Signed this 9th day of October, 2012.

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Certificate of Service

I hereby certify that a copy of the foregoing Exceptions and Memorandum in Support of Exceptions have been served on the following individuals, by email, on October 9, 2012:

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