

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

\* \* \* \* \*

**HOWARD INDUSTRIES, INC., TRANSFORMER  
DIVISION**

**and**

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL UNION  
1317**

\* \* \* \* \*

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

**Case No. 15-CA-18637**

**General Counsel’s Reply Brief to Respondent’s Answering Brief to Exceptions**

On October 9, 2012, the General Counsel filed Exceptions to the Supplemental Decision of the Administrative Law Judge (ALJ) in the matter captioned above. On October 16, 2012, Respondent filed a document styled as Respondent’s Motion to Strike General Counsel’s Exceptions to the Supplemental Decision of the Administrative Law Judge which, by letter on October 25, 2012, the Board indicated it would treat as Respondent’s Answering Brief to the Exceptions. In reply, Counsel for the General Counsel files this Reply Brief.

The case involves a human resources official (Brent Stringer, “HR Stringer”) who threatened a steward (James Chancellor, “Steward Chancellor”) acting in a *Weingarten* capacity for showing the employee being interviewed (Dasmeon Caraway) a notebook page. The ALJ found the writing on the notebook page to be a “script” and determined that the threat was justified because Steward Chancellor was preventing HR Stringer from getting Caraway’s “own account” of events. The General Counsel excepted to the finding, arguing that Steward Chancellor’s actions were well within the protections of *Weingarten* and that the threat of suspension violated the Act.

Respondent's argument in response to the Exceptions consists essentially of two parts. Respondent's first argument is that the General Counsel "mischaracterized" several aspects of the ALJ's findings. Respondent's second argument is that HR Stringer was justified in his actions because Steward Chancellor was giving Caraway a script and it was not Caraway's own account of events (as the ALJ found). However, as explained more fully, both arguments fail.

### **I. The Administrative Law Judge's Findings**

Respondent claims the General Counsel either mischaracterized or misunderstood some of the findings of the ALJ. Respondent first asserts the General Counsel mischaracterized the ALJ's findings concerning the meeting between Caraway and Steward Chancellor prior to the investigative interview. It is unclear to what aspect of the ALJ's findings Respondent is referring. However, the ALJ's findings in this regard, as quoted below, are clear, correct, and accurately described in the General Counsel's Memorandum in Support of Exceptions:

Although employee Caraway told Chancellor that he was unsure why he had been sent to Human Resources, the notes taken by Union Steward Chancellor prior to the interview suggest that employee Caraway was aware that the upcoming interview related [to] his failure to use a "breakdown pad." Chancellor, *pursuant to his conversation with Caraway*, wrote 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." Whether the foregoing was true is immaterial.<sup>1</sup>

It is clear that what the ALJ was referring to as "immaterial" was whether Caraway was trained to do the job. Further, the ALJ wrote that Steward Chancellor wrote the quoted language in his notebook "pursuant to his conversation with Caraway." The clear meaning of the ALJ's writing

---

<sup>1</sup> Supplemental Decision, p. 2, ln.1-4 (emphasis added).

is that he found that Caraway told Steward Chancellor that he had not been trained to perform the job. The ALJ is correct that, for purposes of *Weingarten*, it does not matter whether Caraway was, in fact, trained to do the job. At no point did the General Counsel state the ALJ found that Caraway had not been trained. What matters, and what the ALJ found, is that Caraway told Steward Chancellor he had not been trained to do the job.

Respondent then takes issue with the General Counsel's observation that the page from Steward Chancellor's notebook introduced into evidence contained no writing other than that which was contained on the page. While he acknowledges it is an accurate observation, he nevertheless suggests it is a "mischaracterization" of the findings because it "implies" the notebook contained no other entries, a fact which is not known because the rest of the notebook was not introduced into evidence by any party. No such implication was suggested by the General Counsel. Further, Respondent's apparent remorse that it failed to introduce the notebook at the hearing does not reflect upon the General Counsel's observations of the evidence in the record.

Next, Respondent claims the General Counsel mischaracterized (or "misunderstands") the exchange between HR Stringer and Steward Chancellor in which HR Stringer threatened Steward Chancellor with suspension. Respondent claims the General Counsel's assertion that HR Stringer threatened Steward Chancellor with suspension if he did not remove the notebook from the room is "contrary" to the findings of the ALJ. Respondent goes even further and states, unequivocally, "Thus, at no time was Chancellor threatened with suspension if he did not remove the notebook from the meeting room."

It is Respondent who fails to understand the ALJ's findings. In his Supplemental Decision, the ALJ wrote:

Consistent with the testimony of Caraway, I find that, near the end of the interview, Stringer told Chancellor to “[g]et the notebook out of there before I suspend you” after Chancellor refused to close the notebook and had continued to hold the notebook so that Caraway could see it and read what was written.<sup>2</sup>

Next, Respondent correctly notes the United States Court of Appeals for the Fifth Circuit declined to enforce a case relied on heavily by the General Counsel, but then suggests this undermines the precedential value of the case. See *Southwestern Bell Telephone Company*, 251 NLRB 612 (1980), enforcement denied by *Southwestern Bell Telephone Company v. NLRB*, 667 F.2d 470 (5<sup>th</sup> Cir. 1982). However, “[i]t has been the Board’s consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court’s opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. *Insurance Agents’ International Union*, 119 NLRB 768, 773 (1957), set aside by *Insurance Agents’ International Union, AFL-CIO v. N. L. R. B.*, 260 F.2d 736 (D.C. Cir. 1958).

The Fifth Circuit declined to enforce the decision on grounds which do not affect the Board’s findings that the Board must “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.” *Id.* at 613. Nor did the Fifth Circuit dispute the Board’s finding that the employer’s rights in this regard “cannot exceed that which is necessary to ensure the reasonable prevention of such a collective-bargaining or adversary

---

<sup>2</sup> ALJ’s Supplemental Decision, p. 3, ln. 1-4. Even if HR Stringer did not *explicitly* threaten Steward Chancellor with suspension if he did not remove the notebook from the room, even by Respondent’s own telling of events, it was surely implied.

confrontation with the statutory representative.” *Id.*<sup>3</sup> On the contrary, the Fifth Circuit merely determined that, under the circumstances of the case, the employee’s *Weingarten* rights were protected because, even though the steward was instructed to remain silent at the beginning of the interview, he was immediately assured he would have a chance to speak before the end of the interview. In the current case, no such assurances were given to Steward Chancellor.

## **II. The Writing on the Notebook Page was Caraway’s “Own Account” of Events**

Respondent argues, and the ALJ agreed, that HR Stringer acted appropriately in instructing Steward Chancellor to close the notebook (and remove it from the room) because HR Stringer believed Steward Chancellor was reading from a script. Consequently, HR Stringer was not getting Caraway’s “own account” of events, as was his right. However, even if Caraway were reading from the notebook verbatim, the ALJ erred in finding that HR Stringer was not getting Caraway’s own account of events.

It is undisputed that an 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). Moreover, the steward’s right to involve himself *during* the investigative interview is equally undisputed. *Id.*

Further, the General Counsel does not dispute that Respondent was entitled to hear Caraway’s own account. Moreover, the General Counsel does not dispute that a *Weingarten* representative who tells an employee the answer to *every* question (or even most questions) is

---

<sup>3</sup> The Board has cited *Southwestern* for the above propositions on numerous occasions since the Fifth Circuit’s decision, including one of the Postal Service cases cited by the ALJ and Respondent, *United States Postal Service*, 351 NLRB 1226 (2007). Additional cases relying on *Southwestern* include: *Greyhound Lines*, 273 NLRB 1443 (1985); *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992) (cited in the General Counsel’s Memorandum in Support of Exceptions); and *Barnard College*, 340 NLRB 934 (2003).

depriving the interviewer of hearing the employee's own account. However, the General Counsel does dispute the characterization of the writing on Steward Chancellor's notebook page as a "script." Further, however the writing is characterized, the General Counsel disputes the finding that Caraway's reading of it deprived Respondent of Caraway's own account of events.

In the current case, nothing in the record suggests that Steward Chancellor was providing Caraway with every answer. In fact, Respondent's only complaint about Steward Chancellor's conduct is when he showed Caraway the notebook page. The notebook page to which Steward Chancellor directed Caraway's attention contained only 24 words in three short sentences. Such a thing can hardly be characterized as a script. Moreover, it is not unusual for individuals to prepare written remarks (or have the remarks prepared for them), not only in order to remind them to relate crucial information, but to do so accurately. Steward Chancellor's notebook page was nothing more than this.

Even though Steward Chancellor wrote the sentences in the notebook, nothing in the record challenges the truth of the statement contained on the notebook page. Further, and most importantly, the ALJ found that Caraway told Steward Chancellor he had not been trained. While Respondent apparently would like the Board to infer that Steward Chancellor was urging Caraway to present false information, Respondent is unable to explicitly make the accusation because there are no facts or findings by the ALJ supporting it. Of particular note is that Caraway's supervisor, who would have been in a position to know whether Caraway had been trained, did not contradict the assertion during the interview, and did not testify during the hearing that Caraway had, in fact, been trained. In any event, the truth of the statement is not relevant (as the ALJ found). Given the length of the interview, the fact that Caraway answered all of the other questions put to him without involvement by Steward Chancellor, and the

minimal degree to which Steward Chancellor involved himself, it can hardly be said that HR Stringer was deprived of Caraway's own account of events.

Respondent, in its Answering Brief, takes great pains to note that HR Stringer did not know what else might have been written in the notebook. 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."<sup>4</sup> However, as explained more fully in the Memorandum in Support of Exceptions, an error on the part of an employer in this regard, however reasonable it might be, does not excuse a threat of discipline if the employee is not, in fact, engaged in misconduct.

### **Conclusion**

The board should find that Respondent violated the Act. As explained more fully above, Respondent's assertions concerning allegedly "mischaracterized" findings are mistaken. In any event, all that matters, and what is not disputed, is that HR Stringer threatened Steward Chancellor with suspension for telling Caraway to inform HR Stringer that he had not been trained to perform the task for which he was being disciplined. HR Stringer was not deprived of his right to hear Caraway's "own account" of events. Because Steward Chancellor's actions

---

<sup>4</sup> Supp. Dec. p. 3, ln. 4.

were well within the protection of *Weingarten*, HR Stringer's threat to suspend him for those actions violated the Act and the Board should so find.

Signed this 6<sup>th</sup> day of November, 2012.

/s/ Joseph A. Hoffmann, Jr.  
Counsel for the General Counsel  
National Labor Relations Board, Region 15  
600 South Maestri Place – 7<sup>th</sup> Floor  
New Orleans, Louisiana 70130  
Telephone: 504-589-6392  
Facsimile: 504-589-4069  
Email: joseph.hoffmann@nlrb.gov

#### **Certificate of Service**

I hereby certify that a copy of the foregoing Memorandum in Opposition to Motion to Strike Exceptions and/or Reply Memorandum has been served on the following individuals, by email, on November 6, 2012:

**Elmer E. White, III**  
eew@kullmanlaw.com  
Counsel for Respondent

**Roger K. Doolittle**  
rogerkdoolittle@aol.com  
Counsel for the Union

/s/ Joseph A. Hoffmann, Jr.