

**California Nurses Association, National Nurses Organizing Committee and Henry Mayo Newhall Memorial Hospital.** Case 31–CB–012913

July 2, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN  
AND BLOCK

On July 9, 2012, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge’s rulings, findings, and conclusions<sup>1</sup> only to the extent consistent with this Decision and Order.<sup>2</sup>

I.

In 2003, the Charging Party, Henry Mayo Newhall Memorial Hospital (the Hospital), and the Respondent Union, the California Nurses Association, executed a 3-year collective-bargaining agreement. The agreement required the Respondent to provide the Hospital with printed copies of the agreement, which the Hospital in turn was required to furnish to each new bargaining unit member.<sup>3</sup> When it arranged for the printing, the Respondent added a statement of employees’ *Weingarten* rights to the back cover. See *NLRB v. J. Weingarten*, 420 U.S. 251 (1975) (recognizing the Sec. 7 right of an employee to the presence of a union representative, upon request, in investigatory interviews that the employee reasonably believes may result in discipline). After the Hospital objected and the Respondent refused to reprint

<sup>1</sup> We adopt the judge’s conclusion that deferral of any part of this case to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971), is unwarranted. See *Service Employees (Alta Bates Medical Center)*, 321 NLRB 382, 383–384 (1996) (deferral inappropriate where case involves a statutory dispute concerning “whether the [u]nion may include certain material in a collective-bargaining agreement which has not been agreed to by the [e]mployer”).

<sup>2</sup> We shall modify the judge’s recommended Order to conform to our findings and to the Board’s standard remedial language, and we shall substitute a new notice to conform to the Order as modified. We shall also amend the judge’s conclusions of law and remedy consistent with our findings herein.

<sup>3</sup> Art. 6 of the agreement provided, in relevant part: “The Hospital, upon employing a Nurse, will give that Nurse a copy of this Agreement and a written authorization form for dues deduction. (The [Respondent] will provide the Hospital with these Agreement copies and these dues deduction authorization forms.)”

copies without the *Weingarten* statement, the Hospital filed an unfair labor practice charge alleging that the Respondent’s action violated Section 8(b)(1)(A) and (3) of the Act. The Hospital later withdrew the charge after the Respondent and the Hospital entered into a bilateral non-Board settlement agreement, under which the Respondent agreed to reprint the collective-bargaining agreement with a blank back cover.

In 2009, the Hospital and the Respondent executed a new 3-year collective-bargaining agreement. Like the 2003 agreement, the 2009 agreement required the Respondent to provide the Hospital with printed copies of the agreement for distribution. Once again, the Respondent unilaterally added a *Weingarten* statement to the back cover. The statement, which was virtually identical to the statement added to the 2003 document, read as follows:

*The Weingarten Rights*

The Supreme Court has ruled that an employee is entitled to have a CNA Representative present during any interview which may result in discipline. These rights are called your Weingarten Rights.

You must request that a CNA rep be called into the meeting.

You must have a reasonable belief that discipline will result from the meeting.

You have the right to know the subject of the meeting and the right to consult your CNA rep prior to the meeting to get advice.

Do not refuse to attend the meeting if a rep is requested but denied. We suggest you attend the meeting and repeatedly insist upon your right to have a CNA rep present. If this fails, we suggest that you not answer questions and take notes.

The Hospital did not consent to the printing of this language, and its inclusion was not discussed during the parties’ bargaining for the agreement. As it had in 2003, the Hospital objected to the inclusion of the statement on the printed copies of the parties’ agreement. After the Respondent refused to reprint the copies of the agreement, the Hospital again filed an unfair labor practice charge alleging that the Respondent’s action violated Section 8(b)(1)(A) and (3) of the Act.

II.

The judge found that the Respondent violated the Act as alleged. Specifically, she found that one sentence in the *Weingarten* statement—“You must request that a CNA rep be called into the meeting”—was ambiguous and could reasonably be read by bargaining unit

employees to *require* them to request that a union representative be called into a disciplinary interview. Based on that perceived ambiguity, the judge concluded that the statement violated Section 8(b)(1)(A) by chilling employees' exercise of the Section 7 right to forego *Weingarten* representation. The judge also concluded that the Respondent's inclusion of the statement amounted to a unilateral change of the parties' agreement, thereby violating Section 8(b)(3).

### III.

For the reasons below, we reject the judge's conclusion that, by including the *Weingarten* statement in the printed collective-bargaining agreement, the Respondent violated Section 8(b)(1)(A). We do agree with the judge that the Respondent violated Section 8(b)(3), but our rationale for finding that violation differs.

#### A.

Section 8(b)(1)(A) makes it unlawful for a union "to restrain or coerce employees in the exercise of" their Section 7 rights. Section 7 protects the right of represented employees to *refrain* from exercising their *Weingarten* right to union representation. *Appalachian Power Co.*, 253 NLRB 931, 933 (1980), enfd. mem. 660 F.2d 488 (4th Cir. 1981). Here, as explained, the judge found that this right to refrain was restrained by the sentence in the *Weingarten* statement stating, "You must request that a CNA rep be called into the meeting." But when the legality of a work rule applicable to employees is challenged on its face, the Board consistently has emphasized the importance of reading a provision in its context. The Board "must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), citing *Lafayette Park Hotel*, 326 NLRB 824, 825, 827 (1998). See, e.g., *Target Corp.*, 359 NLRB 948, 950 (2013) (parking policy).

We believe that the same principle applies in analyzing the *Weingarten* statement at issue here and that, accordingly, the judge erred in reading the challenged sentence out of context. Read in context of the *Weingarten* statement as a whole, the sentence is not ambiguous. Rather, it is susceptible of only one reasonable interpretation: that *if* an employee of the Hospital wishes to avail himself of the *Weingarten* right to have a union representative present, then he must ask for a representative—because one will not be provided automatically. In short, the challenged sentence clearly (and lawfully) communicates the Board's established requirement that, for the *Weingarten* right to be

triggered, the involved employee must initiate the request for representation. See *Appalachian Power Co.*, supra at 933.

The *Weingarten* statement here tells employees (1) that the right to representation exists; (2) how to invoke the right (the challenged sentence); (3) when the right is available; (4) what the right covers; and (5) what to do if the request for a representative is denied. No reasonable employee would read the challenged sentence, in that context, to require him to exercise his *Weingarten* right, regardless of whether he wished to do so, or face some sanction from the Union. The statement as a whole plainly is intended to provide an explanation of the *Weingarten* right and the procedure for exercising it, not to impose an obligation on employees to seek representation or to penalize them for failing to do so.

The challenged sentence ("You must request that a CNA rep be called into the meeting") follows a description of the *Weingarten* right. In turn, it is followed by a sentence reciting, "You must have a reasonable belief that discipline will result from the meeting." Just as the challenged sentence explains one prerequisite for successfully exercising the *Weingarten* right (the employee "must request" a representative), so does the next sentence (the employee "must have a reasonable belief that discipline will result"). And just as the latter sentence cannot reasonably be read as a *command* to employees to "have a reasonable belief," whether or not they actually do, so the challenged sentence cannot reasonably be read to *command* employees to "request that a CNA rep be called," whether or not they wish to. A reasonable employee necessarily would read "must" in both sentences the same way.

Accordingly, we find that employees would not reasonably understand the *Weingarten* statement to restrain their right to forego union representation at a disciplinary interview. We thus reverse the judge and conclude that the Respondent's printing of this statement did not violate Section 8(b)(1)(A).

#### B.

Based, in part, on her interpretation of the *Weingarten* statement as communicating to employees that they were required to request a union representative, the judge found that the Respondent's printing of the statement on the back cover of the collective-bargaining agreement violated Section 8(b)(3) because it unilaterally modified the contractual disciplinary procedure. Although we reject that rationale, we do agree that Section 8(b)(3), which requires a union to bargain in good faith, was violated here.

We rely on the judge's finding that the Respondent's printing of the statement was "contrary to the settled understanding of the parties on the issue of cover text." As the judge further found:

Although the issue of inclusion of a *Weingarten* Rights Statement on the back cover was not discussed during the 2009–2012 negotiations, based on the previous dispute over the inclusion of identical *Weingarten* language on the back cover of the 2003 agreement, Respondent knew that the Hospital objected to including this text on the back cover. The dispute was only settled when Respondent agreed to remove the text from the back cover of the agreement.

In sum, the Respondent's contractual obligation to print the collective-bargaining agreement (embodied in art. 6) can only be understood as an obligation to print the agreement without the *Weingarten* statement—the inclusion of which had precipitated the parties' earlier dispute and led to a settlement of this very issue.

We have no difficulty in concluding that in these circumstances, the Respondent's conduct was inconsistent with the statutory duty to bargain in good faith. Our conclusion follows from the Board's decision in *Electrical Workers Local 1464 (Kansas City Power)*, 275 NLRB 1504 (1985), revg. 275 NLRB 557. There, the employer and the union had agreed in collective bargaining that the printed agreement, to be prepared by the employer, would include a union bug or other identifying mark. After a contract was reached, the union refused to execute it, unless the union bug or identifying mark was included. The employer, in turn, filed an unfair labor practice charge with the Board, alleging that the union's position violated Section 8(b)(3). In a decision ultimately adopted by the Board, the administrative law judge found no violation by the union, explaining that the union had "permissibly secured the inclusion of such an identifying mark" and that it "should not be forced to forfeit what it secured during negotiations." 275 NLRB at 1506. Here, the same principles apply, although the parties' roles are reversed and the issue is the inclusion (not the omission) of material in the collective-bargaining agreement. As the judge found, the parties had previously reached a clear understanding that the printed contract would *not* contain the *Weingarten* statement. The Hospital thus was entitled to insist that the printed agreement conform to this understanding. The Respondent was not free to include the statement when it printed the agreement. Accordingly, we find that the Respondent violated Section 8(b)(3).

#### AMENDED CONCLUSIONS OF LAW

1. Charging Party Henry Mayo Newhall Memorial Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act, representing the following appropriate unit of employees of the Hospital:

**Included:** All full-time, regular part time, and per diem/casual Registered Nurses employed by the Hospital at its facilities located at 23845, 25727, and 25751 McBean Parkway, Valencia, California.

**Excluded:** All other employees, office clerical employees, managerial employees, confidential employees, contract employees including but not limited to travelers, guards and supervisors as defined in the Act including but not limited to RN Clinical Coordinators, administrative RN House Supervisors, and RN Nursing Directors. Also excluded is any Nurse who habitually works fewer than eight hours in each two-week pay period.

3. By printing and delivering for distribution to unit employees copies of the collective-bargaining agreement containing on the back cover a statement entitled, "The *Weingarten* Rights," the Respondent failed and refused to bargain collectively and in good faith with the Hospital within the meaning of Section 8(d) and violated Section 8(b)(3).

4. The Respondent thereby has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

#### AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(b)(3) by printing and delivering for distribution to unit employees copies of the collective-bargaining agreement containing on the back cover a statement entitled, "The *Weingarten* Rights," we shall order the Respondent, at its sole expense, to reprint and deliver to the Hospital copies of the collective-bargaining agreement without "The *Weingarten* Rights" statement or any other additional language printed thereon or appended thereto, unless the Hospital agrees to such language.

## ORDER

The Respondent, California Nurses Association, National Nurses Organizing Committee, Oakland, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Printing and maintaining copies of the collective-bargaining agreement containing additional language contrary to the agreement of the parties (e.g., including on the back cover a statement entitled, “The *Weingarten* Rights”) without the consent of the Hospital.

(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.

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

(a) Reprint and deliver to the Henry Mayo Newhall Memorial Hospital, at the Respondent’s sole expense, copies of the collective-bargaining agreement without “The *Weingarten* Rights” statement or any other additional language printed thereon or appended thereto, unless the Hospital agrees to such language.

(b) Within 14 days after service by the Region, post at its union offices and meeting halls in Glendale, California, copies of the attached notice marked “Appendix.”<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 14 days after service by the Region, deliver to the Regional Director for Region 31 signed copies of the notice in sufficient number for posting by Henry Mayo Newhall Memorial Hospital at its Valencia, California facility, if it wishes, in all places where notices to employees are customarily posted.

<sup>4</sup> 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.”

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS  
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 Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT print and maintain copies of the collective-bargaining agreement containing additional language contrary to the agreement of the parties (e.g., including on the back cover a statement entitled “The *Weingarten* Rights”), without the consent of the Hospital.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL reprint and deliver to the Henry Mayo Newhall Memorial Hospital, at our sole expense, copies of the collective-bargaining agreement without “The *Weingarten* Rights” statement or any other additional language printed thereon or appended thereto, unless the Hospital agrees to such language.

CALIFORNIA NURSES ASSOCIATION, NATIONAL  
NURSES ORGANIZING COMMITTEE

*Nikki N. Cheaney, Atty.*, for the Acting General Counsel.

*Brendan White, Atty.* and *M. Jane Lawhon, Atty.*, for the Respondent.

*Adam Abrahms, Atty.*, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. At issue in this case is whether California Nurses Association, National Nurses Organizing Committee (Respondent or the Union) violated Section 8(b)(3) of the National Labor Relations

Act (the Act), 29 U.S.C. § 158(b)(3), by printing an agreed-upon contract containing a version of *Weingarten*<sup>1</sup> rights on the back cover of the 2009–2012 collective-bargaining agreement when there was no agreement to include anything on the back cover and no agreement to the language used. Independently, the language on the back cover is alleged to violate Section 8(b)(1)(A) of the Act.

The complaint and notice of hearing issued on April 29, 2011, pursuant to an unfair labor practice charge filed October 22, 2010, by Henry Mayo Newhall Memorial Hospital (the Charging Party or the Employer). This case was tried in Los Angeles, California, on April 9, 2012.

On the entire record and after considering the briefs filed by the Acting General Counsel, the Charging Party, and Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Employer, a corporation, operates a hospital providing inpatient and outpatient medical care in Valencia, California, where it annually purchases and receives goods or services valued in excess of \$50,000 directly from points outside the State of California. During the year preceding issuance of complaint, the Employer derived gross revenues in excess of \$250,000. The Union admits and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

##### II. LABOR ORGANIZATION STATUS

The Union admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

##### III. ALLEGED UNFAIR LABOR PRACTICES

Since at least 2000, the Union has been the designated exclusive collective-bargaining representative of the Employer's registered nurses.

All parties agree that in about April 2009, the Employer and the Union reached complete agreement on terms and conditions of employment to be incorporated in a collective-bargaining agreement to be printed by the Union with copies provided to the Employer. In about October 2010, the Union provided copies of the agreement to the Employer. On the back cover of these printed copies, the following language appeared:

#### The *Weingarten* Rights

The Supreme Court has ruled that an employee is entitled to have a CNA Representative present during any interview which may result in discipline. These rights are called your *Weingarten* Rights.

You must request that a CNA rep be called into the meeting.

You must have a reasonable belief that discipline will result from the meeting.

You have the right to know the subject of the meeting and the right to consult your CNA rep prior to the meeting to get advice.

Do not refuse to attend the meeting if a rep is requested but denied. We suggest you attend the meeting and repeatedly insist upon your right to have a CNA rep present. If this fails, we suggest that you not answer questions and take notes.

Inclusion of this language on the back cover of the printed copy of the 2009–2012 collective-bargaining agreement was not discussed during bargaining. All parties agree that the Employer did not consent to printing this language on the back cover of the agreement.

In addition, the parties stipulated that at 42 other employers, where appropriate units of employees are also represented by the Union, the collective-bargaining agreements contain or contained within the agreement itself or on the back cover of the agreement, a *Weingarten* Rights Statement identical to the statement on the back cover of the agreement with the Employer. The complaint alleges that maintenance of the *Weingarten* Rights Statement on or in the 42 collective-bargaining agreements is a violation of Section 8(b)(1)(A).

The 2003–2006 collective-bargaining agreement between the Union and the Employer was the subject of a similar unfair labor practice proceeding in that the Employer alleged the Union's inclusion of the identical *Weingarten* Rights Statement on the back cover of the 2003–2006 agreement violated Section 8(b)(1)(A) and (3). The Division of Advice authorized issuance of a complaint alleging that the Union violated Section 8(b)(1)(A) and failed to bargain in good faith within the meaning of Section 8(d) in violation of Section 8(b)(3) by publishing the *Weingarten* language on the back cover of the 2003–2006 agreement. Advice Memorandum, *California Nurses Association (Henry Mayo Newhall Memorial Hospital)*, Case 31–CB–011267, dated September 16, 2003 (hereinafter Advice Memo). The matter was ultimately settled in a bilateral non-Board settlement agreement. As part of this agreement, the Union republished the 2003–2006 collective-bargaining agreement without the *Weingarten* Rights Statement on the back cover.

The Acting General Counsel alleges that by including the *Weingarten* language, Respondent restrained and coerced employees in the exercise of the rights guaranteed by Section 7 in violation of Section 8(b)(1)(A) of the Act. He further alleges that, in maintaining the *Weingarten* language, Respondent has failed and refused to bargain collectively and in good faith with the Employer within the meaning of Section 8(d) in violation of Section 8(b)(3).

#### IV. FACTUAL FINDINGS AND ANALYSIS

The critical facts in this case are not in dispute. No party denies that the *Weingarten* statement was printed by the Union on copies of the agreement. The parties' bargaining history—including the previous unfair labor practice complaint, Division of Advice memorandum, and settlement—are likewise accepted

<sup>1</sup> In *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Court upheld the Board's interpretation of Sec. 8(a)(1) to afford an employee who reasonably believes that an interview may result in discipline the right to union representation at the interview.

by both parties. All parties agree that there was no agreement to the language of The *Weingarten* Rights Statement or to printing it on the back. As such, the case turns simply on the interpretation of the *Weingarten* statement and the application of relevant law.

*A. Alleged Violation of Section 8(b)(1)(A)*

The Acting General Counsel argues that the *Weingarten* statement gives employees the false impression that union representation at a disciplinary meeting is mandatory. This infringes on the employees' right not to have a union representative present at a disciplinary meeting. Such infringement, according to the Acting General Counsel, constitutes coercion in the exercise of Section 7 rights in violation of Section 8(b)(1)(A) of the Act. For the reasons stated below, I agree that inclusion of the language violates Section 8(b)(1)(A).

1. There is a right *not* to have a union representative present at a meeting the employee reasonably believes may lead to discipline

Section 7 of the Act gives employees "the right to . . . engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection . . ." Section 7, however, also provides employees with the right "to refrain from any or all such activities." Section 8(b)(1)(A) protects these rights by making it an unfair labor practice for a labor organization to "restrain or coerce" employees in the exercise of their Section 7 rights.

In *Weingarten*, the Supreme Court established that employees have a Section 7 right to request a union representative's presence at a meeting they reasonably believe may result in discipline. *NLRB v. J. Weingarten*, 420 U.S. at 260. The converse of that right was also established. According to the Court, an employee may "forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." *Id.* at 257. This second right was later verified by the Board in *Appalachian Power Co.*, 253 NLRB 931, 933 (1980), when it explained:

[I]t is the individual employee who had an immediate stake in the outcome of the disciplinary process for it is his job security which may be jeopardized in any confrontation with management . . . . Therefore, it should be the employee's right to determine whether or not he wishes union assistance to protect his employment interests.

The Board explicated further that, if this right to forego union representation was not recognized, "one of the fundamental purposes of the rule as articulated in *Weingarten* would be undermined." *Id.* The Union argues that it had no duty to inform employees of the right to forego union representation. This argument misses the point. The issue here is whether the language employed by the Union trampled on the right to forego union representation.

2. The language used in the *Weingarten* Rights Statement restrains and coerces employees' Section 7 right not to have a union representative present at a disciplinary meeting

The second clause of the *Weingarten* Rights Statement is the controversial one. It reads, "You must request that a CNA rep be called into the meeting." This clause is the first of four parallel clauses which all follow an opening paragraph explaining the *Weingarten* rights generally. Given this context, the clause may be reasonably read in two different ways. On one interpretation, the clause at issue reads as a command, announcing that employees *must* request a CNA representative for all disciplinary meetings. Alternatively, the clause can be read as stating one of several preconditions that must be met for an employee to invoke her *Weingarten* rights. Under this latter interpretation, the clause is not a command but an instruction for employees on how to exercise their *Weingarten* rights. This interpretation might be more fully stated: "The Employer will not automatically call a Union rep for your meeting. If you want a rep, you must ask for one." Since both readings are reasonable, the text is ambiguous.

In *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999), the Board found that a rule promulgated by an employer may violate Section 8 if it would "reasonably tend to chill employees in the exercise of their Section 7 rights." Essentially, this language establishes an objective-employee standard for determining the possible impacts of a promulgated rule.

In the same case, the Board held that if a "rule could be considered ambiguous, any ambiguity in the rule must be construed against the respondent as the promulgator of the rule." *Id.* at 828. This standard regarding ambiguities has been applied in multiple opinions by the Board and circuit courts alike. In *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992), the Board found that because "it would not be illogical for an employee to interpret [the term at issue]" as broader than what the employer intended, it was ambiguous and thus should be construed against the promulgator. As the Union points out, the rule must be given a reasonable reading. Particular phrases cannot be read in isolation and improper interference cannot be presumed. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Similarly, in *NLRB v. Miller*, 341 F.2d 870, 874 (2d Cir. 1965), the United States Court of Appeals for the Second Circuit stated:

The true meaning of the rule might be the subject of grammatical controversy. However, the employees of respondent are not grammarians. The rule is at best ambiguous and the risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it.

Respondent points out that in all of these cases resolving ambiguity against the promulgator, the rule is only applied against *employers* under Section 8(a). Although there appear to be no reported cases in which the rule has been applied to a labor organization, I do not find this argument persuasive. The

rule by its terms is equally applicable in 8(b) situations where the labor organization has created the ambiguity. The rule construing ambiguities against the promulgator is an employee-based rule. Employees are bound to follow the written rules applicable to the terms and conditions of their employment regardless of who promulgates the rule. Thus, whether the ambiguity is created by an employer or a labor organization, the ambiguity must be construed against the author who, in writing an ambiguous rule, has impacted Section 7 rights.

The statement that an employee must request that a CNA representative be called into the meeting is not “an accurate synoptic statement” of *Weingarten*, as the Union argues. Because the phrase at issue possesses two reasonable interpretations and one of these interpretations would reasonably be understood as forcing employees to request a CNA representative for disciplinary meetings, the rule purports to deprive an employee of her right to attend the meeting by herself. It is thus reasonable to expect the rule will chill employees’ exercise of that right. The chilling effect is to be expected for two reasons. First, the Union is invoking the authority of law in making its command. Second, the statement is printed on the back of the collective-bargaining agreement which could lead a reasonable employee to believe that it was just as binding on them as the substantive terms of the agreement.<sup>2</sup> Thus, the rule restrains and coerces employees’ exercise of their Section 7 right to refrain from union activity.

The Union argues that when the offending clause is read in context, no reasonable employee would interpret it to mean that she could not opt to forego union representation at a *Weingarten* meeting. Thus, the *Weingarten* Rights Statement, when read in context is nothing more than an instruction that the CNA representative will not appear automatically. The employee must ask for the representative: “The Supreme Court has ruled that an employee is entitled to have a CNA Rep present during any interview which may result in discipline. . . . You must request that a CNA Rep be called into the meeting. . . .” The Union notes that a reasonable employee would know that a *Weingarten* right, just as a *Miranda* right,<sup>3</sup> can be waived. Although I agree with the Union that this is a reasonable construction, it is not the sole reasonable construction. The alternative reading—that an employee must call a Union representative in all circumstances—is not only reasonable; it is coercive of employee rights as well. When faced with an ambiguous text, I apply the rule that ambiguities must be resolved against the text’s promulgator. For that reason, I find that by maintaining the *Weingarten* Rights Statement on the back cover of the 2009–2012 collective-bargaining agreement, the Union violated Section 8(b)(1)(A).

<sup>2</sup> The fact that the statement appears on copies of the agreement also distinguishes this case from those involving mere internal union rules. See Advice Memo, supra at 4–5 (citing *Sheet Metal Workers Local 550 (Dynamics Corp.)*, 312 NLRB 229, 229 (1993)). While members are free to escape the effect of union rules by quitting the union, they cannot so escape the force of a collective-bargaining agreement. Id.

<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

### B. Alleged Violation of Section 8(b)(3)

The Acting General Counsel argues that Respondent violated Section 8(b)(3) of the Act when it unilaterally modified the terms of the collective-bargaining agreement by adding the *Weingarten* statement. For the reasons that follow, I agree.

Section 8(b)(3) makes it an unfair labor practice for a union “to refuse to bargain collectively with an employer.” Section 8(d) defines the duty to bargain so as to encompass an obligation not to “terminate or modify” a collective-bargaining agreement that is in effect. The Supreme Court has held that a modification of an existing contract is only an unfair labor practice “when it changes a term that is a mandatory rather than a permissive subject of bargaining. *Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass*, 404 U.S. 157, 185 (1971).

Discipline procedures and the role played by union representatives in them are mandatory subjects of bargaining. See *Washoe Medical Center, Inc.*, 337 NLRB 202, 205 (2001) (“Employee discipline is unquestionably a mandatory subject of bargaining, and any alteration of a disciplinary system is also a mandatory subject of bargaining.”); *Service Employees Local 250 (Alta Bates Medical Center)*, 321 NLRB 382, 384 (1996) (mentioning access to stewards as a mandatory subject).

By including the *Weingarten* statement on the back cover of the agreement, Respondent modified the disciplinary procedure provided for in the agreement in a “material, substantial, and significant manner.” *Service Employees*, 321 NLRB at 385 (citing *Peerless Food Products*, 236 NLRB 161 (1978)). Reading Respondent’s added text, a nurse could reasonably understand that he or she is required to obtain the assistance of a union representative prior to a meeting which could result in discipline.

This contradicts the agreed-upon text of the agreement. The provision of the contract contradicted is article 12, section C which states, “Nothing in this Agreement shall prevent a Nurse from resolving any problem consistent with this Agreement with or without the presence of a [sic] Association Representative.” See *Service Employees*, 321 NLRB at 384 (finding a violation of the duty to bargain in good faith where respondent union inserted a foreword found to contradict provisions of the contract).

It also runs contrary to the settled understanding of the parties on the issue of cover text. Although the issue of inclusion of a *Weingarten* Rights Statement on the back cover was not discussed during the 2009–2012 negotiations, based on the previous dispute over the inclusion of identical *Weingarten* language on the back cover of the 2003 agreement, Respondent knew that the Hospital objected to including this text on the back cover. The dispute was only settled when Respondent agreed to remove the text from the back cover of the agreement.

The Respondent cannot claim that it merely restated an employee’s statutory rights because the statement does not unambiguously reflect the State of the law. The statement impliedly steps outside the provisions of *Weingarten* case law, which gives an employee the right to attend with a union official but does not require the employee to do so. See *Weingarten*, 420 U.S. at 257 (asserting that “the employee may

forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative”).

The distinction between text on the cover and text in the body of the agreement is likewise unavailing for Respondent. In *Service Employees*, the respondent union inserted a foreword when printing the contract. 321 NLRB at 383. The employer had not agreed to the contents of the foreword or its inclusion in the contract. Id. at 384. The text of the foreword spoke of the union’s hard work in bargaining for the agreement and reminded readers that benefits achieved must not be taken for granted. Id. It exhorted employees to “work to ensure that this contract is enforced each and every day” and told them that they “should feel free to contact their shop steward at any time concerning any matter within the scope of this contract or any other work-related problems.” Id. It also mentioned that “the Union’s professional staff is available to help meet the needs of our members and stewards in addressing worksite problems and concerns.” Id.

With the approval of the Board, the administrative law judge in *Service Employees* determined that the language regarding shop stewards constituted an unlawful unilateral modification of the contract in regards to a mandatory subject of employment. Id. at 385. Though not specifically addressed by the judge, he reached this decision even though the text at issue was contained in a foreword appended to the agreed upon text of the contract. Id. at 383. I likewise do not find it significant that the text at issue in this case was similarly contained outside the body of the agreement and on its back cover.

The cases cited by Respondent in favor of distinguishing cover text from body text are not apposite. Respondent cites *Electrical Workers Local 3 (Eastern Electrical Wholesalers)*, 306 NLRB 208 (1992), for the proposition that “the contents of the cover of a duly executed collective-bargaining agreement is a permissive subject of bargaining.” (R. Br. at 13.) Respondent, however, misunderstands the case. The case did not necessarily turn on the location of text inserted into an agreement. The holding was that the choice of name to be used for the employer on the cover was not a mandatory subject of bargaining such that the union could refuse to execute the contract once its terms were agreed upon. See id. at 211. The judge reasoned as follows:

The Employer’s name on the contract’s cover does not “materially or significantly affect” employees’ terms and conditions of employment. Those terms and conditions of employment are set forth in the body of the agreement, not its cover. The cover simply serves to identify the contracting parties.

Id. Thus, *Eastern Electrical* appears to be as much about *names* as it is about cover text.

Respondent also cites *Electrical Workers Local 1463 (Kansas City Power)*, 275 NLRB 557 (1985). It involved an employer’s refusal to include the union bug (a union label or trademark) on printed copies of the contract. Id. at 557. This case was not decided based on a distinction between cover text and body text but rather on the nature of the bug. The Board reasoned that the union bug was not a substantive aspect of the

contract. Id. It explained, “While the presence of the union bug on the printed copies of the collective-bargaining agreement may have symbolic value for the Respondent, it nevertheless constituted at most a peripheral concern, something akin to a ministerial matter, rather than a material aspect of the collective-bargaining relationship.” Id. at 558. The Board’s decision turned on the content of the bug, its symbolic or pro forma character, and not its location. I note further that the Board overruled this case *sua sponte*, using a rationale which similarly did not turn on the location of the bug. *Electrical Workers Local 1463 (Kansas City Power)*, 275 NLRB 1504 (1985), holding that the parties’ negotiated agreement to include the union bug justified the union’s refusal to execute the agreement which was printed without the union bug. Id., 275 NLRB at 1506. This situation is different, there being no prior agreement to include the *Weingarten* statement. Thus, I find that the Union’s unilateral alteration of the agreed-upon terms and conditions of employment set forth in the 2009–2012 collective-bargaining agreement by printing the *Weingarten* Rights Statement on the back cover of the agreement constitutes failure to bargain in good faith within the meaning of Section 8(d) in violation of Section 8(b)(3).

#### C. Respondent’s Deferral Argument

Respondent contends that its printing the *Weingarten* Rights Statement on the back cover of the agreement should be deferred to arbitration. It argues that this case turns on a matter of contract interpretation and that, as such, Board doctrine dictates it be deferred. For the reasons that follow, I disagree.

*Collyer Insulated Wire*, 192 NLRB 837 (1971), reflects the policy of the Board that cases which center on the interpretation and application of a collective-bargaining agreement should be left to the decision procedures provided for by that agreement. Respondent argues that the present dispute actually turns on the interpretation of article 6 of the agreement, which reads: “The Hospital, upon employing a Nurse, will give that Nurse a copy of this Agreement . . . (The Association will provide the Hospital with these Agreement copies . . .).” Interpretation of this language is the key to the 8(b)(3) charge, the Respondent explains, because its interpretation is necessary to a determination of whether the agreement gave Respondent the right to add the *Weingarten* statement to the back cover. If the agreement contemplated such an addition, then it could not be an unlawful unilateral modification as alleged in the complaint. In that event, an authoritative interpretation of the contract is a precondition to disposing of the unfair labor practice charge, a situation which renders deference appropriate. See *Collyer*, supra at 842 (“[T]he Act and its policies become involved only if it is determined that the agreement between the parties . . . did not sanction Respondent’s right to make the disputed changes . . . . That threshold determination is clearly within the expertise of a mutually agreed-upon arbitrator.”).

Respondent’s argument is inventive but ultimately miscarries. Although Respondent is correct that the Board generally defers to the expertise of arbitrators where an authoritative interpretation of a collective-bargaining agreement is necessary to resolution of the case, it is equally correct that the Board will not defer where the language is

unambiguous and the arbitrator's expertise superfluous. See *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 617 (1973), supplemented 207 NLRB 1063 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). It is equally true that not every case in which a collective-bargaining agreement is implicated is a case which turns on interpretation of that agreement.

The contention that article 6 plausibly authorizes Respondent's printing of the *Weingarten* statement is essential to the logic of its deferral position. Article 6, however, is merely the background to the parties' dispute and not its hinge. It simply establishes that it is Respondent's responsibility to print copies of the agreement for distribution to employees. I accept that an arbitrator could plausibly reach different decisions as to the scope of that obligation, i.e., whether addition of the *Weingarten* statement was consistent with fulfillment of that obligation. I do not accept, however, that an arbitrator could plausibly interpret article 6 to confer a positive right or permission on Respondent to add the *Weingarten* statement.<sup>4</sup> Cf. *U.S. Steel Corp.*, 223 NLRB 1246, 1247 (1976), enfd. 547 F.2d 1166 (3d Cir. 1977) ("[D]eferral of consideration by the Board is dependent on the express language of the contract."); *Keystone Steel & Wire Division*, 217 NLRB 995, 996 (1975) (refusing to defer where no language in the contract dealt with the subject matter of the case). Article 6 is completely silent on the issue of cover text, and this silence is itself an unambiguous feature of the agreement, a feature which both an arbitrator and I can equally well recognize. In the end, Respondent's suggestion that an arbitrator could find in article 6 a license to print the *Weingarten* statement is too conjectural to justify deferral.

Furthermore, deferral in this case would run against the Board's policy in favor of the efficient resolution of disputes in a single proceeding. See, e.g., *Sheet Metal Workers Local 17*, 199 NLRB 166, 168 (1972), enfd. 502 F.2d 1159 (1st Cir. 1974), cert. denied 416 U.S. 904 (1974). Even if the charge under Section 8(b)(3) were deferred, the charges under Section 8(b)(1)(A) would remain for resolution.<sup>5</sup> The charges under Section 8(b)(1)(A) are inappropriate for deferral because they are not subject to the grievance procedures provided by the agreement. See *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB 461, 462 (1972) ("[I]t has never been the practice of this Board . . . to abstain from action in cases which present issues which are irresolvable . . . in an alternative forum."). The charges concern the addition of the *Weingarten* statement as a restriction on employees' Section 7 rights. The wrong complained of is thus not cognizable under the terms of the agreement.

<sup>4</sup> It should be kept in mind that the agreement confines an arbitrator's authority to "decid[ing] disputes concerning the interpretation or application of the specific Section(s) and Article(s) of the Agreement listed in the . . . grievance document." (Art. 12, sec. E.1.)

<sup>5</sup> Astutely, Respondent does not contend that the charges under Sec. 8(b)(1)(A) are independently appropriate for deferral. (See R. Br. at 14-18.)

A like problem exists with respect to the charges involving the 42 other employers. As these employers and their employees are not parties to the agreement, the arbitrator obviously has no authority to entertain grievances involving them. In such cases, where all interested parties cannot participate in the arbitration proceeding, the Board will not defer to arbitration. *International Organization of Masters*, 220 NLRB 164, 168 (1975).

In conclusion, the fact that the charges under Section 8(b)(1)(A) must not be deferred militates against deferral of those under Section (8)(b)(3) as well. To do otherwise would frustrate the Board's policy favoring resolution of disputes in a single proceeding. E.g., *Everlock Fastening Systems*, 308 NLRB 1018, 1019 fn. 8 (1992); *Sheet Metal Workers*, 199 NLRB at 168.

#### CONCLUSIONS OF LAW

1. California Nurses Association, National Nurses Organizing Committee, represents the following appropriate unit of employees of the Employer:

**Included:** All full-time, regular part time, and per diem/casual Registered Nurses employed by [the Employer].

**Excluded:** All other employees, office clerical employees, managerial employees, confidential employees, contract employees including but not limited to travelers, guards and supervisors as defined in the Act including but not limited to RN Clinical Coordinators, administrative RN House Supervisors, and RN Nursing Directors. Also excluded is any Nurse who habitually works fewer than eight hours in each two-week pay period.

2. California Nurses Association also maintains collective-bargaining relationships covering appropriate bargaining units with 42 additional health care institutions in the Los Angeles area as follows: AHMC San Gabriel Valley Medical Center, AHMC Whittier Hospital Medical Center, Alvarado Medical Center, Catholic Healthcare West, Centinela Hospital Medical Center, Children's Hospital & Research Center Oakland, City of Hope National Medical Center, Cypress Fairbanks Medical Center, Dameron Hospital Association, Daughters of Charity Hospitals, Desert Regional Medical Center (Tenet), Doctors Medical Center Modesto (Tenet), Eden Medical Center, Enloe Medical Center, Good Samaritan Hospital, Good Samaritan Hospital San Jose (HCA), Hemet Valley Medical Center, John Muir Medical Center, Long Beach Memorial Hospital, Los Alamitos Medical Center (Tenet), Oroville Hospital, Petaluma Valley Hospital (Saint Joseph Health System), Providence Little Company of Mary Medical Center San Pedro Hospital, San Diego Blood Bank, San Ramon Regional Medical Center (Tenet), Sierra Vista Regional Medical Center (Tenet), St. Joseph Hospital Eureka (Saint Joseph Health System), St. Mary Medical Center Apple Valley (Saint Joseph Health System), Sutter Auburn Faith Hospital, Sutter Delta Medical Center, Sutter Health Alta Bates Summit Medical Center, Sutter Health Mills-Peninsula, Sutter Health Novato Community Hospital, Sutter Lakeside Hospital, Sutter Medical Center of Santa Rosa, Sutter Roseville Medical Center, Sutter Solano Medical Center,

Sutter VNA Home Health and Hospice Auburn, Twin Cities Community Hospital (Tenet), USC University Hospital (Tenet), Visiting Nurse Association of Santa Cruz County, and Watsonville Community Hospital.

3. By printing and maintaining language on the back cover of its collective-bargaining agreement with Henry Mayo Newhall Memorial Hospital implying that employees must request a union representative during investigatory meetings and, therefore, employees are not free to exercise their Section 7 right to avoid union activity altogether, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

4. By maintaining collective-bargaining agreements with the 42 additional health care institutions (above) which contain or contained within the agreement themselves or on the back cover of the agreement, a *Weingarten* Rights Statement identical to the statement on the back cover of the agreement with the Employer, the Union violated Section 8(b)(1)(A) of the Act.

5. By unilaterally altering the terms and conditions of the collective-bargaining agreement with the Employer by printing and distributing to unit employees a copy of the collective-bargaining agreement that contained on the back cover a statement entitled “The *Weingarten* Rights,” the Union failed and refused to bargain collectively and in good faith with the

Employer within the meaning of Section 8(d) and in violation of Section 8(b)(3) of the Act.

#### REMEDY

Having found that the Respondent violated Section 8(b)(1)(A) of the Act by maintaining the unlawful *Weingarten* Statement on or in copies of its collective-bargaining agreement with the Employer and the 42 additional health care institutions, I recommend that Respondent be ordered to cease and desist and post the notices attached as Appendix A and B. Further, although the collective-bargaining agreement with the Employer had expired at the time of the hearing, to the extent any of the collective-bargaining agreements with the 42 additional health care institutions is still in effect, Respondent is ordered to recall and reprint these agreements eliminating the *Weingarten* Rights Statement. Because the 2009–2012 collective-bargaining agreement has expired by its terms, and because the parties had reached a successor agreement at the time of the hearing and it is in the process of being printed, the Employer requests that the new collective-bargaining agreement contain a statement on the back providing notice that the Union had unlawfully modified the 2009 agreement by inclusion of the *Weingarten* Rights Statement. I will not order that this be done. The notices which are ordered to be posted will provide a sufficient remedy.

[Recommended Order omitted from publication.]