

United States Postal Service and National Association of Letter Carriers, Sunshine Branch 504, affiliated with National Association of Letter Carriers, AFL-CIO. Cases 28-CA-068385, 28-CA-075708, 28-CA-077161, 28-CA-077164, and 28-CA-078376

April 22, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On September 11, 2013, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.²

The judge found that the Respondent committed several violations of Section 8(a)(1), as well as a violation of Section 8(a)(5). We adopt most of the judge's findings.³

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. We also note that the judge included a narrow cease-and-desist provision in his recommended Order, but the notice attached to his decision inadvertently included a broad cease-and-desist provision. We have substituted a new notice to conform to the recommended Order as modified and to correct that error.

³ For the reasons stated in the judge's decision, we adopt his finding that the Respondent violated Sec. 8(a)(1) by refusing to inform employees of the nature of an investigatory interview. We also adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (4) by revoking an employee's previously scheduled leave.

There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by threatening employees with unspecified reprisals because they threatened to file a charge with the Board, threatening employees that it would be futile to request a union representative of their choosing to represent them at an investigatory interview, and threatening employees with discipline because they invoked their *Weingarten* rights. In addition, there are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing its past practice at its airport and North Valley stations of

For the reasons set forth below, however, we reverse the judge's finding that the Respondent violated Section 8(a)(1) by continuing to question employee John Trujillo after he asserted his *Weingarten* right to union representation at an investigatory interview. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

Trujillo is a letter carrier at the Respondent's main office carrier annex in Albuquerque, New Mexico. On February 23, 2012,⁴ Trujillo completed a written request for leave from March 1 through 4. Trujillo mistakenly dated the request February 24. An unidentified supervisor signed and approved the request on February 23.

On March 1, while working on a project at a different office, Trujillo informed Supervisor Mel Sanchez of his upcoming scheduled leave. Sanchez asked Trujillo if he had an approved leave slip, and Trujillo said that he did. Sanchez then asked Trujillo for a copy. In response, Trujillo told Sanchez that he was invoking his *Weingarten* rights and that he wanted the union president, David Pratt, to represent him.⁵ Sanchez told Trujillo that their discussion would not lead to discipline. Trujillo asked Sanchez to put that in writing, which Sanchez did. Trujillo then showed Sanchez the approved leave slip. But when Sanchez told Trujillo to give him the leave slip, Trujillo refused. Sanchez then left the room.

A short time later, Marla Lacy, then-manager of customer service operations and a higher-level official than Sanchez, entered the room and asked Trujillo if he had scheduled leave. Trujillo said that he had. Trujillo then told Lacy that he was invoking his *Weingarten* rights and wanted Pratt to represent him. Lacy said, "Are you kidding?" to which Trujillo replied, "No, I am not." Lacy did not question Trujillo further.

Under *Weingarten*, an employee has the right to union representation at an interview that the employee reasonably fears may result in discipline. 420 U.S. at 256, 267. The judge found that when Sanchez first questioned Trujillo about his leave request, Trujillo reasonably believed that the questioning could lead to discipline because of the date discrepancy. The judge found that Sanchez's written assurance neutralized Trujillo's concern and that, had the matter gone no further, there would be no violation. The judge reasoned, however, that by bringing Lacy into the interview and her asking Trujillo additional questions, the Respondent "ratcheted up the seriousness of the interview and negated Sanchez' assurances of no

allowing employees to select a union representative from outside their assigned stations to represent them at investigatory interviews.

⁴ All dates hereafter are 2012, unless otherwise noted.

⁵ At the hearing, Trujillo testified that he was concerned that he would be questioned about the date discrepancy and that the questioning could lead to discipline.

discipline.” In the judge’s view, this conduct triggered the Respondent’s obligation under *Weingarten* to exercise one of three options: honor Trujillo’s earlier request for union representation, give Trujillo the option of going forward without a representative, or stop the interview. See *Postal Service*, 241 NLRB 141 (1979). The judge found that by continuing the questioning without giving Trujillo this choice, the Respondent violated Section 8(a)(1).

We disagree. Even assuming Trujillo had an objectively reasonable basis to fear discipline, the right to *Weingarten* representation is triggered when the employee requests it. See 420 U.S. at 257. And a request need not be repeated if it has been communicated to the person conducting the interview. See *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); *Ball Plastics Division*, 257 NLRB 971, 976 (1981); *Roadway Express*, 246 NLRB 1127, 1128 (1979). Here, however, there is no evidence that Lacy knew about Trujillo’s earlier request for union representation when she took charge and asked him if he had scheduled leave.⁶ When Trujillo told Lacy that he wanted union representation, Lacy discontinued the interview. Accordingly, we reverse the judge’s finding that the Respondent’s questioning of Trujillo violated Section 8(a)(1).⁷

ORDER

The National Labor Relations Board orders that the Respondent, United States Postal Service, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals because they threatened to file a charge with the National Labor Relations Board.

⁶ The Board has also held that, if the supervisor to whom the request was made is present for the interview, then the employee need not reassert his *Weingarten* rights to the management official conducting the interview. See, e.g., *Amoco Oil Co.*, 278 NLRB 1, 8 (1986). Here, it is not clear from the record whether Sanchez was present when Lacy asked Trujillo if he had scheduled leave. Trujillo’s testimony implies that Sanchez was present, but Lacy testified that, to her recollection, only she and Trujillo were present. No party called Sanchez to testify.

⁷ Member Miscimarra would also find that Lacy’s sole question to Trujillo—asking whether he had scheduled a leave—was not a further investigatory question that could have infringed on his *Weingarten* rights. The single question posed by Lacy did not in any way extend Sanchez’s prior questioning concerning the leave slip. It was clearly introductory and did not elicit anything beyond what Trujillo had already volunteered and freely discussed with Sanchez. Trujillo had approached Sanchez to tell him about the leave, and Trujillo only requested a *Weingarten* representative when Sanchez asked for a copy of the leave slip.

(b) Threatening employees that it would be futile to request a union representative of their choosing to represent them in an investigatory interview.

(c) Threatening employees with discipline for failing to obey instructions because they invoked their *Weingarten* rights.

(d) Refusing to inform employees of the nature of an investigatory interview.

(e) Unilaterally changing its past practice at its airport and North Valley stations in Albuquerque, New Mexico, of providing employees a union representative of their choosing at fact-finding investigatory interviews.

(f) In any like or related manner interfering with, 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) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit. The appropriate unit is described in article 1, sections 1 through 4, of the 2006–2011 collective-bargaining agreement.

(b) Rescind the unilateral change and restore the practice of providing its employees with a representative of their choosing in fact-finding investigative interviews.

(c) Within 14 days after service by the Region, post at its Airport, Highland, North Valley, and Main Office facilities in Albuquerque, New Mexico, copies of the attached notice marked “Appendix.”⁸ Copies of the notice, on forms provided by the Regional Director for Region 28, 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 are customarily posted. In addition to physical posting of paper notices, 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 employees 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all cur-

⁸ 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.”

rent employees and former employees employed by the Respondent at any time since November 3, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

The National Labor Relations Board has found that we violated 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 threaten you with unspecified reprisals because you stated that you would file a charge with the Board.

WE WILL NOT threaten you that it would be futile to request a union representative of your own choosing to represent you in an investigatory interview.

WE WILL NOT threaten you with discipline for failing to obey instructions because you invoked your *Weingarten* rights.

WE WILL NOT refuse to inform you of the nature of investigatory interviews that you would reasonably believe could result in discipline.

WE WILL NOT fail to bargain collectively with National Association of Letter Carriers, Sunshine Branch 504, affiliated with National Association of Letter Carriers, AFL-CIO (the Union) by unilaterally changing the practice of providing you with a union representative of your own choosing to represent you in a fact-finding investigatory interview.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of

unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit. The appropriate unit is described in article 1, sections 1 through 4, of our 2006–2011 collective-bargaining agreement.

WE WILL rescind the unilateral change and restore the practice of providing you with a representative of your choosing in fact-finding investigative interviews.

UNITED STATES POSTAL SERVICE

David Garza, Esq., for the General Counsel.
Roderick D. Eves, Esq., of St. Louis, Missouri, for the Respondent.
David Pratt, President, NALC Branch 504, of Albuquerque, New Mexico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Albuquerque, New Mexico, on June 18 and 19, 2013, upon the third consolidated complaint¹ (complaint) in Cases 28–CA–068385, et al., issued on April 3, 2013, by the Regional Director for Region 28.

The complaint alleges that the United States Postal Service (Respondent) violated Section 8(a)(1), (3), (4), and (5) of the (the National Labor Relations Act (the Act)).

It is alleged Respondent violated Section 8(a)(1) and (4) of the Act by threatening employees because they filed charges with the Board. It is alleged Respondent violated Section 8(a)(1) of the Act by denying employees representation by the Union during an investigatory interview, by threatening employees it would be futile to request a union representative at an investigatory interview, by threatening employees with discipline for failing to obey instructions because they invoked their *Weingarten* rights,² and by threatening employees by refusing to inform them of the nature of an investigatory interview.

The complaint alleges Respondent violated Section 8(a)(3) of the Act by cancelling employee John Trujillo's leave.

It is also alleged Respondent violated Section 8(a)(5) of the Act, at its Airport and North Valley stations, by changing its practice of providing unit employees a representative of their choosing during an investigatory interview that they reasonably believed might result in discipline without giving notice to the Union or bargaining about this change.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing.

¹ On May 16, 2013, the Regional Director for Region 28 issued an Order Severing Cases and Dismissing Complaint Allegations. (GC Exh. 1(vv).) In that order, as a result of a Stipulation for Entry of Consent Order and a Consent Order in Cases 28–CA–023200, 28–CA–063556, 28–CA–064310, and 28–CA–075375, those cases were severed from this case. Further pars. 1(a) through (d), 1(g), 6(a), and 8(a) through (g) of the instant complaint were dismissed.

² *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

FINDINGS OF FACT

Upon the entire record herein, including the briefs from the counsel for the Acting General Counsel (the General Counsel) and Respondent, I make the following findings of fact.

I. JURISDICTION

In its answer Respondent admitted it provides postal services for the United States of America, and in the performance of that function, has operated various facilities throughout the United States, including facilities located in Albuquerque, New Mexico.

Based upon the above, the Board has jurisdiction over Respondent under Section 1209 of the Postal Reform Act (PRA).

II. LABOR ORGANIZATION

Respondent admitted and I find that the National Association of Letter Carriers, Sunshine Branch 504, affiliated with the National Association of Letter Carriers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

This case involves the United States Postal Service (Respondent) in Albuquerque, New Mexico. The National Association of Letter Carriers, Branch 504 (the Union) is the exclusive collective-bargaining representative of city letter carriers who deliver mail at 12 of Respondent's stations in Albuquerque. It is undisputed that Respondent and the Union have had a long collective-bargaining history embodied in several collective-bargaining agreements the most recent of which is effective 2006–2011.³

At all times relevant herein, Humberto Trujillo was Respondent's postmaster in Albuquerque. Respondent's customer service representatives, including Marla Lacy, reported to Trujillo. Station managers are responsible for the operations of each of the 12 postal stations in Albuquerque. A morning and evening supervisor directly supervise the letter carriers and report to the station manager.

Postal supervisors and station managers are called upon to conduct factfinding interviews with bargaining unit letter carriers. There is no dispute that these fact finding interviews may result in employee discipline.

A. The 8(a)5 Allegations

Complaint paragraphs 8(h)–(k) allege that since on or about March 20 and April 5, 2012, at Respondent's Airport and North Valley stations respectively, Respondent changed its practice of providing unit employees a union representative of their choosing during an investigatory interview which they believed might result in discipline. It is alleged that this change relates to a mandatory subject of bargaining and was made without

³ (GC Exh. 39). At the hearing the General Counsel moved for the admission of this exhibit. It is a complete copy of R. Exh. 10, a portion of the April 2009 Joint Contract Administration Manual. Sufficient copies of the General Counsel's exhibit were not available before the hearing closed, and I gave the General Counsel an opportunity to provide sufficient copies posthearing. There being no objection, the GC Exh. 39 is received into evidence.

notice to or an opportunity for the Union to bargain with Respondent in violation of Section 8(a)(5) of the Act.

1. The facts

a. Past practice

The record clearly establishes that for many years before March 2012 Respondent permitted a practice of allowing letter carriers to choose who would represent them in factfinding interviews. Before March 2012, Union President David Pratt (Pratt), Union Vice President Angel Martinez (Martinez), formal step A designee John Trujillo (J. Trujillo), and Chief Shop Steward Robert Woodley (Woodley) each regularly represented employees in fact finding investigations at stations other than the stations where the union representatives worked.

This testimony was corroborated by both employee testimony and documents memorializing the factfinding investigations. General Counsel's Exhibits 6–18, 27, and 34–36 reflect that employees were represented in factfinding meetings by union representatives of their choosing who did not work in the office where the meeting was being held. Respondent proffered 127 factfinding investigation documents,⁴ which purport to show that employees were represented by a union steward or officer from the same facility. Respondent offered this evidence to show there was no past practice by Respondent of granting employees a choice of representative at factfinding meetings from outside their station.

However, prior to the hearing herein, the General Counsel served subpoenas on Respondent seeking documents that would show factfinding interviews were conducted by union representatives at stations other than their assigned station. The requests included specific requests for factfinding documents involving Union President Pratt, Vice President Martinez, formal step A designee J. Trujillo, and Chief Shop Steward Woodley. At the hearing the General Counsel questioned Respondent's failure to produce more documents concerning factfinding meetings. Respondent contended that the documents reflecting factfinding meetings were destroyed if no discipline resulted from the factfinding. However, Respondent admitted that if an employee was issued subsequent discipline, the previous fact finding documents would be kept in the employee's file for no longer than 2 years.

Later in the hearing it became apparent that Respondent did not make a diligent effort to locate responsive fact finding meeting documents as requested in the subpoena. Respondent's labor relations representative, Ed Arvizo, admitted that he had searched through only a quarter to a third of the boxes of documents that could contain copies of the factfinding sheets requested by the subpoena.⁵ Arvizo further admitted that neither he nor any other representative of Respondent searched any employee files located at the employee's workstation which might contain factfinding meeting documents.⁶

Several options are available where a party refuses to comply with a subpoena. An adverse inference may be drawn against a

⁴ R. Exh. 8.

⁵ Tr. at 360, L. 17, Tr. 360, LL. 17–25 to 36, LL. 1–3, 25 to 36, LL. 1–3.

⁶ Tr. at 367, LL. 20–25 to 368, LL. 1–3.

party that introduces incomplete or altered evidence, especially in response to a subpoena. *ADF, Inc.*, 355 NLRB 81, 86 (2010); *Precipitator Services Group, Inc.*, 349 NLRB 797, 800 (2007). Given Respondent's failure to diligently search its files to determine if there were additional documents which would show that factfinding investigations were conducted by union representatives at stations other than their assigned station, I will draw the adverse inference that had the files been fully searched documents would have been produced showing that the practice of factfinding investigations were conducted by Union representatives at stations other than their assigned station.

City carrier Joseph Valverde (Valverde) was represented by Pratt, Martinez, and J. Trujillo in factfinding meetings at his North Valley Carrier Annex station prior to March 2012. Pratt represented city carrier and North Valley Carrier Annex Steward Christopher Montoya (Montoya) 4 times in the past 3 to 5 years in factfinding investigations. Montoya had seen Martinez represent employees in factfinding investigations at his station four to five times in the last 3 to 5 years after seeing documentation with Martinez' name in station employee grievance and request for information files.⁷

Pratt, Martinez, Trujillo, and Woodley have been represented by a union officer other than the certified steward at their station.

Respondent's supervisor Richard Guzman (Guzman), participated in about 30 factfinding investigations in 13 years as a supervisor or manager in Albuquerque. In those 30 investigations, no employee objected to the steward provided and only one employee requested a representative from another station.

Respondent's supervisor Rommel Gomez (Gomez), was involved in three or four factfinding investigations as a supervisor in 15 years in Albuquerque and no employee asked for representative from another station. Respondent's supervisor, Platero-Dryer, took part in five factfinding investigations as a supervisor in Albuquerque in the past 6 years. No employee asked for a representative from another station. Respondent's supervisor Jacqueline Woods, recalled 25 times when she conducted a factfinding investigation herself, and another 5 times when a supervisor who reported to her conducted a fact-finding investigation in the last 15 to 16 years. Of those prior to March 21, 2012, Woods recalled two or three times when an employee asked for a representative from another station because the steward was not in the facility. Respondent's supervisor, Archuleta, claimed to be involved in hundreds of factfinding investigations as a supervisor or manager in Albuquerque in the last 5 years. Of those, she could recall only two or three employees who asked for a representative from another facility in the last 6 months.

The testimony of Guzman, Gomez, Platero-Dryer, Archuleta, and Woods is of little probative value since their total number of investigations is miniscule in relation to the total number of

investigations conducted during the time they were supervisors. It will be given little credit.

Contrary to Respondent's argument in its brief, Supervisor Rose Griego (Griego testified that she has not conducted a factfinding investigation before March 20, 2012. All she could recall was investigations her supervisors had conducted, and she was unable to recall that the employee asked for a representative from another station when the steward that was assigned to her station was not available. Her testimony is of dubious value since she did not participate in these investigations and is not in a position to know if an employee asked for another representative.

Respondent's labor relations representative, Ed Arvizo (Arvizo), a manager and supervisor for Respondent for at least 16 years, recalled 200 to 300 factfinding investigations as a manager and a seeing perhaps a thousand factfinding investigation reports while working in labor relations. He claimed that an employee asked for a representative from another facility 10 to 15 times. Like Griego, Arvizo's testimony is of limited value since he did not participate in the "thousand" investigations as a labor relations representative. Further, it is unclear that he participated in the "200 to 300" investigations as a manager. It has not been established he is competent to know if the employees in the 1200-1300 investigations requested a representative from another station.

Respondent contends that the testimony of Union Representatives Woodley, Trujillo, Martinez, and Pratt fail to establish a past practice of representing employees in factfinding investigations because they may have referred to themselves as step A designees when they represented employees in factfinding meetings. Respondent's argument follows that since step A grievance proceedings take place only after a grievance has been filed, Woodley, Trujillo, Martinez, and Pratt could not have taken part in factfinding meetings since they occur before the filing of a grievance.

This argument holds no water. Whether they described themselves as union officers, stewards, or step A designees, the record is clear that they acted as representatives of employees at factfinding investigations at locations other than their own workstations on a routine basis for an extended period of time.

b. The change

Beginning in mid-March 2012, shortly after new Postmaster Humberto Trujillo arrived in Albuquerque in February 2012, Respondent no longer allowed employees to choose their representative for factfinding investigations conducted at their assigned stations.

Airport Station Supervisor Peter Baldwin (Baldwin) admitted that in the past, employees had always been allowed to choose their union representative for factfinding interviews. Baldwin's manager, Rose Griego, told him that the new rule that employees could not have union representatives from other stations represent them in factfinding investigations, came from the Albuquerque postmaster's office. North Valley Station Manager Guzman said that he received this new policy from manager of customer service operations, Marla Lacy. In March 2012, main office carrier annex (MOCA) Manager Al Baca and MOCA Supervisor Rick Oyer told the union formal step-A

⁷ I find no inconsistency in Montoya's testimony when compared with his affidavit as he stated on both occasions that he had overheard conversations about Martinez' representing other employees at the North Valley station.

designee Trujillo that the Albuquerque postmaster had issued orders that employees at the MOCA station could not have representatives from other stations represent them for fact finding meetings.

c. Examples of the rule change

i. The March 20, 2012 factfinding investigation of Angel Martinez

Martinez is a letter carrier who has worked at Respondent's Airport station in Albuquerque, New Mexico, since 2003. Martinez has been union vice president for the past 3 years and a Union formal step A designee since 2004.

At the Airport station on March 20, 2012, Martinez was told by his supervisor, Baldwin, that he was to attend a factfinding investigation. Martinez told Baldwin that he was invoking his *Weingarten* rights and wanted union formal A representative, Trujillo, who worked at the main post office (MOCA) in downtown Albuquerque, to represent him at the factfinding meeting. Martinez told Baldwin that Trujillo was available and on the clock. Baldwin walked away.

Baldwin returned about 5 minutes later and Martinez asked him if he had gotten a hold of Trujillo. Baldwin told Martinez Respondent was trying to get a hold of Trujillo and Baldwin told Martinez to wait and left again. Martinez then spoke to Trujillo by cell phone and Martinez told Trujillo that he had requested him as representative for a factfinding meeting. Trujillo was at the MOCA station, about 3 miles or 10 minutes away from the Airport station.

When Baldwin returned a third time 2 to 3 minutes later, Martinez told him that no one had tried to contact Trujillo and repeated that he was invoking his *Weingarten* rights and wanted J. Trujillo to represent him in the factfinding meeting. Martinez told Baldwin that J. Trujillo was available. Baldwin told Martinez to stop invoking his *Weingarten* rights. Baldwin said it was futile for Martinez to say that he was violating his rights. Baldwin told Martinez that Airport station steward, Mike Gill, would be representing him.

Baldwin conducted a factfinding investigation with Martinez about 45 minutes later. Steward Mike Gill was present at the meeting.

ii. The March 21, 2012 factfinding investigation of Rudy Segarra

Since 1996 Rudy Segarra has been employed as a letter carrier at Respondent's Highland station in Albuquerque, New Mexico.

On March 21, 2012, Segarra's supervisor Minga Platero-Dreyer, told Segarra that he had to attend a factfinding meeting. Segarra had attended a previous factfinding meeting on March 19, 2012, regarding an incident with his postal vehicle.⁸ Union Steward Woodley, who also worked at the Highland station, represented Segarra for this factfinding interview. Segarra told Platero-Dreyer that if the new factfinding meeting was related to the March 19 meeting, he wanted Woodley to represent him again. Platero-Dreyer told Segarra that Highland station stew-

ard, Bill Mallison, would serve as his representative not Woodley. Segarra told Platero-Dreyer that he was invoking his *Weingarten* rights and would not be saying anything else. Platero-Dreyer walked away.

Platero-Dreyer returned with Highland Station Manager Jacqueline Woods. Platero-Dreyer repeated that she needed Segarra to go to the factfinding meeting. Manager Woods told Segarra that if he did not cooperate, he would be charged with failure to obey instructions.

Segarra followed Platero-Dreyer to her office where the factfinding investigation was held with Segarra, Platero-Dreyer, and Steward Mallison. Each time Segarra was questioned by Platero-Dreyer, he invoked his *Weingarten* rights and stated he wanted Woodley to represent him. Mallison told Platero-Dreyer she was violating Segarra's *Weingarten* rights by not allowing Woodley to represent him. Platero-Dreyer said the postmaster told her to provide Mallison and not Woodley for the factfinding meeting.

On March 21, 2012, Mallison told Woodley that Segarra had requested Woodley for a factfinding meeting. Woodley told Platero-Dreyer that she was violating Segarra's *Weingarten* rights. Platero-Dreyer told Woodley she needed to talk to someone and left. When Platero-Dreyer returned a short time later, she told Woodley she had been ordered by the Albuquerque postmaster to have Mallison represent Segarra not Woodley.

iii. The April 5, 2012 factfinding investigation of Joseph Valverde

For the last 5 years, Valverde has been employed as a letter carrier at Respondent's North Valley Carrier Annex in Albuquerque, New Mexico.

On April 5, 2012, two factfinding meetings were conducted with Valverde. On the morning of April 5, 2012, Valverde was approached by his supervisor, Rommel Gomez, who told Valverde that he needed to conduct a factfinding investigation with him. Valverde told North Valley Carrier Annex Union Steward Christopher Montoya, in Gomez' presence, that he wanted Union President Pratt or Vice President Martinez to represent him.

Valverde, Montoya, and Gomez spoke with Station Manager Guzman. Montoya told Guzman that Valverde had requested Union President Pratt or Vice President Martinez to represent him at the factfinding meeting. Guzman told Valverde and Montoya that Montoya was the station steward and that he was going to represent Valverde.

Gomez conducted the factfinding meeting with Valverde and Union Steward Montoya. During the meeting, each time Valverde was asked a question by Gomez, he asserted his *Weingarten* rights and said he wanted Martinez or one of the other union officers to represent him.⁹

Valverde returned to work after the factfinding meeting. About 30 minutes later, Gomez called Valverde back to a second factfinding meeting. Gomez told Valverde there were additional questions manager of customer service operations,

⁸ I find nothing inconsistent between Segarra's affidavit and his testimony at trial.

⁹ I find no inconsistencies between Valverde's affidavit and his testimony.

Marla Lacy, had written for him. During this meeting, Valverde received a letter that stated if he did not answer the factfinding questions, he would be held insubordinate.

When Gomez approached Montoya on April 5, 2012, about the factfinding investigation of Valverde, Montoya asked Gomez what the issue in the investigation was. Gomez told him he did not know. No effort was made by Respondent to have Pratt, Martinez, or J. Trujillo present for Valverde's fact finding meeting or to see if any of them were available to attend the factfinding.

Prior to mid-March 2012, the Union was never contacted by Respondent about any changes to the practice of granting employees' their choice of representative at a factfinding investigation not was the Union given notice prior to the change in practice being implemented in mid-March 2012. In early March 2012, once the Union was aware of the change in the policy of allowing employees to choose their representative in factfinding meetings, Union President Pratt made several verbal requests to Postmaster Trujillo to rescind the change and go back to observing the established past practice. The Union stopped making the requests when Postmaster Trujillo made it clear that Respondent was not going to comply with the decision of Administrative Law Judge Lana Parke,¹⁰ finding that employees had the right to choose the representative of their choice in factfinding investigations.

2. The analysis

There is no dispute that Respondent's factfindings meetings are investigations that can lead to discipline. Accordingly, under *Weingarten* employees are entitled to union representation during these meetings. As ALJ Lana Parke pointed out in her November 6, 2006 decision in *Postal Service*, JD(SF)–60–06, involving the same bargaining unit involved herein, "The selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances. . . ." *Barnard College*, 340 NLRB 934, 935 (2003), citing *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), enfd. 338 F.3d 267 (4th Cir. 2003), and *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981).

The first issue that must be resolved herein is whether Respondent made unilateral changes to its employees' mandatory terms and conditions of employment in the selection of union representatives at factfinding investigations.

The Board has long held that mandatory subjects of bargaining include wages, hours, and other terms and conditions of employment as set forth in Section 8(d) of the Act. *Axelson, Inc.*, 243 NLRB 414, 415 (1978). Likewise, disciplinary procedures and any changes to an established system of discipline mandatory subjects of bargaining. *Washoe Medical Center, Inc.*, 337 NLRB 202, 205 (2001). *Service Employees Local 250 (Alta Bates Medical Center)*, 321 NLRB 382, 384 (1996).

In *Barnard College*, 340 NLRB at 945, the ALJ found, and the Board affirmed, that unilateral changes in the parties' past practice with respect to grievance procedures, including meeting with union representatives, violated Section 8(a)(5) of the Act.

Before an employer may make changes to mandatory subjects of bargaining, it must first notify and give the union an opportunity to request bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962); *St. Anthony Hospital Systems*, 319 NLRB 46 (1995). An employer who has made unilateral changes to mandatory terms and conditions of employment without notice or bargaining with the union has presented the union with a *fait accompli* which does not constitute timely notice or bargaining. *Penntech Papers v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983); *Los Angeles Soap Co.*, 300 NLRB 289 (1990).

With respect to extra contractual terms and conditions of employment that have become a past practice, in *Sunoco, Inc.*, 349 NLRB 240, 244 (2007), the ALJ affirmed by the Board held:

An employer's practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change A past practice must occur with such regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis.

In the instant case, it is abundantly clear that long before March 2012, Respondent regularly permitted its employees to choose the union representative of their choice at factfinding investigative meetings. This was the case whether or not the requested union representative worked at the employees' station. Having established a regular and longstanding practice dealing with disciplinary measures, a mandatory subject of bargaining, employees reasonably expected this practice to continue on a consistent basis. The parties were no longer free to change this practice without notice to and bargaining with each other.

3. Respondent's defenses

a. Deferral

Respondent contends that the issue of whether there has been a violation of Section 8(a)(5) of the Act in the alleged change in practice concerning employee choice of representatives in factfinding investigations should be deferred to arbitration.

Respondent cites *Collyer Insulated Wire*, 192 NLRB 837, 842, where the Board stated it will defer to arbitration unfair labor practices involving Section 8(a)(5) of the Act if the dispute arose under a long and productive collective-bargaining relationship, if there is no evidence of respondent's enmity to employees' protected rights, if respondent has agreed to arbitration under a clause that provides for arbitration in a broad range of disputes, broad enough to encompass the dispute before the Board and if the contract and its meaning lie at the center of the dispute.

Since there is no evidence that a grievance has been filed involving this issue, Respondent contends that a request for pre-arbitral deferral may be raised during the unfair labor practice hearing citing *Duchess Furniture*, 220 NLRB 13 (1975), for support. Unfortunately *Duchess Furniture* does not support this proposition. In fact in *Duchess Furniture* the Board re-

¹⁰ *Postal Service*, JD(SF)–60–06, November 6, 2006.

versed the ALJ and refused deferral to arbitration without mentioning the issue of raising arbitration during the unfair labor practice hearing.

However in *Postal Service*, 225 NLRB, 220, 220–221 (1976), the Board noted that it would defer to arbitration since the union agreed to file a grievance and respondent United States Postal Service indicated its willingness to waive contractual time limitations. See also *Pilot Freight Carriers, Inc.*, 224 NLRB 341, 345 (1976).

It is apparent that the time limits for filing a grievance in this matter have long since passed.¹¹ While Respondent in its answer has indicated the matter should be deferred to arbitration, there is no evidence that the Union is willing to file a grievance or that Respondent will waive time limits. Accordingly, deferral is inappropriate.

b. Waiver

Respondent also argues that the Union has waived its right to bargain over employees' choice of a union representative in a factfinding investigation by the terms of the parties' collective-bargaining agreement, particularly article 17, Representation, the interpretation of article 17 in the parties 2009 Joint Contract Administration Manual (JCAM) and the interpretation given article 17 in the June 27, 1989, Carlton J. Snow arbitration decision.

Article 17 of the parties' collective-bargaining agreement provides for representation of employees by union stewards in the grievance procedure.

Article 17.1¹² provides that: "Stewards may be designated to the purpose of investigating, presenting and adjusting grievances."

Article 17.2¹³ provides that:

A. The Union will certify to the Employer in writing a steward or stewards and alternates in accordance with the following general guidelines. Where more than one steward is appointed, one shall be designated chief steward. The selection and appointment of stewards or chief stewards is the sole and exclusive function of the Union. Stewards will be certified to represent employees in specific work location(s) on their tour, provided no more than one steward may be certified to represent employees in a particular work location(s). The number of stewards certified shall not exceed, but may be less than, the number provided by the formula. Hereinafter set forth.

Article 17.3¹⁴ provides that: "If an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted."

There is nothing in article 17 which suggests that employee choice of a union representative is in any manner limited in a factfinding investigation. Article 17 refers solely to representation in the grievance procedure.

The 2009 Joint Contract Administration Manual (JCAM)¹⁵ is an administrative manual which provides interpretation for the parties of their 2006–2011 collective-bargaining agreement.¹⁶ Page 17–6 of the JCAM discusses employees' *Weingarten* rights and when they are entitled to be represented at an investigatory interview. This portion of the JCAM makes no mention of an employee's right to choose a representative in an investigatory interview or in a factfinding interview. It simply states that an employee is entitled to representation if the employee reasonably believes the interview may result in discipline.

On June 27, 1989, arbitrator Carlton J. Snow issued his arbitration decision¹⁷ in an arbitration case between the American Postal Workers Union and Respondent involving the right of an employee to choose his union representative in a grievance procedure. Respondent's reliance on this decision for the proposition that the arbitrator's interpretation of the collective-bargaining agreement establishes that the Union agreed to limit employee choice of representatives in factfinding investigations is misplaced. This arbitration decision deals with the right to choose a union representative in grievance arbitration under articles 15¹⁸ and 17 of the collective-bargaining agreement. It never mentions the factfinding investigation which is a pre-grievance procedure not covered by the terms of the collective-bargaining agreement. Moreover, the arbitrator's discussion of Board law involving employee choice of representatives in *Weingarten* interviews has been superseded by the Board's decisions in *Barnard College*, 340 NLRB 934, 935 (2003), and *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001).

Respondent's acting human resources director, Lerene Wiley, stated that article 17 of the parties' collective-bargaining agreement applies to factfinding investigations based upon her interpretation of JCAM and the Carlton Snow arbitration decision. This argument is without merit since article 17, JCAM and the Snow decision do not refer to fact finding investigations. Article 17, JCAM and the Snow decision all involve contractual interpretations of the right to choose representatives in the parties' grievance arbitration procedure and have no bearing on factfinding procedures.

The Board has long held that the waiver of a statutory right will not be inferred from general contract provision. Rather, such waivers must be clear and unmistakable. *Amoco Chemical Co.*, 328 NLRB 1220, 1221–1222 (1999). In the instant case, it is clear that neither the language of the parties' collective-bargaining agreement, nor the JCAM, nor the arbitrator's decision establish that the Union has clearly and unmistakably waived employees' rights to choose their representative at a factfinding meeting.

As to Respondent's request to reconsider my ruling at hearing rejecting Respondent's Exhibit 11, a settlement of a step 4 grievance between the Postal Service and the APWU, this settlement involves a grievance not a factfinding investigation and involves an interpretation of article 17 of the collective-

¹¹ R. Exh. 7.

¹² R. Exh. 9.

¹³ Id.

¹⁴ Id.

¹⁵ R. Exh. 10.

¹⁶ GC Exh. 39.

¹⁷ R. Exh. 12.

¹⁸ R. Exh. 7.

bargaining agreement relating to representation in the grievance procedure. It is not relevant to the issues herein.

By changing the established practice of allowing city letter carriers to choose a representative of choice at factfinding investigations without notice to or bargaining with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

B. The 8(a)(1), (3), and (4) Allegations

Complaint paragraph 6(b) alleges that on about November 3, 2012, Respondent threatened its employee with unspecified reprisals because they said they would file a charge with the Board in violation of Section 8(a)(1) and (4) of the Act.

Complaint paragraphs 7(a) and (b) allege that on about March 1, 2012, Respondent informed employee John Trujillo that his scheduled leave was canceled because he engaged in union activities in violation of Section 8(a)(1) and (3) of the Act.

While the complaint was not amended, both in his opening statement at the hearing and in his brief counsel for the General Counsel alleges that the revocation of Trujillo's approved leave violated not only Section 8(a)(3) of the Act, discussed below but also Section 8(a)(4) of the Act. At the outset of the hearing Respondent was apprised that the General Counsel was alleging that the denial of Trujillo's leave violated not only Section 8(a)(3), but also 8(a)(4) of the Act. Respondent made no objection to the General Counsel's reliance on this additional theory of a violation. The facts upon which the additional 8(a)(4) violation are based were set forth in the complaint.

An unpled matter may support an unfair labor practice finding if it is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989). The Board has held that, "The determination of whether a matter has been fully litigated rests in part on whether . . . the Respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *Postal Service*, 352 NLRB 923 (2008).

By stating the additional theory of a violation of Section 8(a)(4) of the Act in his opening statement without objection from Respondent, the General Counsel put Respondent on notice of this new theory and gave it an opportunity to alter its defense. The factual matter was fully explored by the parties concerning Trujillo's denial of leave. I find that the matter had been fully litigated and will support findings concerning the denial of Trujillo's leave as a violation of Section 8(a)(4) of the Act.

1. The facts

a. The threat to report Trujillo for filing unfair labor practice charges

John Trujillo has been employed for 20 years by Respondent as letter carrier at its main office carrier annex (MOCA) in downtown Albuquerque, New Mexico. Trujillo has been union chief shop steward since January 2013 and has been union formal step A designee for the past 17 years.

Trujillo has filed unfair labor practice charges against Respondent with the National Labor Relations Board, including

several charges¹⁹ with the Board during the 9 months prior to March 2012.

On November 3, 2011, Trujillo called Academy Station Manager Archuleta by phone to discuss grievances and outstanding information requests. During the call, Trujillo told Archuleta that Respondent had not provided requested information. Trujillo told Archuleta that if Respondent did not provide the information, Trujillo would be filing an unfair labor practice charge. Archuleta told Trujillo that he had threatened her and that she was going to report him for threatening her.

Archuleta testified that she told Trujillo her supervisor said he was not going to provide Trujillo with requested information. Archuleta admitted she said she would check about the information and get it for Trujillo. Trujillo responded he would file a charge and Archuleta said that Trujillo should do what he needed to do and she would do what she needed to do. Trujillo said if he were her boss he would fire her for not getting the information. She denied saying that Trujillo had made a threat or that she would report him for making a threat.

I found that Trujillo's testimony was made in an open, honest, and forthright manner. His testimony had a quality of believability. On the other hand, Archuleta's testimony with respect to the alleged threat was given in a hesitant and tentative manner, lacking in credibility as far as this observer is concerned. I will credit Trujillo's version of the facts.

There is no evidence that Archuleta reported Trujillo or that Trujillo was in any way disciplined.

b. The leave denial

Respondent's employees must complete a PS Form 3971 when requesting leave. On February 23, 2012, Trujillo completed a PS Form 3971²⁰ requesting leave from March 1, 2012, to March 4, 2012. In error, Trujillo dated the form February 24, 2012, when he turned the form into his immediate supervisor, Rick Oyer (Oyer), on February 23, 2012. An unidentified supervisor signed and approved the leave request on February 23, 2012. Trujillo's leave request was later signed and approved by Oyer on February 25, 2012.

In early March 2012, J. Trujillo was assigned to the Joint Alternative Route Adjustment Procedure staff (JARAP) working on route adjustment projects with Respondent's management. Since there was still work to be done on the JARAP project, Trujillo decided to work on one of his days of leave. On March 1, 2012, Trujillo worked at the JARAP office on the second floor of Respondent's the main office facility with his management counterpart, Supervisor Mel Sanchez.

While working in the JARAP office, Trujillo told Sanchez that since work was light, he was going to take leave on March 2 and 3, 2012. Sanchez asked Trujillo if he had an approved leave slip and Trujillo said he did. Sanchez asked Trujillo for a copy of his leave slip. Trujillo told Sanchez that he was invoking his *Weingarten* rights and that he wanted Union President Pratt to represent him. Sanchez told Trujillo that this was not going to lead to discipline. Trujillo told him to put it in writing which Sanchez did. Then Trujillo showed Sanchez the leave

¹⁹ GC Exhs. 19–25.

²⁰ GC Exh. 26.

slip that had been approved. When Sanchez told Trujillo to give him the leave slip, Trujillo told Sanchez he would show it to him but not give it to him. At that time, Sanchez left the JARAP room.

Manager Lacy came into the room a short time later and asked Trujillo if he had scheduled leave for Friday and Saturday (March 3 and 4, 2012). Trujillo told her that he did. Trujillo told Lacy that he was invoking his *Weingarten* rights and wanted Pratt to represent him. Lacy said, "Are you kidding?" to which Trujillo replied, "No, I am not." Lacy went to her office and called Trujillo's supervisor, Oyer, who said he could not find Trujillo's approved leave form. Oyer in fact later found the approved form. Lacy then said, "Your leave is revoked. Return to your duty station."²¹

Lacy denied revoking Trujillo's leave. Further, Respondent's "Everything Report"²² for Trujillo reflects at the bottom of page 2 and the top of page 3 a code 55 for both Friday and Saturday under the heading "Base" which reflects that Trujillo was paid vacation pay for those days.

Based upon both Lacy's testimony and the un rebutted documentary evidence it is clear that Trujillo's leave was not revoked. However, having contacted Oyer and finding that there was no approved leave slip for Trujillo, it seems unlikely that Lacy would not have told Trujillo his leave was revoked. That she would have threatened to revoke his leave is particularly likely in light of Lacy's testimony that there were deadlines that had to be met in the JARAP process in the 2 days that Trujillo had asked for leave. While I credit Lacy's testimony that she did not cancel Trujillo's leave, I credit Trujillo that she threatened to do so.

2. The analysis

a. *The Archuleta threat*

An employer who threatens an employee with a reprisal because he filed or threatens to file charges with the Board violates Section 8(a)(1) of the Act. *Postal Service*, 351 NLRB 265 (2007); *Postal Service*, 350 NLRB 125 (2007). Having found that on November 3, 1011, Respondent's manager, Rosarita Archuleta, told employee Trujillo that that she was going to report him for threatening her after he said he would be filing an unfair labor practice charge, Respondent has violated Section 8(a)(1) of the Act.

b. *The alleged denial of leave to Trujillo*

In order to find a violation of Section 8(a)(3) of the Act, the General Counsel must establish a discriminatee has engaged in protected union activity, that the employer had knowledge of this activity, and that the employer carried out the adverse action because of the protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Similarly, a violation of Section 8(a)(4) of the Act is found where an employer discriminates against its employee for filing charges, or for testifying, or for being subpoenaed to testify, at a Board proceeding. *American Garden's Management Co.*, 338

NLRB 644, 645 (2002); *Grand Rapids Die Casting Corp.*, 279 NLRB 662, 664 (1986).

There is no dispute that Trujillo was an active union member and officer and that this was well known to Respondent. There is likewise no dispute that Respondent was aware that Trujillo had filed numerous charges against it with the Board. Respondent also demonstrated its animus toward Trujillo's protected activity by threatening him with reprisals for filing charges and for threatening to cancel his leave. However, there is no evidence that any adverse employment action was ever taken against Trujillo. The record reflects that he in fact took his vacation leave and Respondent took no action against him for threatening to file charges with the Board.

Since there was no discriminatory action taken by Respondent there is no violation of Section 8(a)(3) or (4) of the Act and I will recommend that these allegations be dismissed. The denial of leave has not been alleged as an independent violation of Section 8(a)(1) of the Act.

C. *The 8(a)(1) Allegations*

1. Complaint allegations 6(c)–(e) allege that on about March 1, 2012, Respondent denied employee John Trujillo's request for a union representative during an interview he reasonably believed would result in discipline

a. *The facts*

As noted above, on March 1, 2012, while working in the JARAP office, Trujillo told Respondent's supervisor, Sanchez, that since work was light, he was going to take leave on March 2 and 3, 2012. Sanchez asked Trujillo if he had an approved leave slip and Trujillo said he did. Sanchez asked Trujillo for a copy of his leave slip. Trujillo told Sanchez that he was invoking his *Weingarten* rights and that he wanted Union President Pratt to represent him. Sanchez told Trujillo that this was not going to lead to discipline. Trujillo told him to put it in writing which Sanchez did. Then Trujillo showed Sanchez the leave slip that had been approved. When Sanchez told Trujillo to give him the leave slip, Trujillo told Sanchez he would show it to him but not give it to him. At that time, Sanchez left the JARAP room.

Manager Lacy came into the room a short time later and asked Trujillo if he had scheduled leave for Friday and Saturday (March 3, and 4, 2012). Trujillo told her that he did. Trujillo told Lacy that he was invoking his *Weingarten* rights and wanted Pratt to represent him. Lacy said, "Are you kidding?" to which Trujillo replied, "No, I am not." Lacy went to her office and called Trujillo's supervisor, Oyer, who said he could not find Trujillo's approved leave form. Oyer in fact later found the approved form. Lacy then said, "Your leave is revoked. Return to your duty station."²³

As a result of the date error on the leave form, Trujillo was concerned he was going to be questioned about that discrepancy and that it could involve potential discipline, including termination.

After Trujillo asserted his *Weingarten* rights, Manager Lacy told him that his leave was revoked and that he needed to return to his duty station. No other questions were asked of Trujillo.

²¹ Tr. at 111, LL. 7–10.

²² R. Exh. 4.

²³ Tr. at 111, LL. 7–10.

b. The analysis

Respondent contends that these facts do not establish a violation of Section 8(a)(1) of the Act since Trujillo did not reasonably believe the inquiry about his approved leave could result in discipline. Moreover, any subjective belief he may have had that the inquiry could result in discipline ended when Sanchez provide him assurances that his questioning would not lead to discipline. Further, once Trujillo invoked his *Weingarten* rights, Lacy asked no further questions.

In *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Supreme Court held an employee had the right to union representation at an interview which the employee reasonably feared may result in discipline. An employee's reasonable belief that an interview might result in discipline is measured by an objective standard that considers all circumstances of the case and not simply the employee's subjective motivation. *Weingarten*, supra at 257 fn. 5. The right to union representation is triggered when the employee requests representation. *Weingarten*, supra at 257.

When an employee makes a request, the employer must either grant the request, give the employee the option of going forward with the interview unrepresented, discontinue the interview, or reject the request and end the interview. *Washoe Medical Center*, 348 NLRB 361 fn. 5 (2006) (quoting *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982)).

When Respondent's supervisor, Sanchez, questioned Trujillo about his leave request and leave form, Trujillo had concerns that due to the discrepancies in the dates on the leave form Sanchez' questions could lead to discipline. Given the discrepancies it was reasonable for Trujillo to believe that there could be discipline issued to him for fraud. As a result of this concern, J. Trujillo invoked his *Weingarten* rights to have a union representative present for any further questioning by Sanchez. However, Sanchez assured Trujillo in writing that his questions would not result in discipline before he continued questioning him. Had the matter gone no further, I believe that no violation of the Act would have occurred since Trujillo apparently accepted Sanchez' assurances, believed no discipline would take place, and showed him the leave form. However, the matter did not end there. Having refused to give Sanchez a copy of the leave form, Sanchez brought his superior, Manager Lacy, into the inquest. Lacy again took up the questioning asking if Trujillo had approved leave. When Trujillo said he did, he again invoked his *Weingarten* rights and asked for union representation. From this point on Lacy asked no further questions but said she was revoking Trujillo's leave.

In bringing a new supervisor of greater authority, Lacy, into the interview and asking Trujillo additional questions, Respondent ratcheted up the seriousness of the interview and negated Sanchez' assurances of no discipline. This conduct triggered Respondent's obligation under *Weingarten* to honor Trujillo's earlier request for union representation, give Trujillo the option of going forward without a representative or stopping the interview. By continuing the questioning without giving Trujillo these options, Respondent violated Section 8(a)(1) of the Act.

2. Complaint paragraph 6(f) alleges that on about March 20, 2012, Respondent threatened its employee that it would be futile for them to request a union representative of their choosing in an investigatory interview

a. The facts

As previously discussed, on March 20, 2012, Respondent's supervisor, Baldwin, told Union Vice President Martinez that Respondent needed him to stay for a factfinding interview. Martinez invoked his *Weingarten* rights and requested that formal step A designee Trujillo represent him for the meeting. Baldwin denied this request and informed Martinez that Airport Station Steward Mike Gill would be representing him. Martinez repeatedly told Baldwin that he was invoking his *Weingarten* rights and wanted Trujillo to represent him. Baldwin shrugged his shoulders and told Martinez to stop invoking his *Weingarten* rights and that it was futile to continue telling him that he was violating Martinez' rights.

Respondent contends that Baldwin was simply expressing the fact that the Union and Respondent disagreed over whether employees could select the union representative of their choice pursuant to article 17 of the collective-bargaining agreement and was not threatening him.

b. The analysis

An employer that tells employees that their union activities would be futile has long been held to be a violation of Section 8(a)(1) of the Act. *Goya Foods*, 347 NLRB 1118, 1128-1129 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008); *Wellstream Corp.*, 313 NLRB 698, 706 (1994); *Altercare of Wadsworth Center for Rehabilitation & Nursing Care, Inc.*, 355 NLRB 565, 574 (2010). Similarly, an employer may not tell employees that it would be futile for them to seek *Weingarten* rights. *Las Palmas Medical Center*, 358 NLRB 460, 471-472 (2012); *Dish Network Service Corp.*, 339 NLRB 1126, 1128 (2003).

Contrary to Respondent's contention, there was nothing objectively in this interchange that suggests Baldwin was expressing disagreement with the Union's interpretation of the collective-bargaining agreement. The test of a violation of Section 8(a)(1) of the Act is an objective one. A reasonable person would have understood that Baldwin was not engaging Martinez in an esoteric discussion of the terms of the collective-bargaining agreement, but rather was telling him there was no use in asserting his *Weingarten* rights to select his union representative. In these circumstances, Baldwin unlawfully threatened Martinez in violation of Section 8(a)(1) of the Act, *Las Palmas Medical Center*, *Dish Network Service Corp.*, supra.

3. Complaint paragraph 6(g) alleges that on about March 21, 2012, Respondent threatened its employee with discipline for failing to obey instructions because they invoked their *Weingarten* rights

a. The facts

As discussed above, on March 21, 2012, when Supervisor Platero-Dreyer told city letter carrier Segarra that he was going to be involved in a factfinding investigation, Segarra invoked his *Weingarten* rights and requested Union Steward Woodley to represent him. Platero-Dreyer told Segarra that he would be

represented by Union Steward Bill Mallison. When Segarra told Platero-Dreyer that he was invoking his *Weingarten* rights and would not be saying anything else, Platero-Dreyer walked away and returned with Station Manager Jackie Woods. Woods told Segarra that if he did not cooperate regarding the fact finding investigation, he would be charged with failure to obey instructions.

Respondent contends that Woods told Segarra only that he needed to “cooperate” with Platero-Dryer’s direction to go to a factfinding investigation not how to answer any questions. As such, there is no evidence that Woods’ primary motive was to punish Segarra for protected activity and she did not violate Section 8(a)(1) of the Act.

b. The analysis

The Board has found that threats of reprisal to compel an employee to attend an investigative interview without union representation violates Section 8(a)(1) of the Act. *Good Samaritan Nursing Home*, 250 NLRB 207 (1980). Here, Woods threatened Segarra with discipline for failing to obey instructions if he did not attend the factfinding meeting without his representative of choice. Respondent’s argument that Woods merely told Segarra to go to the meeting without requiring him to answer questions is without merit. Cooperation strongly suggests answering questions. After all, that is the purpose of a factfinding investigation. There can be no investigation without questions being answered. Moreover, since Segarra was entitled to his representative of choice, under *Weingarten*, Respondent’s choices were limited to giving Segarra his representative of choice, giving him the option, without threat of discipline, to continue with the interview without his chosen representative or to discontinue the meeting. Having failed to do so and having threatened Segarra with discipline for failure to participate in the investigation, Woods’ threat to compel attendance by Segarra at an investigatory meeting without his requested union representative violates Section 8(a)(1) of the Act.

4. Complaint paragraph 6(h) alleges that on about March 21, 2012, Respondent threatened its employee by refusing to inform them of the nature of investigatory interviews that they would reasonably believe could result in discipline

a. The facts

As discussed at length above, when Segarra was approached by Platero-Dreyer on March 21, 2012, about attending a fact-finding meeting, Segarra asked her why there was going to be a factfinding meeting with him. Platero-Dreyer did not respond.

In its brief²⁴ Respondent attempts to show that Segarra admitted knowing that the March 21, 2012 factfinding investigation was a continuation of the March 19, 2012 factfinding meeting by quoting from Segarra’s affidavit to the Board dated March 22, 2012. While cross-examining Segarra, counsel for Respondent purportedly showed Segarra an affidavit to help refresh his recollection. However, the affidavit was never received into the record. After looking at the affidavit on cross-examination, Segarra reaffirmed that he did not know the pur-

pose of the March 21, 2012 factfinding investigation. I will not consider the substance of the affidavit inappropriately cited in Respondent’s brief.

b. The analysis

The Board has held that an employer, upon request, must inform an employee and the employee’s union representative of the specific charges that are to be discussed during a *Weingarten* investigatory interview. *Postal Service*, 345 NLRB 426, 436 (2005). This is so because *Weingarten* rights encompass the right to a meaningful consultation with the union representative prior to an investigatory interview. *Postal Service*, 303 NLRB 463 fn. 4 (1991); *Climax Molybdenum Co.*, 227 NLRB 1189, 1190 (1977). In explaining why an employee must know the nature of the issues in the investigatory interview, the Board in *Colgate-Palmolive Co.*, 257 NLRB 130, 133 (1981) noted:

Nothing in the rationale of *Weingarten* suggests that, in its endorsement of the role of “knowledgeable union representative” the Supreme Court meant to put blinders on the union representative by denying him the opportunity of learning the facts by consultation with the employee prior to the investigatory-disciplinary interview. Knowledgeably implies the very opposite. The right to representation clearly embraces the right to prior consultation.

When Platero-Dryer did not respond or answer Segarra’s inquiry about what the March 21, 2012 factfinding meeting was about, Segarra was unable to meaningfully consult with his representative about the charges he faced. This conduct violates Section 8(a)(1) of the Act. *Postal Service*, supra.

CONCLUSIONS OF LAW

1. The United States Postal Service is now, and at all times herein, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. National Association of Letter Carriers, Sunshine Branch 504, affiliated with the National Association of Letter Carriers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening employees with unspecified reprisals because they threatened to file a charge with the National Labor Relations Board, Respondent violated Section 8(a)(1) of the Act.
4. By denying John Trujillo’s request for union representation during a discussion that he reasonably believed might result in discipline, Respondent violated Section 8(a)(1) of the Act.
5. By threatening employees that it would be futile to request a union representative of their choosing to represent them in an investigatory interview, Respondent violated Section 8(a)(1) of the Act.
6. By threatening employees with discipline for failing to obey instructions because they invoked their *Weingarten* rights, Respondent violated Section 8(a)(1) of the Act.
7. By refusing to inform employees of the nature of an investigatory interview, Respondent violated Section 8(a)(1) of the Act.

²⁴ R. Posthearing Br. pp. 9 and 25–26.

8. By changing its past practice at its Airport and North Valley stations in Albuquerque, New Mexico, of providing employees a union representative of their choosing at factfinding investigatory interviews without giving notice to or bargaining with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

9. All other allegations in the complaint are dismissed.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom

and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unilaterally changed the practice of providing its employees with a representative of their choosing in factfinding investigatory interviews without notice to or bargaining with the Union must upon request of the Union rescind such rule change and restore the practice of providing city letter carriers with a union representative of their own choosing and before changing this practice, notify and bargain with the Union about any decision to make such change and the effects of such change to agreement or a good-faith impasse.

[Recommended Order omitted from publication.]