Recent Developments in the Weingarten Doctrine: The NLRB Shifts to the Right

Thomas V. Walsh

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ARTICLES

RECENT DEVELOPMENTS IN THE WEINGARTEN DOCTRINE: THE BOARD SHIFTS TO THE RIGHT

A decade ago, the Supreme Court, in NLRB v. Weingarten, endorsed the policy that an employee has the right, under section 7 of the National Labor Relations Act, to be accompanied by a representative when summoned to an interview which the employee reasonably believes may result in the imposition of discipline. An employer's denial of this right, the Court said, is an unfair labor practice under section 8(a)(1) of the Act.

1. 420 U.S. 251 (1975). In NLRB v. Weingarten, an employer interviewed an employee suspected of theft. Id. at 254. The employer denied the employee's requests to admit a union representative to the meeting. Id. Although no discipline was administered, the union instituted an unfair labor practice proceeding concerning the refusal to allow a representative at the interview. Id. at 255-56.

2. 29 U.S.C. § 157 (1982). Section 7 of the National Labor Relations Act (the Act) provides that "employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Id.

3. 29 U.S.C. §§ 151-69 (1982). The Act, commonly known as the Wagner Act, was passed in 1935; it sought to enhance the power of labor to equal roughly that of management in order to promote industrial peace during the Depression. See generally B. Taylor & F. Witney, Labor Relations Law 153-60 (1971).

4. 420 U.S. at 253. See also J. Weingarten, Inc., 202 N.L.R.B. 446, 449-50 (National Labor Relations Board decision establishing the section 7 basis of the representation right), enforcement denied, 485 F.2d 1135 (5th Cir. 1973) (holding that section 7 does not extend to merely investigative interviews). The Supreme Court found the construction of section 7 employed by the National Labor Relations Board (NLRB) to be a "permissible" one. 420 U.S. at 260. This construction is universally recognized, even by the seemingly hostile opinions of the current NLRB. See Sears, Roebuck & Co., 274 N.L.R.B. No. 55, slip op. —— (Feb. 22, 1985), 118 L.R.R.M. 1329, 1330 (1985).

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While the decision outlined the elements of the employee's right to representative accompaniment, the details of the application of this right have been wrestled with by the National Labor Relations Board (hereinafter "the Board" or "the NLRB") and the courts for ten years. It is suggested that expansion of these rights, which reached a peak under President Carter's Board, has begun a process of reversal fueled by the pro-management philosophies of the Reagan Board. This article will review three recent decisions of the NLRB in the Weingarten area: Taracorp Industries, Sears, Roebuck and Co., and Prudential Insurance Co.

of section 7 basis for the representational rights).

6. See 420 U.S. at 256-60. The Court in Weingarten first determined that the representation right springs from the section 7 protection of concerted action undertaken by employees for their mutual aid and protection. Id. at 256-57. Second, the Court said, the representation right can only be triggered by the employee's request. Id. at 257. Third, the opinion stated that the right only arises in situations where the employee reasonably believes discipline will result from the investigation. Id. Fourth, the Court attenuated the impact of this right on the employer by permitting the employer to decline to conduct the interview under such conditions and allowing the employer to pursue the investigation through independent means. Id. at 258. This provision leaves the decision up to the employee, who could choose to consent to the interview without his representative or to forgo any interview and its attendant benefits. Id. Lastly, the Court characterized the function of the representative as that of an assistant to the employee, possibly clarifying facts, or suggesting other employees who have knowledge of them. Id. at 259-60. Not only need the employer not bargain with the representative, he need not listen, at that time, to anyone but the employee. Id. at 260.

7. See, e.g., Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 411 (9th Cir. 1978) (rights do not attach at an interview conducted merely to explain disciplinary action); NLRB v. Certified Grocers of California, Ltd., 587 F.2d 449, 451 (9th Cir. 1978) (meeting where employer warns employees fails to give rise to Weingarten rights); Mt. Vernon Tanker Co. v. NLRB, 549 F.2d 571, 574 (9th Cir. 1977) (formal logging of charges against a seaman was not an investigative interview in the Weingarten sense). See generally Hill, We Only Promised You a "Weingarten" . . . , 6 OREA. CITY U.L. REV. 395, 401-08 (1981) (noting the impact of various courts' constructions of Weingarten rights and their subsequent impact on Board decisions); Comment, The Repercussions of Weingarten: An Employee's Right to Representation at Investigatory Interviews, 64 MARQ. L. REV. 173, 178-201 (1980) (broad survey of caselaw construing Weingarten principles in particular applications).


9. 273 N.L.R.B. No. 54 (Dec. 12, 1984), 117 L.R.R.M. 1497 (1984). In Taracorp, the Board reversed the earlier NLRB precedent, Kraft Foods, Inc., 251 N.L.R.B. 598, 605 (1980). 273 N.L.R.B. No. 54, slip op. at 4, 117 L.R.R.M. at 1497. The Taracorp decision banned any "make-whole" remedy for violation of employee rights where discipline was meted out "for cause" and not for the employee's assertion of Weingarten rights. 273 N.L.R.B. No. 54, slip op. at 7 n.12, 117 L.R.R.M. at 1499 n.12. "Make-whole" remedies are those which seek to place the employee in the same position he enjoyed prior to the
These cases highlight the retrenchment of the Board from the expansion of employee rights and represent the concurrent increase in recognition of employers' rights. Each of these cases marks a regression within the principles of the *Weingarten* doctrine. It is submitted that these decisions evidence an attempt by the NLRB to implement an ideological shift and to nullify the *Weingarten* decision, an endeavor which may achieve practical results, but leaves a residue of weak, unsound law.

I. *Weingarten* Violations and the Make-Whole Remedy

The *Taracorp* Board began its current revision of the *Weingarten* doctrine with a limitation of the doctrine's remedial power. The issue of remedies available to correct or prevent unfair labor practices in the *Weingarten* area revolves around the construction of National Labor Relations Act section 10(c), which provides that employees disciplined for cause are ineligible for make-whole relief. The NLRB had not always applied the plain meaning of the "for cause" wording of the provision. In the 1980 *Kraft Foods,* violation; they include, most commonly, reinstatement and back pay. *See R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining* 536-37 (1976).


12. *Cf. Modjeska,* supra note 8, at 95-131 (notes the haste with which the current Board applied this Administration's philosophies).

13. *See infra* notes 27-58 and accompanying text (discussing *Taracorp*); *infra* notes 88-116 and accompanying text (discussing *Sears, Roebuck*); *infra* notes 147-54 and accompanying text (discussing *Prudential*).


15. 29 U.S.C. § 160(c) (1982). Section 160(c) provides in pertinent part: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." *Id.*

16. *See, e.g., United States Postal Service,* 241 N.L.R.B. 141, 141 (1979) (fruit of criminal investigation conducted by employer cannot be used to discipline employee unless union representative was permitted to attend criminal interview); Anchortank, Inc., 239
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In decision, the Board established a test for the applicability of make-whole remedies.\textsuperscript{17} If an employee is disciplined for conduct which was the subject of an interview where Weingarten rights were violated, make-whole relief will be available unless the employer demonstrates that the disciplinary decision was not based on information gained at that interview.\textsuperscript{18} The Circuits, however, did not endorse (nor completely reject) the NLRB test of Kraft Foods.\textsuperscript{19}

N.L.R.B. 240, 241 (1978) (employer's failure to honor Weingarten rights rendered unlawful a discharge otherwise lawful), modified, 618 F.2d 1156 (5th Cir. 1980); Potter Electric Signal Co., 237 N.L.R.B. 1289, 1292 n.8 (1978) (breach of Weingarten safeguards "tainted not only the conduct of the interview, but any investigation subsequently conducted"), enforcement denied, 600 F.2d 120 (8th Cir. 1979); Certified Grocers of California, Ltd., 227 N.L.R.B. 1211, 1215 (1977) (suspension of employee unlawful even though it stemmed from investigation of his allegedly low productivity), enforcement denied, 587 F.2d 449 (9th Cir. 1978).


18. Id. Initially, under the Kraft Foods test, the Board determines if the General Counsel has made a \textit{prima facie} showing that a make-whole remedy is appropriate. Id. This showing is achieved by establishing that there was an interview at which Weingarten rights were violated and that the employee involved was disciplined for the conduct which was the subject of the interview. Id. Upon this showing, the burden then shifts to the respondent employer to demonstrate that the decision to impose discipline upon the employee was not based on information obtained at the unlawful interview. Id. If the employer meets this burden, a make-whole remedy will not be applied; the Board will be limited to a cease-and-desist order. Id.

19. See Pacific Tel. & Tel. v. NLRB, 711 F.2d 134, 137-38 (9th Cir. 1983). The Pacific Tel. & Tel. court, the only one to consider directly the Kraft Foods test, held the NLRB standard to be incorrect, and found the existence of "cause" ended the inquiry. Id. The Eighth Circuit elucidated the elements of the "for cause" test of section 10(c). See NLRB v. Potter Elec. Signal Co., 600 F.2d 120, 123-24 (8th Cir. 1979). The court harkened back to the analysis of section 10(c) suggested by the Supreme Court in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964). 600 F.2d at 124. The Fibreboard Court held that the legislative history of section 10(c) showed the congressional intent that union activity cannot be a shield for employee misconduct. 379 U.S. at 217 n.11. Therefore, according to Potter Elec., an employee's discharge for malfeasance cannot give rise to a make-whole remedy regardless of the existence of a Weingarten violation. 600 F.2d at 123.

Other circuits accepted the possibility of full relief despite the strictures of section 10(c). For example, the Seventh Circuit proposed a modified Kraft Foods test under which the employer would escape liability by showing the existence of evidence, independent of the unlawful interview, sufficient to support discipline. See NLRB v. Illinois Bell Tel. Co., 674 F.2d 618, 623 (7th Cir. 1982). Similarly, the Sixth Circuit developed a standard under which the employer's burden was met by the mere existence of independent evidence, without a showing of reliance or sufficiency. See General Motors Corp. v. NLRB, 674 F.2d 576, 577-78 (6th Cir. 1982).

Other non-Weingarten cases have construed section 10(c). See, e.g., NLRB v. Haberman Const. Co., 641 F.2d 351, 361-62 (5th Cir. 1981) (remedies seeking to ameliorate conditions which would exist in any event are \textit{punitive} and unenforceable); Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 409 (9th Cir. 1978) (section 10(c) will not bar make-whole remedy
A. Taracorp: Board Reversal

In Taracorp, the Board overruled the Kraft Foods standard finding that it fails under a section 10(c) analysis, as well as under general policy grounds. The decision reads section 10(c) as a restriction upon the issuance of make-whole remedies, which will not be available if the discipline is imposed for cause. Only where the discipline was the result of an unfair labor practice, that is, not for cause, will the employee be eligible for the full remedy. In the Weingarten setting, this rule is limited to situations where employees are disciplined for asserting their Weingarten rights. Absent the required nexus between the assertion of Weingarten rights and the discipline, a make-whole remedy is barred as

where sufficient nexus exists between unfair labor practice and discipline, modified, 681 F.2d 1184 (9th Cir. 1982).

20. 275 N.L.R.B. No. 54, slip op. at 4, 117 L.R.R.M. at 1498; see supra note 18.

21. 275 N.L.R.B. No. 54, slip op. at 4, 117 L.R.R.M. at 1498. The Board stated that "make-whole relief in the context of a Weingarten violation is contrary to the specific remedial restriction contained in Section 10(c), the general remedial framework of the Act, and, independent of those restrictions constitutes bad policy." Id.

22. Id. at 5, 117 L.R.R.M. at 1498. The Board in Taracorp cited the language of the Supreme Court in Fibreboard Paper Products which barred application of the make-whole remedy for discipline based on employee misconduct. Id. at 5 n.9, 117 L.R.R.M. at 1498 n.9.

23. 275 N.L.R.B. No. 54, slip op. at 6, 117 L.R.R.M. at 1499. Where an employer unlawfully imposes work quotas without due bargaining, employees discharged for failing to perform adequately under them can be reinstated since the discipline arose directly from the employer's unfair labor practice. Id. at 6 n.10, 117 L.R.R.M. at 1499 n.10.

24. 275 N.L.R.B. No. 54, slip op. at 7 n.12, 117 L.R.R.M. at 1499 n.12. The Taracorp Board reasoned that employee discharges for cause will not be remedied regardless of the accompanying Weingarten violation because the worker's misconduct was the basis of the discipline, not the Weingarten breach. Id. at 7-8, 117 L.R.R.M. at 1498; see also Montgomery Ward & Co. v. NLRB, 664 F.2d 1095, 1097 (8th Cir. 1981) ("employees effected their own discharge . . . the [Weingarten] violation was simply incidental").


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"punitive."25 The Board also criticized the elaborate workplace rules which have developed around the Weingarten doctrine as "bad policy," and as exceeding the scope of the original decision.26

The decision to reverse Kraft Foods was based primarily on the current Board's reading of section 10(c).27 The key phrase in this section is "for cause."28 Taracorp defines "cause" by stating the oft-cited proposition that "[m]anagement can discharge for good cause, bad cause, or no cause at all" provided that the purpose behind such action is not contrary to the NLRA.29 This formulation means "cause" is any reason (or no reason) which is not prohibited by law.30 According to the Board, the purpose behind the enactment of section 10(c) was to bar interference with an employer's right to do that which he is not prohibited from doing.31 The Board supports this interpretation with the Supreme Court's analysis of section 10(c) from the 1964 Fibreboard Paper Products Corp. v. NLRB decision.32

Fibreboard held that section 10(c) precludes reinstatement for employees discharged for misconduct, essentially defining "cause" as misconduct.33 A closer review of the legislative history dis-
cussed in *Fibreboard* establishes that the meaning of "cause" in section 10(c) is indeed "misconduct." The intent of Congress in the passage of this reform provision was to bring an end to a perceived NLRB practice of reinstating malfeasant employees by inferring that the discipline was imposed due to their union involvement, rather than their misconduct. The trigger, then, for the restrictions of section 10(c) is a finding of misconduct, or another affirmative basis for discipline. The *Taracorp* definition of cause is any reason not prohibited. The Board's reliance on *Fibreboard* is inapposite; *Fibreboard* noted the Congressional intent to apply a misconduct standard. It is suggested that misconduct under *Fibreboard* is a substantive term which requires an affirmative finding of malfeasance. This meaning does not comport with the *Taracorp* standard which enables an employer to discharge an employee at will, so long as not for a prohibited reason.

The finding of malfeasance needed to trigger the section 10(c) remedial restriction may result from an investigative interview of...
the type contemplated under *Weingarten*. The Supreme Court established the employer's duty to allow a representative to be present at the interview. Further, the presence of the representative was found to benefit each party. A breach of *Weingarten* rights may be considered to result in a faulty finding of "cause." It is submitted that if the finding of misconduct ("cause") is suspect, then the restrictions of section 10(c) do not necessarily become operative and make-whole remedies should be available.

It is suggested that the following standard would best effectuate *Weingarten* rights while protecting the legitimate prerogatives of the employer: an employee will not be eligible for reinstatement if the employer can show sufficient evidence of misconduct, which was gained independently of the illegal interview. The employer would not be required to show that the unlawfully obtained evidence was not used, but only that there existed independent evidence of sufficient weight to enable an employer to determine the employee's malfeasance.

40. *See Weingarten*, 420 U.S. at 257. The Supreme Court, in outlining the scope of the *Weingarten* rights, specified that the rights arise only where the employee reasonably believes disciplinary action will ensue from the interview. *Id.; see also Comment*, supra note 7, at 190 (discussion of the employee's reasonable belief). It is submitted that this requirement contemplates a similar "misconduct" standard in *Weingarten* cases, since the only way in which an employee can attain a sense of impending discipline is if he believes the employer has reason to commence an investigation.


42. *Id.* at 262. The *Weingarten* representative can assist an employee "too fearful or inarticulate" or "too ignorant to raise extenuating factors." *Id.* at 265. The employer is aided by the elicitation of facts and the time saved by the representative's assistance in expediting the matter. *Id.* The Court analogized the contribution of the representative to the first stages of arbitration; such involvement can be advantageous to each party. *Id.* at 262 n.7; *see also Gregory*, supra note 8, at 613-15 (discussion of the role of the representative).

43. 420 U.S. at 263-64. The *Weingarten* Court recognized that the representative may have an impact on the employer's finding, not the least significant of which is vindication of the employee. *Id.* Failure to observe the *Weingarten* protections have been held by the Board to "taint" the employer's investigation. Potter Elec. Signal Co., 237 N.L.R.B. at 1292 n.8.

44. *Cf. NLRB v. John Zink Co.*, 551 F.2d 799, 803 (10th Cir. 1977) (lack of certainty will not preclude an award where employer's wrongful acts contribute to the uncertainty); *see also NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572-73 (5th Cir. 1966).

45. *See Weingarten*, 420 U.S. at 260; *see also supra* note 6. Effectuation of the policies of the NLRA is a duty placed upon the Board by section 10(c). *See 29 U.S.C. § 160(c) (1982).*

46. *See NLRB v. Illinois Bell Tel. Co.*, 674 F.2d 618, 623 (7th Cir. 1982).

47. *Cf. id.* The proposed standard allows the employer to show evidence to support the disciplinary action. *Id.* It is suggested that the sufficiency requirement should not be overly
This approach would vitalize the employee's protections and, by continuing the availability of the make-whole remedy, foster greater attention by employers to *Weingarten* rights. The employer's interests are served by the assurance that an employee disciplined for obvious misconduct will have no remedy. Where the employer has no independent evidence, the safeguards remain because this setting is fraught with the potential evils foreseen by the Supreme Court.

The *Taracorp* Board's second basis for restricting make-whole remedies was to prohibit the Board from engaging in punitive measures. To avoid being punitive, a Board order must be an exercise geared to restrain violations and to remove the consequences of such violations. The remedies of reinstatement and back pay are among the NLRB's most effective weapons to restrain violations. Likewise, it is suggested that discipline stemming from an unlawful interview is curable by the make-whole remedy.

The *Taracorp* Board's third reason for its decision was that the "labyrinth of rules" surrounding *Weingarten* constitutes "bad policy." It is submitted that the veracity of this statement is irrelevant; the Supreme Court has declared that representation rights burdensome, but something more than the mere existence of independent evidence would suffice. To place a greater burden on the employer would put the Board in the position of umpiring the employer's personnel management, which is not a proper function of the NLRB. Cf. NLRB v. Jones & McLaughlin Steel Corp., 301 U.S. 1, 45 (1936) ("Act does not interfere with the normal exercise of the right of the employer to select . . . or to discharge"); accord Intermountain Rural Elec. Ass'n v. NLRB, 732 F.2d 754, 760 n.8 (10th Cir.), cert. denied, ___ U.S. ___, 105 S. Ct. 327 (1984); G & H Prods. v. NLRB, 714 F.2d 1397, 1404 (7th Cir. 1983).
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are necessary to effectuate a fundamental purpose of the Act, eliminating the inequality of bargaining power between employer and employee. As inconvenient or insignificant as they are susceptible of being characterized, these rights still exist as section 7 rights, and as such are due the deference afforded to other statutory rights.

II. The Application of Weingarten Protection to Unorganized Employees

The second branch of the Weingarten doctrine recently curtailed by the NLRB was its applicability to non-organized employees. Generally, court and Board opinions have supported the extension of Weingarten principles to unorganized workplaces, primarily on section 7 grounds. The Board, however, reversed existing precedent in 1985 in Sears, Roebuck & Co., holding that Weingarten protections depend upon the presence of an organized representative.


60. See supra note 59 and infra note 71.


64. 118 L.R.R.M. at 1329-30.

65. See, e.g., PPG Indus., Inc., 251 N.L.R.B. 1146, 1166 (1980) (union or non-union
Corp., the Board recognized that Weingarten rights spring from section 7 protection of concerted activity and that this concerted activity can only be triggered by the employee's request for assistance. Furthermore, the Board held that since the right arises under section 7 and since section 7 rights apply in both union and non-union settings, Weingarten rights must be extended to unorganized employees. The Materials Research rationale enjoyed wide support in the circuits.

status of representative irrelevant); Livingston Shipbuilding Co., 249 N.L.R.B. 1, 10 (1980) (Weingarten protections extend to unrepresented employees); Glomac Plastics, Inc., 234 N.L.R.B. 1509, 1511 (1978) (representation rights grounded on section 7, which applies to all employees).

67. Id. at 1011. The Board in Materials Research noted the Supreme Court's finding in Weingarten that the employee's request for aid constituted "concerted activity" under section 7. Id. (citing 420 U.S. at 260). Weingarten found that the representative in this setting not only safeguards the particular employee, but adds to the security of all employees. 420 U.S. at 261.

In Materials Research the Board found that Weingarten rights do not emanate from the section 9 rights of union exclusivity. 262 N.L.R.B. at 1012. Section 9 provides that the formally designated collective bargaining representative "shall be the exclusive representatives of all the employees . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[.]" 29 U.S.C. § 159(a) (1982). The Weingarten representative's role was found by the Board not to rise to the level of a bargaining representative. 262 N.L.R.B. at 1012.

68. Materials Research, 262 N.L.R.B. at 1012.
69. Id. The Board noted that "it is by now axiomatic" that section 7 rights apply regardless of representational status. Id. See also Koch Supplies Inc. v. NLRB, 646 F.2d 1257, 1259 (8th Cir. 1981) (concerted activities need not take place in union setting if the employee contemplates group activity benefitting other employees); Vic Tanny Int'l Inc. v. NLRB, 262 F.2d 237, 241 (6th Cir. 1980) (Congressional intent behind section 7 was to protect concerted activity by employees without regard to organizational status); United Packinghouse, Food, and Allied Workers Int'l v. NLRB, 416 F.2d 1126, 1135 (D.C. Cir. 1969) (concerted activity protected whether channeled through a union or not).

70. Materials Research, 262 N.L.R.B. at 1014. The "inequality of power" perceived by the Weingarten Court is present whether there is a union or not; in order to combat it, it is essential that unrepresented employees look to each other for mutual aid and protection. Id.

71. See E.I. DuPont de Nemours & Co. (Chestnut Run) v. NLRB, 724 F.2d 1061, 1065-66 (3d Cir. 1983), vacated, 735 F.2d 296 (3d Cir. 1984). In Chestnut Run the court noted that the Weingarten majority had to be aware of the applicability of the section 7 rights outside the union setting, and if the Supreme Court's holding was intended to be limited to organized workers it could have so stated. 724 F.2d at 1065-66; accord, E.I. DuPont de Nemours & Co. v. NLRB, 707 F.2d 1076, 1078 (9th Cir. 1983) (since section 7 is not limited to organized workers, Weingarten rights cannot be); Anchortank, Inc. v. NLRB, 618 F.2d 1158, 1157-58 (8th Cir. 1980) (employee's request for co-worker's representation is protected concerted activity under section 7); Keokuk Gas Service Co. v. NLRB, 580 F.2d 328, 334 n.14 (8th Cir. 1978) (section 7 applicable to non-union employees); Oil Chemical and Atomic Workers Int'l Union v. NLRB, 547 F.2d 575, 592 (D.C. Cir. 1976) (protection
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A. Board Reversal: Sears, Roebuck & Co.

The Sears, Roebuck & Co. decision,72 issued two months after Taracorp,73 held that the Materials Research rationale was incorrect74 and “fully endorse[d]” the dissenting opinion in Materials Research,75 thereby subsuming the rationale of the dissent into the new opinion.76

Chairman Van de Water’s Materials Research dissent noted that employers are not obliged to discuss terms and conditions of employment with any employee representative unless the representative is duly certified.77 Absent a union, he said, the employer is free to deal with the employees individually.78 The Materials Research rule, the dissent held, sacrifices this right to deal individually by requiring recognition of a non-union representative.79 The Chairman equated the Weingarten representative with a collective bargaining agent;80 the activities of the Weingarten representative, like those of a union representative, constitute “dealing with” the employer, he said.81 A body which “deals with” an employer con-
cerning workers' terms and conditions of employment, continued
the opinion, is within the statutory definition of a "labor organization." Therefore, concluded the Chairman, forced recognition of a non-union Weingarten representative requires the employer to bargain with a non-certified union without the NLRA-required majority election.

The Sears, Roebuck decision embellished upon the Van de Water dissent by disputing the blanket protection found in section 7 by Materials Research. The Board held that union and non-union employees do not enjoy the same degree of protection under the Act. The organizational structure contemplated by the NLRA denotes the primacy of formal worker organization; therefore,
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Sears, Roebuck held that non-union employees are ineligible for coverage under the Weingarten doctrine.\(^{87}\)

The Sears, Roebuck rationale did not contest that Weingarten rights emanate from section 7,\(^ {88}\) nor did it refute the accepted protection of concerted activity.\(^ {89}\) Chairman Van de Water's dissent to Materials Research observed that although the rights were available to all, certain rights require the presence of a collective-bargaining representative.\(^ {90}\) An example of these rights is the right to engage in collective bargaining;\(^ {91}\) although existing under section 7, it cannot become functional without a union.\(^ {92}\) Further, once this right becomes effective, it can only be exercised collectively and not by individuals.\(^ {93}\)

Weingarten rights were characterized in the Sears, Roebuck decision as bargaining rights.\(^ {94}\) To support this construction, the Board had to transform the Weingarten representative into a bargaining agent.\(^ {95}\) Chairman Van de Water's Materials Research dissent applied the Supreme Court's Cabot Carbon rationale, deter-
mining that the *Weingarten* representative “deals with” the employer. Moreover, under *Cabot Carbon*, an entity that “deals with” an employer is a “labor organization;” therefore the *Weingarten* representative is a labor organization. Chairman Van de Water noted, however, that the employer can only be required to deal with a *bona fide* union; thus, absent a statutory representative, the employer may deal unilaterally with the workers as individuals, and avoid recognition of *Weingarten* representatives.

It is suggested that the *Sears, Roebuck* rationale fails in several respects. The entity discussed by the Supreme Court in *Cabot Carbon* was a formal body, created and dominated by the employer. This organization bore many of the characteristics of a statutory representative and thus was found to conform to the section 2(5) definition of a “labor organization.” A *Weingarten* representative’s activities, however, are limited to a small core of suggestions.

96. See *Materials Research*, 262 N.L.R.B. at 1016 n.30 (Van de Water, dissenting). “[A]n entity ‘deals with’ an employer when, on behalf of employees, it engages in discussions with the employer on matters relating to terms and conditions of employment, makes various proposals, and offers suggestions to the employer.” Id. This analysis was also employed in the *Sears, Roebuck* decision. See 118 L.R.R.M. at 1331.

97. See *Cabot Carbon*, 360 U.S. at 213.

98. See *Sears, Roebuck*, 118 L.R.R.M. at 1331.

The Board has held that the representative must be allowed to speak, and is free to make proposals and suggestions or to offer alternate discipline . . . . Such functions constitute ‘dealing with’ the employer and ‘dealing with’ an employer is a primary indicium of labor organization status as well as a traditional union function. Id.

99. See *Materials Research*, 262 N.L.R.B. at 1019 (Van de Water, dissenting). “[I]n the absence of a recognized or certified union an employer . . . cannot be compelled to recognize any individual, group or organization as a representative . . . .” Id.

100. Id.; see also *Sears, Roebuck*, 118 L.R.R.M. at 1330.

101. See *Cabot Carbon*, 360 U.S. at 218.

102. Id. In *Cabot Carbon*, the employer established “employee committees” to consider “ideas and problems of mutual interest.” Id. at 205. The Supreme Court held that these committees were “labor organizations” under section 2(5), id. at 211-13, even though the committees did not engage in collective bargaining. Id. at 212-13.

“Dealing with” is a section 2(5) standard, and it includes discussions covering the whole scope of the employment relationship, as distinguished from “bargaining” in that the latter carries with it the “unfettered power” of the party to insist on its position. Id. at 214. The committees, once determined to be labor organizations, were subject to the section 8(a)(2) bar of employer domination, 29 U.S.C. § 158(a)(2) (1982). See 360 U.S. at 218.

The committees included employees and dealt with grievances, labor disputes, wages, hours and other conditions. Id. at 213-14. The conduct engaged in by the committees were clearly *prospectus*; that is, the proposals and the suggestions made on behalf of the employees were intended to affect future terms and conditions. Id.
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concerning a present matter;\textsuperscript{103} his role is not intended to be adversarial;\textsuperscript{104} he cannot initiate discussion of general terms of employment;\textsuperscript{105} and he is powerless to propose alteration of the subject employee's duties.\textsuperscript{106} Since the Weingarten representative can only engage in activities similar to the Cabot Carbon committees in a most attenuated way,\textsuperscript{107} it is suggested that the representative does not bear the same indicia of "dealing with" the employer as contemplated by the Cabot Carbon Court.

Assuming that a Weingarten representative does "deal with" an employer, it remains doubtful that he can properly be considered a "labor organization."\textsuperscript{108} Generally, such a finding is predicated upon the existence of a more formal type of organization.\textsuperscript{109} Even accepting the Weingarten representative as a "labor organization" "dealing with" an employer, it is submitted that the Board's rationale still fails. The Board's position is that a properly qualified union is the exclusive agent of the employee and that, under section 8(a)(5), the employer must deal with that agent.\textsuperscript{110} Since the

\textsuperscript{103} See Weingarten, 420 U.S. at 260. The representative deals only with the individual employee; the assistance provided can only relate to the matter under investigation. 420 U.S. at 259-60. See generally Gregory, supra note 8, at 615-14.

\textsuperscript{104} See Weingarten, 420 U.S. at 265.

\textsuperscript{105} See id. at 259. "[T]he employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview . . . . [W]e are not giving the Union any particular rights . . . . which it otherwise was not able to secure during collective-bargaining negotiations." Id.

\textsuperscript{106} See id.

\textsuperscript{107} Compare Cabot Carbon, 360 U.S. at 213-14 (committees considered terms and conditions of employment as they affected employees unit-wide with Weingarten, 420 U.S. at 260 (representative deals with the investigatory interview of one employee).\textsuperscript{105}

\textsuperscript{108} See 29 U.S.C. § 152(5) (1982); supra note 82.

\textsuperscript{109} See, e.g., East Chicago Rehabilitation Center v. NLRB, 710 F.2d 397, 404 (7th Cir. 1983) (spontaneously striking workers had neither organization nor purpose of dealing with employer, and therefore, were not labor organization), cert. denied, 465 U.S. 1065 (1985); NLRB v. Steamway Div. of Scott & Fetzer Co., 691 F.2d 288, 294 (6th Cir. 1982) ("labor organization" is involved in an ongoing association between management and employees); NLRB v. Long Beach Youth Center, 591 F.2d 1276, 1278 (9th Cir. 1979) (employees who met, signed union authorization cards, and drew up demands not a labor organization). It is suggested that the common thread running through these decisions is the presence of some sense of permanence, an organization which addresses matters affecting employees' terms and conditions of employment both at the moment as well as in the past and in the future. Likewise, it is submitted, the Weingarten representative exists for the moment, and carries no rights or obligations beyond the termination of the interview.

\textsuperscript{110} See Materials Research, 262 N.L.R.B. at 1017 (Van de Water, dissenting). Section 9(a) provides that "representatives designated . . . . for the purposes of collective bargaining . . . . shall be the exclusive representatives of all the employees . . . . for the purposes of
statutory obligation only applies to the union, the employer need not deal with a Weingarten representative. The linchpin of this argument is the section 8(a)(5) provision; the Board's interpretation of it is erroneous because the Board refers to the employer's duty under that section to deal with the union. The provision states that the duty is to bargain. As the Cabot Carbon Court stated, "bargain" and "deal with" were neither understood nor intended by Congress to be synonymous. The Sears, Roebuck doctrine, as a necessary component of its theoretical basis, elevates the Weingarten representative to the level of a certified union by noting the representative's attenuated similarity to a "labor organization," an entity which in itself has no power to compel bargaining.

Weingarten rights should not be the subject of such tortured analyses, attempting to categorize them as bargaining rights, when the Supreme Court has conclusively recognized them as elements of the section 7 protection of concerted activities.

collective bargaining in respect to rates of pay, wages . . . or other conditions of employment." 29 U.S.C. § 159(a) (1982). Section 8(a)(5) states that "[i]t shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5) (1982).

111. Sears, Roebuck, 118 L.R.R.M. at 1330.

112. See Materials Research, 262 N.L.R.B. at 1017 (Van de Water, dissenting). "Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to deal with the employees' exclusive representative . . . ." Id.


114. See Cabot Carbon, 360 U.S. at 211 (legislative history of Wagner Act indicates that Congress intended to reject term "bargaining" and apply "dealing" instead). See id. at 211-12.

115. See Sears, Roebuck, 118 L.R.R.M. at 1330; supra note 82. Although the Court in Cabot Carbon found the employer-dominated committees were "labor organizations," it did not ascribe any extraordinary power to them. 360 U.S. at 214. Cabot Carbon applied the NLRA sanctions against employer domination of labor organizations to the employee committees. Id. at 218. It is suggested that if the Weingarten representative is a labor organization, and if the NLRA requires the employer to deal with this organization under sections 9(a) and 8(a)(5), then the Weingarten representative must have full bargaining power. This requirement would make the representative a far more formidable figure, and it is submitted that it is unlikely the Reagan Board would seek to elevate the Weingarten representative to such a potent status.

116. See Weingarten, 420 U.S. at 256-57, 260. The Board explained the Weingarten doctrine in the Sears, Roebuck decision as follows:

Weingarten rights stem from an employer action (an interview) which is reasonably perceived by an employee as affecting his or her terms and conditions of employment (the potential imposition of discipline). The Board and the Supreme Court have determined that an employee should not be required to participate in such an

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III. UNION WAIVER OF Weingarten RIGHTS

In Prudential Insurance Co., the NLRB devised a third inroad on the Weingarten doctrine, determining that a union has the authority to waive its members' Weingarten rights. The decision settled an issue that had been unresolved since the announcement of the Weingarten opinion.

The Supreme Court previously considered questions of union waivability of non-Weingarten rights, determining that waivers not interfering with the employees' union selection were valid. Waivers not interfering with the selection process were characterized as waivers of economic rights, and, therefore, permissible.

employer action alone, without his or her duly designated collective-bargaining representative should such representation be requested.

118 L.R.R.M. at 1329-30.
118. 119 L.R.R.M. at 1075.
119. See 420 U.S. at 270-75 (Powell, J., dissenting). Justice Powell noted that the question of whether an employee's section 7 right to a Weingarten representative could be waived by his union went unanswered by the majority. 420 U.S. at 275 n.8 (Powell, J., dissenting).

The NLRB also avoided deciding this issue, but, one member, Chairman Miller, in 1972, indicated his view that representational rights at investigatory interviews can be waived by the collective bargaining agreement. See Western Electric Co., 198 N.L.R.B. 623, 626 (1972). Subsequent decisions (prior to Prudential) addressed the question only hypothetically, "assuming" such waivers were possible without determining the issue. See, e.g., United States Postal Service, 256 N.L.R.B. 78, 80-81 (1981) (contract clause insufficient to effect waiver), modified, 689 F.2d 835 (9th Cir. 1982); Prudential Ins. Co., 251 N.L.R.B. 1591, 1592 (1980) (contract clause did not address Weingarten representative, so no waiver was effectuated), enforcement denied, 661 F.2d 398 (5th Cir. 1981). Of all the circuit courts, only the Fifth Circuit reached the question, holding that since the Weingarten rights are "fundamental" and other "fundamental" rights, such as the right to strike, have been held to be waivable, Weingarten rights must also be waivable. See Prudential Ins. Co. v. NLRB, 661 F.2d 598, 400 (5th Cir. 1981). Although the court apparently considered all "fundamental" rights under the NLRA to be fungible, no mention is made of the dichotomies between individual and collective rights, or between bargaining and concerted action rights. See id.

120. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1955). The Court accepted waiver only when satisfied that the full freedom of association inherent in the NLRA was protected. Id. Where an employee's free selection of a representative for collective bargaining is not influenced by the waiver, the waiver meets policy considerations and is held to be valid. Id.

121. NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974). The collective bargaining agreement in Magnavox permitted the employer to regulate the distribution of literature and the bulletin boards at the plant. Id. at 323. The Court recognized that the union waiver of the right to strike had been held permissible as a quid pro quo for the employer's acceptance of grievance and arbitration procedures. Id. at 325 (citing Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)). The waiver attempted in Magnavox, however, was of
The Court considered the impact of a union's waiver upon employees' concerted activities in Metropolitan Edison Co. v. NLRB. There, the Court found that union allowance of stronger penalties for officials who breach a no-strike clause was theoretically sound as it was "closely related to the economic decision a union makes when it waives its members' right to strike." A Second Circuit opinion summarized this analysis as follows: the union can waive the employees' rights to perform any lawful act if its purpose is the acquisition of economic benefit. These economic rights are waivable because the union, as the exclusive agent of the employee, subject to the duty of fair representation, is responsible for maximizing the employees' economic advantage. Thus, the workers and the union are seen as having a "commonality of interests" over economic matters, an identity of purpose which is lacking in the area of employee selection of a bargaining representative.

A. Prudential Insurance Co.

In Prudential, the NLRB held that a collective-bargaining agreement could waive employees' Weingarten rights. The decision communication rights at the plant. 415 U.S. at 325. This was not seen as an economic ploy. Id. Union manipulation of the means of communication in the workplace could chill the employees' full exercise of choice in selecting a bargaining representative as the union could close an avenue of publicity for campaigns adverse to it. Id. at 325-26.

123. Id. at 706. The collective-bargaining agreement in Metropolitan Edison contained a no-strike clause which was breached by union officials and members; the officials received harsher discipline than the rank-and-file employees although they did not lead the strike. 460 U.S. at 695-97. The NLRB found this to constitute discrimination against the union officials, which deprived them of their section 7 rights to engage in concerted activity. See id. at 703. The Court recognized that the bases for the validity of the earlier waivers were the "union's premise of fair representation" of the employees and that the selection process remained unfettered. Id. at 705 (citing Magnavox, 415 U.S. at 325). Fair representation involves the union's duty in bargaining to enhance its members' economic position. See Mastro Plastics, 350 U.S. at 280. The Metropolitan Edison Court summarized: "[A] union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative." 460 U.S. at 705-06.
124. Metropolitan Edison, 460 U.S. at 706.
126. Id.
127. Id. at 150-51.
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reviewed and applied *Metropolitan Edison*, which recognized the right of unions to bargain away statutory protections of individuals in order to secure collective gains. The Board noted that Weingarten rights, although triggered by one employee who alone has an immediate stake in the outcome, serve to protect all members of the bargaining unit. Since all employees are involved, their bargaining representative also gains an "important stake in the process." Therefore, Prudential holds, these rights are subject to being used by the union as a bargaining chip when negotiating with the employer.

The principles of *Metropolitan Edison* do not readily apply to Weingarten rights. The union, under the Supreme Court rationale, as the exclusive repository of the employees' right to bargain over terms and conditions of employment, is authorized to waive employee rights in the exercise of their bargaining function. The Weingarten representative does not carry any bargaining power, therefore there is less reason to sacrifice employees' rights. Also, the unfortunate use of the label "economic rights" by the Supreme Court makes it appear that only collective rights which contemplate economic gain for the unit are waivable; conversely, Weingarten rights are exercised by one members shall interfere with the rights of the Employer... [t]o interview any Agent with respect to any phase of his work without the grievance committee being present." *Id.* Although this clause pre-dated the development of Weingarten-style rights by many years and despite its reference to a "grievance committee," the present Board found that it constituted a clear and unmistakable waiver of the employees' Weingarten rights. 119 L.R.R.M. at 1075.


130. *See* 460 U.S. at 705.

131. 119 L.R.R.M. at 1075 (citing Sears, Roebuck, 274 N.L.R.B. No. 55, slip op. at 6-7, 118 L.R.R.M. at 1330). *See also* Weingarten, 420 U.S. at 260.

132. 119 L.R.R.M. at 1075. "Because the union's duty of fair representation allows for flexibility in collective bargaining negotiations with the employer, the Weingarten right, like the right to strike, is subject to being waived by the union." *Id.*

133. *Id.; see infra* notes 135-39 and accompanying text.

134. *See infra* notes 135-39 and accompanying text.


137. *Metropolitan Edison*, 460 U.S. at 705-06. In *Metropolitan Edison*, the Court limited the waiver power of unions to "economic rights." *Id.*

138. *Id.* at 705. The illustrations of "economic rights" provided by the Court in *Metropolitan Edison* are limited to those involving strikes and picket lines. *Id.*
employee.  

It is suggested that these apparent distinctions between *Weingarten* rights and "economic rights" do not prevent a finding of waivability. Under the Second Circuit's interpretation of *Metropolitan Edison*, the employees' "economic rights" are equated with the union's exercise of the collective rights of the employees. Individual employee rights exercised in conjunction with the union therefore are waivable. An employee's *Weingarten* request is therefore concerted activity, and in an organized workplace, it is exercised under the aegis of the union, which seeks to enhance or preserve the employees' terms and conditions. Both the union and the individual employee, therefore, share the commonality of interests necessary to ensure the integrity of the NLRA scheme of employee protections. It is suggested that for that reason union waiver of *Weingarten* rights is permissible.

The *Prudential* decision reaches this same conclusion but for possibly the wrong reason. The Board does not offer a rationale to explain how the "important stake" the union has in the *Weingarten* process translates into the ability to waive workers' rights. The Board recalled its recent holding in *Sears, Roebuck*, which limited the exercise of *Weingarten* rights to organized employees, and said that because the union has flexibility in conducting collective bargaining with the employer, *Weingarten* rights

139. See *Weingarten*, 420 U.S. at 262-63.
140. See *Niagara Machine*, 746 F.2d 145, 150 (2d Cir. 1984); supra notes 125-27 and accompanying text.
141. See *Niagara Machine*, 746 F.2d at 150. The Second Circuit, in *Niagara Machine*, describes economic rights as the rights that the employees - acting in concert through a collective bargaining agent - may exercise in attempts to gain economic advantage. *Id.* (citing NLRB v. Mid-States Metal Products, Inc., 405 F.2d 702, 705 (5th Cir. 1968)).
142. See *Niagara Machine*, 746 F.2d at 150.
143. See *Weingarten*, 420 U.S. at 260.
144. See *Materials Research*, 262 N.L.R.B. at 1012. The majority opinion in *Materials Research* recognized that, at an organized facility, the employee generally seeks the assistance of the union. *Id.*
146. Compare *Weingarten*, 420 U.S. at 260 (employee and union acting in concert to preserve employee's terms and conditions of employment) with *Niagara Machine*, 746 F.2d at 150-51 (union and employee share the same interest when pursuing economic goals).
147. See infra notes 148-54 and accompanying text.
148. See 119 L.R.R.M. at 1075.
149. See *id.*
The reliance on Sears, Roebuck makes it appear that the current Board viewed Weingarten rights as elements of the union's exclusive right of representation. It is suggested that the finding in Prudential that such rights are waivable hints that the Board based its position on the notion that Weingarten rights, like other representational rights, are subject to waiver. This would mark a return to the approach the pre-Weingarten Board espoused; that is, representation at investigatory interviews is part of the union's bargaining rights. This approach was abandoned when the concept developed that these rights arise not from the section 9(a) right of exclusivity, but from employees' section 7 rights to concerted action. Prudential, then, suggests a reinforcement of the Sears, Roebuck rationale; but, as Prudential notes, Weingarten is a section 7 right and, it is submitted, a waivability theory cannot properly be based on the union representation right.

IV. Conclusion

Authorities deliberating on labor issues are often anxious to affix their own brand of jurisprudence. Likewise, the Reagan Board, marking an ideological shift, was eager to remedy the perceived excesses of its predecessors.

The NLRB, in Taracorp, arguably sought to rectify a situation which permitted malfeasants to "get off on a technicality" and thus saddled the employer with both an unsatisfactory employee.
and an interference with managerial prerogatives. The Board's decision was based on an uncritical study of section 10(c) which, while susceptible to a differing analysis, is a good faith construction of the law. The result leaves the employee with a Board remedy of a cease-and-desist order, a measure least likely to address any injury the employee may have suffered and certainly least effective in creating any deterrence. It is suggested that this decision will act as a signal to employers to all but ignore Weingarten rights and is an attempt by the Board to effectuate a back-door reversal of Weingarten.

The Board's decision in Sears, Roebuck is less defensible. The Board, in desiring to limit Weingarten as much as possible, engaged in an unusual construction of both the role of the Weingarten representative and the statutory basis for the right. This interpretation has the immediate result of dispossessing all non-union employees from their Supreme Court recognized rights, further suggesting an attempt to neutralize Weingarten.

Standing on firmer footing is the Prudential decision. Insofar as it purports to follow the Supreme Court's Metropolitan Edison decision, Prudential is sound. The motivation for the decision, however, was probably the same as in Sears, Roebuck. To this extent, Prudential reaffirms an incorrect reading of Weingarten, and promotes the restrictive construction of the NLRA subscribed to by this Board.

158. See id. at 6.
159. See 29 U.S.C. § 160(a) (1982). The Board is bound, under section 10(c), to take affirmative action "as will effectuate the policies of the Act." Id. See generally Comment, NLRB Remedies - Moving into the Jet Age, 27 BAYLOR L. REV. 292, 292-304 (1975) (discussing adequacy of remedies).
160. See supra notes 88-116 and accompanying text.
161. See supra notes 81-85 and accompanying text.
162. See supra notes 86-87 and accompanying text.
163. See Sears, Roebuck, 118 L.R.R.M. at 1550.
165. See supra notes 129-32 and accompanying text.
166. See supra notes 147-54 and accompanying text.
167. See supra notes 155-54 and accompanying text.
168. Cf. Materials Research, 262 N.L.R.B. at 1018 n.36 (Van de Water, dissenting). While the Supreme Court stated that the nature of the Weingarten right is to engage in concerted activity at an adverse interview, 420 U.S. at 260, Chairman Van de Water stated
The philosophy of this Board is decidedly conservative and more pro-management, in comparison with its predecessors.\textsuperscript{166} The ideology the current Board espouses is perfectly valid; its judgment of labor policy may be that which is best suited to America in the eighties. However, the interplay of the Board's political beliefs and precedent leaves unsatisfying results.\textsuperscript{170}

While the \textit{Weingarten} doctrine is not the cornerstone of labor's rights, it was firmly established by the Supreme Court that it "plainly effectuates the most fundamental purposes of the Act."\textsuperscript{171} Undoubtedly, an employee's assertion of this right can be an inconvenience to the employer who may see it as an improper interference with his business; the principles of \textit{Weingarten} may even constitute unsound law,\textsuperscript{172} but this is not the issue. As stated, the Supreme Court has recognized the protected status of the rights; the Board may criticize that opinion, but they should not seek to nullify it. Good faith constructions of the law are the province of the NLRB; deliberate misconstructions to achieve a policy goal differing from the Court's are not only institutionally unsound, but create bad law.\textsuperscript{178}

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that the doctrine involved the employee right to be free from employer interference with the workers' representation by their duly chosen agent, 262 N.L.R.B. at 1018 n.36 (Van de Water, dissenting). The purpose of the Act is to promote the cause of labor to a point of theoretical equilibrium with management. 29 U.S.C. § 151 (1982). It is submitted that the Board's construction of \textit{Weingarten} rights belies a view of the NLRA as labor-repressive, rather than labor-expansive.

169. Modjeska, supra note 8, at 95.
170. See Bierman, supra note 156, at 551. An example of the effect of ideology is the language in \textit{Taracorp} decrying the "bad policy" of the earlier Boards. 273 N.L.R.B. No. 54, slip op. at 8-9. It is suggested that although this rationale was \textit{dicta}, the actual motivation for the three decisions discussed lies there. The Board members "believe that the expansionist approach to \textit{Weingarten} has disserved the labor-management community and that both parties would benefit from a refusal to grant make-whole remedies." 273 N.L.R.B. No. 54, slip op. at 9.
172. See Hunter, \textit{Weingarten Riddles: Answers from Metropolitan Edison?}, 36 N.Y.U. ANN. NAT'L CON. ON LABOR 12.1, 12-2 (1983). Board member Robert P. Hunter noted that "the whole gamut of the \textit{Weingarten} question may not be capable of common sense administration except within the framework of specific language of a collective agreement . . . ." \textit{Id.}
173. See Bierman, supra note 155, at 881-82.