

## ARTICLES

### HONING OUR *KRAFT*?: RECONCILING VARIATIONS IN THE REMEDIAL TREATMENT OF *WEINGARTEN* VIOLATIONS

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#### I. INTRODUCTION

Title I of the Labor Management Relations Act,<sup>1</sup> originally enacted and still commonly referred to as the National Labor Relations Act (“NLRA” or the “Act”),<sup>2</sup> is the nation’s most significant and comprehensive labor management legislation.<sup>3</sup> Among other things, the Act established the right of private sector employees to organize and bargain collectively<sup>4</sup> and otherwise act in concert with one another in their dealings with an employer.<sup>5</sup> The Act also created the National Labor Rela-

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1. 29 U.S.C. §§ 151–69 (2000).

2. See *Crilly v. Southeastern Pa. Transp. Auth.*, 529 F.2d 1355, 1358 (3d Cir. 1976); *Isbrandtsen Co. v. District 2, Marine Eng’rs Beneficial Ass’n*, 256 F. Supp. 68, 71–72 (E.D.N.Y. 1966).

3. See *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969) (describing the NLRA as “our most comprehensive national labor scheme”); *Falls Stamping & Welding Co. v. Int’l Union, United Auto., Aircraft & Agri. Implement Workers*, 485 F. Supp. 1097, 1135 n.13 (N.D. Ohio 1979) (describing the NLRA as “the primary federal statute regulating labor-management relations”).

4. See *Crilly*, 529 F.2d at 1358 (noting that the Act “guaranteed employees the right to organize and bargain collectively”); *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963) (observing that “the basic philosophy of the Act . . . is the encouragement of collective—as opposed to individual—bargaining”).

5. See *In re Detroit Auto Dealers Ass’n*, 955 F.2d 457, 461 (6th Cir. 1992) (discussing the “right of employees to act in concert against their own employer over a legitimate issue of working

tions Board (“NLRB” or the “Board”),<sup>6</sup> and charged the Board with primary responsibility for administering and enforcing the substantive provisions of the Act.<sup>7</sup>

Section 8(a)(1) of the NLRA<sup>8</sup> makes it an unfair labor practice for an employer to interfere with its employees’ right under Section 7 of the Act “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>9</sup> Other provisions of the Act authorize unfair labor practice claims to be presented to the Board,<sup>10</sup> and provide for the Board to conduct evidentiary hearings in connection with those claims.<sup>11</sup> If the Board finds that an employer has committed an unfair labor practice,<sup>12</sup> the Act generally authorizes the Board to award the aggrieved employee affirmative relief, including reinstatement and backpay.<sup>13</sup>

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conditions under § 7 of the National Labor Relations Act”).

6. See *NLRB v. Local 264, Laborers’ Int’l Union*, 529 F.2d 778, 782 (8th Cir. 1976) (“The NLRA, popularly characterized as the Wagner Act, was approved by Congress in 1935. The Wagner Act created the National Labor Relations Board . . .”) (citation omitted).

7. See *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952) (“Congress has made the Board the only party entitled to enforce the Act.”); *Baker Mfg. Co. v. NLRB*, 759 F.2d 1219, 1222 (5th Cir. 1985) (“Congress has charged the Board with the primary responsibility for enforcing the Act.”).

8. 29 U.S.C. § 158(a)(1) (2000). In pertinent part, Section 8(a)(1) states: “It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . .” *Id.*

9. *Id.* § 157. Section 7 is a “fundamental provision of the Act.” *NLRB v. Modern Carpet Indus., Inc.*, 611 F.2d 811, 813 (10th Cir. 1979). Indeed, the employee rights protected by that provision are generally deemed to be of “overriding importance” in construing and applying the NLRA. *Gilbert v. NLRB*, 56 F.3d 1438, 1448 (D.C. Cir. 1995). *But see Lechmere, Inc. v. NLRB*, 914 F.2d 313, 318 (1st Cir. 1990) (“The prerogatives conferred by Section 7 are important, but not absolute. If an effort to further Section 7 rights conflicts with other, equally solemn rights, the law demands a reasonable accommodation.”), *rev’d*, 502 U.S. 527 (1992).

10. See *Kirk v. Transp. Workers Union*, 934 F. Supp. 775, 794 (S.D. Tex. 1995) (“The Act defines certain unfair labor practices and mandates a procedure through the National Labor Relations Board . . . to process and remedy unfair labor practices.”). For an academic discussion of the Board’s procedures, see Dennis R. Nolan & Richard I. Lehr, *Improving NLRB Unfair Labor Practice Procedures*, 57 TEX. L. REV. 47 (1979).

11. See *NLRB v. Pa. Greyhound Lines, Inc.*, 303 U.S. 261, 265 (1938) (“By § 10 (b) the Board is given authority to hear complaints of unfair labor practices on the evidence . . .”) (discussing 29 U.S.C. § 160(b)); *S.E. Overton Co. v. Int’l Bhd. of Teamsters*, 115 F. Supp. 764, 774 (W.D. Mich. 1953) (noting that the Board has “full authority to hear charges of alleged unfair labor practices”).

12. The federal courts generally have no jurisdiction “to determine what is or is not an unfair labor practice,” but instead “must defer to the exclusive competence of the NLRB.” *Kirk*, 934 F. Supp. at 794; *see also S.E. Overton Co.*, 115 F. Supp. at 774 (“Congress in creating the National Labor Relations Board has given it [the] exclusive right to determine whether any particular acts constitute unfair labor practices as defined by the Act . . .”).

13. See 29 U.S.C. § 160(c) (2000):

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair la-

In its landmark ruling in *NLRB v. J. Weingarten, Inc.*,<sup>14</sup> the Supreme Court held that the Section 7 right of an employee to act in concert with other employees includes the right to the assistance of a union representative at an investigatory interview the employee reasonably believes may result in the imposition of discipline.<sup>15</sup> Although the underlying right to union representation at an investigatory interview is now well-established,<sup>16</sup> the full implications of that right continue to be debated more than a quarter of a century after *Weingarten* was decided.<sup>17</sup> Among the issues that remain unresolved is the proper remedy for an employer's violation of an employee's right to representation at an investigatory interview.<sup>18</sup>

This article addresses that question, which has been described as “a remedial issue of first rank importance.”<sup>19</sup> The article begins with a gen-

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bor practice, then the Board shall . . . take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act] . . . .

14. 420 U.S. 251 (1975). Both the Board and the courts have characterized *Weingarten* as a seminal decision. See *Spartan Stores, Inc. v. NLRB*, 628 F.2d 953, 957 (6th Cir. 1980); *Epilepsy Found.*, 331 N.L.R.B. 676, 677 (2000), *enforced in part and rev'd in part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002).

15. See *Weingarten*, 420 U.S. at 262.

16. See *United States Postal Serv.*, 245 N.L.R.B. 901, 912 (1979) (“It is well established that an employee has a right to request representation as a condition of participation in an interview where the employee reasonably believes that the interview will result in disciplinary action.”) (citing *Weingarten*).

17. See *Materials Research Corp.*, 262 N.L.R.B. 1010, 1021 (1982) (Hunter, Member, concurring and dissenting) (“[T]he Board has struggled with an ever increasing number and variety of problems arising from the attempted exercise of *Weingarten* rights in the workplace.”); *Amoco Chems. Corp.*, 237 N.L.R.B. 394, 397 (1978) (“[T]he scope of the right to representation at employer interviews of employees is a very difficult question, subject to many qualifications and conditions . . . .”); LaDawn L. Ostmann, Comment, *Union Rights, No Dues: In re Epilepsy Foundation and the NLRB's Extension of Weingarten Rights to Nonunion Employees*, 45 ST. LOUIS U. L.J. 1309, 1323 (2001) (“*Weingarten* left many questions unanswered, thus leading the Board to a myriad of different interpretations.”).

18. See Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 280 n.131 (1987) (noting that the “legal development of the *Weingarten* doctrine has been troubled and controversial,” and referring specifically to the “controversy [that] has surrounded the proper remedy for a *Weingarten* violation”); Carlton J. Snow, *Collective Agreements and Individual Contracts Employment in Labor Law*, 50 AM. J. COMP. L. 319, 342 (Supp. 2002) (“In addition to defining the scope of the right, difficult remedial issues have arisen in the unionized setting when the right has been violated.”).

19. *Newport News Shipbuilding & Drydock Co. v. United Steel Workers*, 78 Lab. Arb. Rep. (BNA) 921, 927 (1982) (Garrett, Arb.); see also John C. Truesdale, Recent Issues and Trends in NLRB Decisions, Address Before A Labor Law Conference in Columbia, Mo. (Oct. 3, 1980), in LAB. REL. Y.B., 1980, at 176, 180 (describing “the appropriate remedy when a *Weingarten* violation has occurred” as one of the “difficult issues that come before the Board”).

eral discussion of *Weingarten*<sup>20</sup> and Congress' subsequent codification of that decision in legislation extending many of the NLRA's protections to federal government employees.<sup>21</sup> The article then describes the evolution of the Board's remedial treatment of *Weingarten* violations,<sup>22</sup> and examines the statutory underpinnings of the Board's current approach to the issue.<sup>23</sup> After exploring the policy implications of the Board's various remedial approaches to *Weingarten*,<sup>24</sup> the article ultimately concludes that employees shown to have been disciplined as the result of information obtained at an unlawful investigatory interview should be entitled to have that discipline rescinded,<sup>25</sup> and should also be made whole for any economic losses suffered as the result of the discipline.<sup>26</sup>

20. For a prior academic discussion of *Weingarten* and subsequent Board cases applying the Court's decision, see Leslie Ann Margolin, *Employee Right to Representation in Employer Interviews: Weingarten and Progeny*, 12 SETON HALL L. REV. 226 (1981).

21. The NLRA itself generally applies only to private sector employment. See *Gomez v. Virgin Islands*, 882 F.2d 733, 736 (3d Cir. 1989). However, many of the NLRA's protections were extended to employees of the United States Postal Service by the Postal Reorganization Act of 1970. See *Glenn v. United States Postal Serv.*, 939 F.2d 1516, 1519 (11th Cir. 1991); *United States Postal Serv.*, 200 N.L.R.B. 413, 414 n.4 (1972). In addition, although Postal Service employees are the only federal employees specifically covered by the NLRA, see *Blaze v. Payne*, 819 F.2d 128, 130 (5th Cir. 1987), similar protections were ultimately provided to other federal employees by separate legislation patterned after the NLRA. See *Milner v. Bolger*, 546 F. Supp. 375, 378 & n.3 (E.D. Cal. 1982); *Yates v. United States Soldiers' & Airmen's Home*, 533 F. Supp. 461, 463 (D.D.C. 1982).

22. For a broader discussion of *Weingarten*'s evolution, see David L. Gregory, *The Employee's Right to Representation During Employer Investigatory Interviews: A Critical Analysis of the Evolution of Weingarten Principles*, 28 VILL. L. REV. 572 (1983).

23. The Board's remedial authority is derived from the Act itself. See *NLRB v. Hartman*, 774 F.2d 1376, 1387 n.14 (9th Cir. 1985). However, in recognition of the need for flexibility in addressing the various unfair labor practices that arise under the Act, the "legislative imprint on the Board's remedial powers has . . . been lightly laid." *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1029 (1962); see also *Union Starch & Ref. Co. v. NLRB*, 186 F.2d 1008, 1014 (7th Cir. 1951) ("[I]t is uniformly recognized that the variable pattern of [unlawful] practices revealed in cases before the Board requires a correspondingly variable set of remedial orders, if the Board is to fulfill its duty of taking appropriate steps to dissipate the effects of unfair labor practices.").

24. For many years the Board itself did "not explain[] its rationale for this variation in remedy." *Pac. Tel. & Tel. Co.*, 262 N.L.R.B. 1048, 1056 (1982).

25. See *Penn-Dixie Steel Corp.*, 253 N.L.R.B. 91, 96 (1980) ("The Board has ordered an offending employer to expunge from its records any references to any disciplinary action taken on the basis of interviews conducted in violation of employees' *Weingarten* rights.")

26. See, e.g., *Southwestern Bell Tel. Co.*, 273 N.L.R.B. 663, 669 (1984):

[H]aving found that the [employer] after denying [the employee] his *Weingarten* rights, suspended him for 2 weeks, without pay, based on information obtained from him at the unlawful interview itself, I shall order that the unlawful suspension be rescinded . . . and that he be made whole for any loss of pay he suffered as a result of this unlawful suspension, with the payment of interest.

## II. THE RIGHT TO UNION REPRESENTATION UNDER *WEINGARTEN*

In *NLRB v. J. Weingarten, Inc.*,<sup>27</sup> the Supreme Court held that an employee is entitled to union representation, upon request, during an investigatory interview the employee reasonably believes may result in disciplinary action.<sup>28</sup> The case arose when a retail store employee requested but was denied the presence of a union representative during an investigatory interview concerning suspected theft from her employer.<sup>29</sup> Following the interview, the employee reported the details of the interview to her shop steward and other union representatives, and an unfair labor practice charge was filed.<sup>30</sup>

The Board found that the employer's denial of the employee's request for union representation constituted an unfair labor practice in violation of Section 8(a)(1) of the Act because it interfered with the Section 7 right of employees to engage in concerted activities for mutual aid or protection.<sup>31</sup> The Fifth Circuit refused to enforce the Board's order,<sup>32</sup> concluding that "[w]hile a basic purpose of section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview."<sup>33</sup>

The Supreme Court granted certiorari<sup>34</sup> and reversed the Fifth Circuit's decision,<sup>35</sup> remanding the case to the lower court with instructions

27. 420 U.S. 251 (1975).

28. *Id.* at 267; *see also* *Spartan Stores, Inc. v. NLRB*, 628 F.2d 953, 957 (6th Cir. 1980) ("*Weingarten* makes clear . . . that an employee is entitled to request and to receive union representation during an investigatory interview which he reasonably believes will result in disciplinary action.").

29. *See Weingarten*, 420 U.S. at 254.

30. *Id.* at 256.

31. *See* *J. Weingarten, Inc.*, 202 N.L.R.B. 446, 450, *enforcement denied*, 485 F.2d 1135 (5th Cir. 1973), *rev'd*, 420 U.S. 251 (1975), *overruled by* *Epilepsy Found.*, 331 N.L.R.B. 676 (2000), *enforced in part, rev'd in part*, 268 F.3d 1095 (D.C. Cir.2001), *cert. denied*, 536 U.S. 904 (2002).

32. The Board itself "lacks the authority to enforce its remedial orders." *United States v. Palumbo Bros.*, 145 F.3d 850, 870 (7th Cir. 1998). Section 10(e) of the NLRA instead "requires the Board to seek enforcement of its order[s] in a court of appeals." *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999) (citing 29 U.S.C. § 160(e) (2000)).

33. *NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135, 1138 (5th Cir. 1973), *rev'd*, 420 U.S. 251 (1975). Prior to the Supreme Court's decision in *Weingarten*, employers frequently argued that "an employee was not entitled to union representation until, unless, and after management had levied a disciplinary penalty." *Texaco, Inc.*, 251 N.L.R.B. 633, 642 (1980), *enforced*, 659 F.2d 124 (9th Cir. 1981); *see also* *Dep't of Air Force v. Am. Fed'n of Gov't Employees*, 75 Lab. Arb. Rep. (BNA) 994, 996 (1980) (Hart, Arb.) ("Traditionally the employee had a right to representation only after the fact of management investigation and action.").

34. *NLRB v. J. Weingarten, Inc.*, 416 U.S. 969 (1974).

35. *Weingarten*, 420 U.S. at 253.

to enforce the Board's order.<sup>36</sup> The Court held that the "action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that 'employees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.'"<sup>37</sup> The Court reasoned that the presence of a union representative would protect the interests of the employee participating in the interview by ensuring that the employer does not impose discipline unjustly.<sup>38</sup> In addition, the representative's presence assures other employees in the bargaining unit<sup>39</sup> that they would also receive the union's aid and protection during similar interviews.<sup>40</sup>

In deferring to the Board's construction of the NLRA,<sup>41</sup> the *Weingarten* Court emphasized that it is the province of the Board, and not the courts, to determine whether or not a need for representation exists in light of changing industrial practices and "the Board's cumulative experience in dealing with labor-management relations."<sup>42</sup> According to the Court, the Board's holding was a permissible construction of the NLRA, and the Board's special competence in the field justified the deference accorded its determination.<sup>43</sup> In addition, the Court recognized that the Board's construction of the Act was consistent with many collective bargaining agreements, as well as prior arbitration decisions sustaining the right to union representation at an investigatory interview.<sup>44</sup>

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36. *Id.* at 268.

37. *Id.* at 260 (quoting *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 847 (7th Cir. 1973)).

38. *Id.* at 260–61.

39. The employees represented by a union are not limited to those who are members of the union, but include all of the employees in the bargaining unit the union elected or is otherwise designated to represent. See *Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 224 (5th Cir. 1984). A "bargaining unit" has been defined as "a grouping of two or more employees aggregated for the assertion of organizational rights or for collective bargaining . . ." *Salary Policy Employee Panel v. Tenn. Valley Auth.*, 149 F.3d 485, 492 (6th Cir. 1998) (quoting *THE DEVELOPING LABOR LAW* 448–49 (Patrick Hardin ed., 3d ed. 1992)). One court has stated: "The touchstone of an appropriate bargaining unit is the finding that all of its members have a common interest in the terms and conditions of employment, to warrant their inclusion in a single unit to choose a bargaining agent." *Uyeda v. Brooks*, 365 F.2d 326, 329 (6th Cir. 1966).

40. See *Weingarten*, 420 U.S. at 261.

41. One Board member has asserted that "the Section 7 right of an employee to request the presence of his union representative at a disciplinary interview was firmly established by Board law prior to the Supreme Court's decision in *Weingarten*, and . . . *Weingarten* merely reaffirmed the existence of that Section 7 right." *Baton Rouge Water Works Co.*, 246 N.L.R.B. 995, 1000 (1979) (Penello, Member, dissenting). *But cf.* *Ereno Lewis*, 217 N.L.R.B. 239, 241 (1975) ("*Weingarten* involved a change in the Board's interpretation of the statute . . .").

42. *Weingarten*, 420 U.S. at 266.

43. *Id.*

44. See *id.* at 267.

The right to union representation at an investigatory interview was subsequently codified as a matter of federal sector employment when Congress enacted the Federal Service Labor-Management Relations Statute (“FSLMRS” or the “Statute”)<sup>45</sup> a few years after *Weingarten* was decided.<sup>46</sup> The FSLMRS, which was patterned closely after the NLRA,<sup>47</sup> established the collective bargaining rights of most federal government employees,<sup>48</sup> and Section 14(a)(2)(B) of the Statute<sup>49</sup> specifically provides that those employees are entitled to union representation at investigatory interviews that they reasonably believe may result in disciplinary action.<sup>50</sup> Congress’ intent in enacting this “so-called *Weingarten* provision”<sup>51</sup> was to provide federal employees with representational rights comparable to those afforded to private sector employees by the

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45. 5 U.S.C. §§ 7101–35 (2000). Prior to Congress’ adoption of the FSLMRS, “there existed no comparable right . . . to representation during an investigatory interview” in the federal sector. I.R.S., 4 F.L.R.A. 237, 249 (1980); *see also* *Dep’t of the Air Force v. Am. Fed’n of Gov’t Employees*, 75 Lab. Arb. Rep. (BNA) 994, 997 (1980) (Hart, Arb.) (noting that prior to the enactment of the FSLMRS, the agency with primary responsibility for overseeing labor relations in the federal sector “specifically rejected extending the *Weingarten* decision to federal employees”).

46. *See* *Def. Criminal Investigative Serv. v. FLRA*, 855 F.2d 93, 100 (3d Cir. 1988) (“Section 7114(a)(2)(B) [of the FSLMRS] was adopted by Congress in 1978 shortly after the decision in *Weingarten* and purports on its face to confer *Weingarten* rights on all federal employees in a bargaining unit.”). The legislative history of Congress’ codification of *Weingarten* in the FSLMRS is summarized in *Dep’t of Transp., FAA, Mike Monroney Aeronautical Ctr.*, No. 86 FSIP 56, 1987 FSIP LEXIS 42, at \*\*65–72 (Feb. 10, 1987).

47. *See* *Rizzitelli v. FLRA*, 212 F.3d 710, 712 n.1 (2d Cir. 2000) (“Congress intended the FSLMRS to be the public-sector counterpart to the NLRA and structured the respective authority similarly.”); *Dep’t of Justice v. FLRA*, 991 F.2d 285, 289 (5th Cir. 1993) (“The FSLMRS is modeled after the National Labor Relations Act . . .”).

48. *See* *United States Dep’t of Energy v. FLRA*, 880 F.2d 1163, 1166 (10th Cir. 1989) (stating that the Statute “codifies the collective bargaining rights of federal employees”); *Library of Cong. v. FLRA*, 699 F.2d 1280, 1283 (D.C. Cir. 1983) (“Congress intended the new statutory system to . . . protect[] the right of public employees to organize and bargain collectively . . .”). *See generally* *Lipscomb v. FLRA*, 333 F.3d 611, 615 (5th Cir. 2003) (noting that the FSLMRS “governs the labor relations of most federal employees”).

49. 5 U.S.C. § 7114(a)(2)(B) (2000). For the sake of convenience, provisions of the FSLMRS are often referred to “without inclusion of the initial ‘71’ of the statutory reference,” so that § 7116(d), for example, is “referred to, simply, as ‘§ 16(d).’” *United States Dep’t of Def., Def. Contract Audit Agency*, No. BN-CA-20172, 1993 FLRA LEXIS 245, at \*1 n.1 (Sept. 30, 1993).

50. *See* *Dep’t of Justice, I.N.S., Border Patrol*, 36 F.L.R.A. 41, 62 (1990). In particular, the statute provides that a bargaining unit employee is entitled to union representation at “any examination of [the] employee . . . by a representative of the [employer] in connection with an investigation if—(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.” 5 U.S.C. § 7114(a)(2)(B) (2000).

51. *FLRA v. United States Dep’t of Justice*, 137 F.3d 683, 687 (2d Cir. 1997); *see also* *United States Dep’t of Justice, I.N.S. v. FLRA*, 975 F.2d 218, 226 n.11 (5th Cir. 1992) (describing § 7114(a)(2)(B)(i) of the FSLMRS as “[t]he ‘*Weingarten*’ provision”).

*Weingarten* decision itself.<sup>52</sup>

### III. THE BOARD'S INITIAL REMEDIAL APPROACH TO *WEINGARTEN* VIOLATIONS

In the first cases involving a denial of union representation that arose after *Weingarten* was decided,<sup>53</sup> the Board, without offering any supporting analysis,<sup>54</sup> generally afforded no affirmative relief to employees disciplined for conduct that was the subject of interviews conducted in violation of their *Weingarten* rights.<sup>55</sup> However, in subsequent cases such as *Certified Grocers of California, Ltd.*<sup>56</sup> and *Southwestern Bell Telephone Co.*,<sup>57</sup> the Board, with equally little analysis,<sup>58</sup> returned the parties to the status quo by rescinding disciplinary actions taken in cases involving *Weingarten* violations.<sup>59</sup>

The apparent conflict in these cases was noted by a Board adminis-

52. See United States Dep't of Justice, Bureau of Prisons, 35 F.L.R.A. 431, 438-39 (1990); see also D.C. Dep't of Corrections v. Fraternal Order of Police, 105 Lab. Arb. Rep. (BNA) 843, 845 (1996) (Rogers, Arb.) ("The fundamental statutory basis of and the qualifications the Court imposed through the *Weingarten* rule is [sic] the same in the public sector, the federal sector and the private sector of labor relations.").

53. In the first few years after the Court's decision, the Board "had several opportunities to apply the *Weingarten* [sic] test." Good Hope Refineries, Inc., 245 N.L.R.B. 380, 383 (1979); see also PPG Indus., Inc., 251 N.L.R.B. 1146, 1165 (1980) ("The parameters of employee rights under *Weingarten* have been set forth in numerous Board cases since 1975 . . .").

54. One federal judge has asserted that "the Board should be required to articulate its reasons for choosing one remedial course over another." NLRB v. Creative Food Design Ltd., 852 F.2d 1295, 1308 (D.C. Cir. 1988) (Starr, J., dissenting).

55. See United States Postal Serv., 241 N.L.R.B. 141, 154 (1979) (citing Detroit Edison Co., 217 N.L.R.B. 622 (1975), Keystone Steel & Wire, 217 N.L.R.B. 995 (1975), and Mobil Oil Corp., 196 N.L.R.B. 1052 (1972)). In an early case arising under the FSLMRS, the agency charged with responsibility for enforcing that act similarly held that the protection afforded by *Weingarten* "does not, *ipso facto*, require [a] *status quo ante* remedy." United States Dep't of Navy, United States Marine Corps, Marine Corps Logistics Base, 4 F.L.R.A. 397, 407 (1980).

56. 227 N.L.R.B. 1211, 1213-14 (1977), *enforcement denied*, 587 F.2d 449 (9th Cir. 1978).

57. 227 N.L.R.B. 1223 (1977).

58. See La. Council No. 17, 250 N.L.R.B. 880, 899 (1980) ("In fashioning the make-whole remedy in *Certified Grocers*, the Board did not articulate its rationale."). Although the Board in *Southwestern Bell* offered little explanation for its decision, it explicitly rejected the administrative law judge's refusal to award reinstatement and backpay to employees disciplined after their *Weingarten* rights were violated, noting that a "make-whole remedy [was] necessary to restore the *status quo ante*." *Southwestern Bell Tel. Co.*, 227 N.L.R.B. at 1223 n.1.

59. See *United States Postal Serv.*, 241 N.L.R.B. at 154 (discussing *Certified Grocers* and *Southwestern Bell*); see also Gregory, *supra* note 22, at 615 ("The initial approach adopted by the Board after *Weingarten* was to grant full make-whole remedies to the employee if the employer was found to have engaged in an unlawful investigatory interview without the requested representation.") (citing *Certified Grocers*).



trative law judge<sup>60</sup> in *United States Postal Service*.<sup>61</sup> In a decision subsequently affirmed by the Board itself,<sup>62</sup> the judge held that an employee disciplined after being denied union representation at an investigatory interview should be made whole<sup>63</sup> “[a]t least unless the employer can affirmatively show that [it] would have taken the same action even if the union representative had been permitted to attend . . . .”<sup>64</sup>

An award of make-whole relief, typically in the form of reinstatement and backpay, is the Board’s traditional remedy when an employee has been disciplined or discharged in violation of the Act.<sup>65</sup> The purpose of the remedy is “to return the unlawfully discharged employee to the status quo that would have existed absent the unfair labor practice.”<sup>66</sup> In *Postal Service*, the Board extended this remedy to *Weingarten* violations,<sup>67</sup> holding that in cases involving a denial of union representation it would ordinarily require “restoration of the *status quo ante* by requiring affirmative correction of [any resulting adverse] personnel action.”<sup>68</sup>

The question left open in *Postal Service*—whether an employer could avoid an award of make-whole relief by showing that its *Weingarten* violation did not prejudice the employee<sup>69</sup>—was subsequently re-

60. Unfair labor practice hearings under the NLRA are typically held before administrative law judges, whose decisions are then subject to Board review. See 29 C.F.R. §§ 102.15, 102.16, 102.34 & 102.45(a) (2003); see also *Hoeber v. KNZ Constr., Inc.*, 879 F. Supp. 451, 454 (E.D. Pa. 1995) (“After the administrative law judge issues a ruling, the Board must affirm the decision and order.”).

61. 241 N.L.R.B. 141 (1979).

62. *Id.* at 141.

63. *Id.* at 157. The Supreme Court has noted that “making . . . employees whole for losses suffered on account of an unfair labor practice” furthers the public policy embodied in the Act. *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952).

64. *United States Postal Serv.*, 241 N.L.R.B. at 154.

65. See *Viking Indus. Sec., Inc.*, 327 N.L.R.B. 146, 149 (1998) (Brame, Member, dissenting in part); *Dean Gen. Contractors*, 285 N.L.R.B. 573, 573 (1987).

66. *Dean Gen. Contractors*, 285 N.L.R.B. at 573; see also *Local Union No. 418, Sheet Metal Workers’ Int’l Ass’n*, 249 N.L.R.B. 898, 901 (1980) (observing that “the broad remedy of ‘make whole’ is to be defined by the status . . . the employee would have enjoyed but for the wrongful conduct”).

67. Because the employee in *Postal Service* had not been discharged or suspended, the remedy in that case did “not call for . . . reinstatement or for any backpay,” but for the rescission of a written warning that had been issued to the employee. *United States Postal Serv.*, 241 N.L.R.B. at 156. However, make-whole relief is not limited to reinstatement and backpay, but also may involve the “expungement of . . . disciplinary records.” *Salt River Valley Water Users’ Ass’n*, 262 N.L.R.B. 970, 975 n.14 (1982); see also *Bernard Dobranski, The Right of Union Representation in Employer Interviews: A Post-Weingarten Analysis*, 26 ST. LOUIS U. L.J. 295, 326 (1982) (noting that a make-whole remedy “includ[es] reinstatement of the employee, if discharged, or rescission of a lesser form of punishment”).

68. *United States Postal Serv.*, 241 N.L.R.B. at 154.

69. See *Iron Workers Local Union 377*, 326 N.L.R.B. 375, 394 (1998) (“[A] make-whole

solved in the employer's favor in *Kraft Foods, Inc.*<sup>70</sup> In *Kraft*, the Board held that the General Counsel could establish a prima facie case for make-whole relief<sup>71</sup> by demonstrating that an employee was disciplined for conduct that was the subject of an interview conducted in violation of *Weingarten*.<sup>72</sup> If such a showing was made, the burden shifted to the employer to establish that its disciplinary decision was not based on information obtained at the unlawful interview.<sup>73</sup> If the employer satisfied this burden, make-whole relief would not be ordered, and the remedy instead would be limited to the issuance of a cease-and-desist order.<sup>74</sup> Thus,

under the remedial test fashioned in *Kraft*, the right of an employee to union representation during a *Weingarten* interview does not necessarily protect the employee from discipline merely because the right was abridged. The test recognizes that there may be situations in which the decision to discipline was based on information obtained independent of the interview.<sup>75</sup>

The remedial approach to *Weingarten* violations adopted in *Kraft* and other similar Board cases<sup>76</sup> was intended to prevent employers from

remedy is appropriate only where . . . the grievant suffered 'damage' from the unfair [labor practice] for which he or she should be made whole."); *Winn-Dixie Stores, Inc.*, 224 N.L.R.B. 1418, 1461 (1976) (stating that make-whole relief "simply seeks to expunge any prejudice that may have resulted" from an employer's unlawful conduct).

70. 251 N.L.R.B. 598 (1980), *overruled by* *Taracorp Indus.*, 273 N.L.R.B. 221, 222–23 (1984). For prior academic discussions of *Kraft*, see Dobranski, *supra* note 67, at 324–27; Gregory, *supra* note 22, at 615–16; Truesdale, *supra* note 19, at 176.

71. Under section 3(d) of the NLRA, the Board's General Counsel is authorized to investigate unfair labor practice charges and issue complaints based on those charges, and to prosecute those complaints on behalf of the charging parties in proceedings before the Board. *See* 29 U.S.C. § 153(d) (2000). Thus, "[i]t is the General Counsel, [and] not the charging party, who determines the theory of the case." *Int'l Longshoremen's Ass'n*, 323 N.L.R.B. 1029, 1030 n.6 (1997).

72. *See Kraft*, 251 N.L.R.B. at 598.

73. *Id.*; *see also* *Montgomery Ward & Co.*, 254 N.L.R.B. 826, 826 (1981) ("Under *Kraft*, the burden . . . [is on the employer to] demonstrat[e] that its decision to discipline the employee in question was not based on information obtained at the unlawful interview."), *enforced in part and enforcement denied in part*, 664 F.2d 1095 (8th Cir. 1981).

74. *See Kraft*, 251 N.L.R.B. at 598. It has occasionally been suggested that under Section 10(c) of the Act, "upon finding that an unfair labor practice has been committed, the Board *must* issue an order 'requiring such person to cease and desist from such unfair labor practice . . .'" *Textile Workers Union v. NLRB*, 475 F.2d 973, 975–76 (D.C. Cir. 1973) (emphasis added) (quoting 29 U.S.C. § 160(c) (2000)). However "the view that Section 10(c) of the Act mandates issuance of a cease-and-desist order, whenever there is a finding that an unfair labor practice has occurred, is not a unanimous one." *Lucky Stores, Inc.*, 279 N.L.R.B. 1138, 1147 (1986).

75. Dobranski, *supra* note 67, at 326.

76. *See generally* *Taracorp Indus.*, 273 N.L.R.B. 221, 224 (1984) (Zimmerman, Member, concurring) (referring to "*Kraft Foods* and its progeny").

benefiting from violations of their employees' *Weingarten* rights.<sup>77</sup> The Board sought to achieve this result by patterning the remedy for such violations after "the remedy used in criminal cases, where *Miranda* rights of suspects are violated and the statements obtained therein are not permitted to be utilized."<sup>78</sup> As the Board explained:

The implication, if not the direct teaching, of [the *Kraft Foods*] doctrine is that if lawfully obtained evidence of employee wrongdoing and unlawfully obtained admissions are commingled by an employer in arriving at a decision to discharge, the fruit of the poisonous tree taints the lawful evidence and renders the employer liable for a full remedy.<sup>79</sup>

The Federal Labor Relations Authority ("FLRA" or the "Authority,") the federal agency patterned after the NLRB<sup>80</sup> that is primarily responsible for enforcing the FSLMRS,<sup>81</sup> has expressed a similar view of the right to union representation at an investigatory interview.<sup>82</sup> In fact, Congress itself briefly considered including a provision in the FSLMRS that would have prevented any information obtained during an interview conducted in violation of an employee's *Weingarten* rights from being used as the basis for disciplining the employee.<sup>83</sup> This statutory provi-

77. See, e.g., *Montgomery Ward*, 254 N.L.R.B. at 827 n.4 (noting that a refusal to award make-whole relief in accordance with *Kraft* "would permit the [employer] to benefit directly from the commission of proscribed conduct; namely, forcing [an employee] to submit to [an] unlawful interview, during which information [is] obtained for which he [is subsequently] disciplined").

78. N.J. Bell Tel. Co., 300 N.L.R.B. 42, 55 (1990) (footnote omitted); see also *Ill. Bell Tel. Co.*, 251 N.L.R.B. 932, 939 (1980) (suggesting that "statements taken in violation of an employee's [*Weingarten*] rights [may] become 'fruit of a poisonous tree,' to borrow a phrase from constitutional law relating to coerced confessions and illegal searches and seizures"), *enforced in part and enforcement denied in part*, 674 F.2d 618 (7th Cir. 1982).

79. *Ill. Bell Tel. Co.*, 275 N.L.R.B. 148, 150 (1985), *enforced sub nom. Communication Workers v. NLRB*, 784 F.2d 847 (7th Cir. 1986).

80. See *Treasury Employees Union v. FLRA*, 810 F.2d 295, 299 (D.C. Cir. 1987) (observing that "the FLRA was modeled on the NLRB"); *Am. Fed'n of Gov't Employees v. FLRA*, 785 F.2d 333, 336 (D.C. Cir. 1986) ("Congress intended the FLRA's role in adjudicating unfair labor practice cases in the federal sector to be similar to that of the NLRB's in the private sector.").

81. See *Lipscomb v. FLRA*, 333 F.3d 611, 615 (5th Cir. 2003); *Am. Fed'n of Gov't Employees v. FLRA*, 712 F.2d 640, 643 (D.C. Cir. 1983). "Among its powers, the FLRA has authority to determine appropriate bargaining units, to supervise representational elections, to hear and resolve complaints of unfair labor practices, and . . . to resolve issues relating to the duty to bargain in good faith." *Library of Cong. v. FLRA*, 699 F.2d 1280, 1283 (D.C. Cir. 1983) (footnotes omitted).

82. See, e.g., *Dep't of Treasury, Bureau of ATF*, 24 F.L.R.A. 521, 532 (1986) ("[E]xclusion of a union representative from [an] . . . investigation, coupled with the [employer's] potential for use of the fruits of such investigation in the imposition of discipline, would effectively nullify [the] rights recognized in *Weingarten* . . .").

83. See *F.A.A.*, 35 F.L.R.A. 645 (1990):

sion effectively would have codified the Board's decision in *Kraft* by making the FSLMRS remedy for *Weingarten* violations "similar to the exclusionary rule in criminal law."<sup>84</sup>

Although Congress ultimately did not enact this provision,<sup>85</sup> there is no indication in the FSLMRS's legislative history of any congressional disagreement with the Board's analysis in *Kraft*.<sup>86</sup> Thus, despite the absence of any explicit statutory authority to do so,<sup>87</sup> the FLRA has generally prohibited employers from taking disciplinary action against employees "as a result of any information acquired as a result of their examinations . . . when [the] employees requested and were denied representation."<sup>88</sup>

#### IV. THE BOARD'S REVISED APPROACH TO REMEDYING *WEINGARTEN* VIOLATIONS

In *Taracorp*,<sup>89</sup> the Board overruled its prior decision in *Kraft* to the extent *Kraft* had provided a make-whole remedy to *Weingarten* victims

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Should [*Weingarten*] rights be violated, [the FSLMRS would have] provided its own sanction: "[A]ny statement made by or evidence obtained during questioning of an employee may not be used as evidence in the course of any action for suspension, removal or reduction in rank or pay subsequently taken against the employee."

*Id.* at 661 (internal ellipses omitted) (quoting H.R. 3793, 95th Cong. § 7171(c) (1978)); see also Robert M. Tobias & William Harness, *Federalizing Weingarten: An NTEU Perspective*, 31 HOW. L.J. 271, 277 (1988) (noting that under the proposed legislation, "any statement or evidence obtained during questioning could not be used in any disciplinary action against the employee").

84. *F.A.A.*, 35 F.L.R.A. at 661 (quoting H.R. REP. NO. 95-920, at 5 (1978)); cf. *Communications Workers v. NLRB*, 784 F.2d 847, 851 (7th Cir. 1986) (noting that "the Board . . . appl[ied] an exclusionary rule . . . in *Kraft Foods*").

85. See *Dep't of Treasury*, 24 F.L.R.A. at 534 (noting that "the reference[] . . . to the inadmissibility of evidence gathered in the absence of representation [was] dropped" in conference committee); cf. *Karahalios v. Def. Language Inst.*, 821 F.2d 1389, 1392 (9th Cir. 1987) (describing another proposed FSLMRS provision eliminated by the conference committee on the ground that the matter at issue was to "be considered at least in the first instance by the . . . Authority") (quoting H.R. CONF. REP. NO. 95-1717, at 157 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2860, 2891).

86. Instead, "Congress, as it so often does, simply left [the] matter[] to be fleshed out by the Authority," rather than "erect[ing] an explicit [evidentiary] barrier on its own." *F.A.A.*, 35 F.L.R.A. at 662; see also *FDIC v. FLRA*, 977 F.2d 1493, 1498 (D.C. Cir. 1992) (observing that "the language of the FSLMRS exudes a broad congressional delegation of discretion to the FLRA to fashion appropriate remedies for unfair labor practices").

87. Although the statutory prohibition on the use of evidence obtained in violation of *Weingarten* was deleted from the FSLMRS prior to its passage, the Statute does contain a provision authorizing the FLRA to "require [employers] to take any remedial action [the FLRA] considers appropriate to carry out the policies of [the Statute]." 5 U.S.C. § 7105(g)(3) (2000).

88. United States Dep't of Justice, Nos. BN-CA-50149 et al., 1996 FLRA LEXIS 120, at \*\*25-26 (July 30, 1996), application denied on other grounds, 137 F.3d 683 (2d Cir. 1997).

89. 273 N.L.R.B. 221 (1984).

who were discharged for “cause.”<sup>90</sup> Under the revised approach to remedying *Weingarten* violations the Board adopted in *Taracorp*, “[i]f the employer violates *Weingarten* by excluding the union’s representative from a disciplinary interview and fires the employee solely because of the employee’s misconduct, the Board enters only a cease and desist order.”<sup>91</sup>

The analysis in *Taracorp* was premised primarily upon the Board’s interpretation of Section 10(c) of the Act,<sup>92</sup> which states that “[n]o order of the Board shall require the reinstatement of any individual . . . who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.”<sup>93</sup> The Board has interpreted this provision to prohibit an award of make-whole relief to an employee disciplined for cause,<sup>94</sup> even if the employee’s Section 7 rights have been violated by the employer.<sup>95</sup> In *Taracorp*, the Board concluded that “typical” *Weingarten* cases fall within this prohibition,<sup>96</sup> because in such cases “the reason for the discharge is not an unfair labor practice, but some type of employee misconduct.”<sup>97</sup>

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90. Ill. Bell Tel. Co., 275 N.L.R.B. 148, 148 (1985) (discussing *Taracorp*), *enforced sub nom.* Communication Workers v. NLRB, 784 F.2d 847 (7th Cir. 1986).

91. *Communication Workers*, 784 F.2d at 852.

92. *Taracorp*, 273 N.L.R.B. at 221 (“We find that . . . make-whole relief in the context of a *Weingarten* violation is contrary to the specific remedial restriction contained in Section 10(c) . . . .”); *see also* *Communication Workers*, 784 F.2d at 850 (“The Board’s decision in *Taracorp* rests principally on its construction of a proviso to § 10(c) . . . .”); United States Dep’t of Justice, Bureau of Prisons, 35 F.L.R.A. 431, 443 (1990) (noting that the Board’s reasoning in *Taracorp* was “largely based” on Section 10(c)).

93. 29 U.S.C. § 160(c) (2000).

94. *See* Bath Iron Works Corp., 302 N.L.R.B. 898, 913 (1991) (“[W]here an employee is discharged for cause within the meaning of Section 10(c), the Board is precluded from imposing a make-whole remedy.”) (citing *Taracorp*, 273 N.L.R.B. at 222).

95. *See Taracorp*, 273 N.L.R.B. at 222:

[A]n employee discharged or disciplined for misconduct or any other nondiscriminatory reason is not entitled to reinstatement and backpay even though the employee’s Section 7 rights may have been violated by the employer in a context unrelated to the discharge or discipline. This principle is embodied in the remedial restriction in Section 10(c) of the Act . . . .

96. *Id.* at 223 (“[W]e are compelled to conclude that *Weingarten* cases fall into the category of cases where a make-whole remedy is precluded by operation of Section 10(c).”).

97. *Id.* (emphasis added); *see also* Pa. Shipbuilding Co., Nos. 4-CA-16715, 4-CA-16150 1988 NLRB GCM LEXIS 26, at \*4 (Feb. 11, 1988) (“[I]n *Weingarten* cases, the employee is discharged for violating a valid work rule; the sole unfair labor practice lies in the investigatory process.”).

## V. THE BOARD'S INTERPRETATION OF SECTION 10(C) IS QUESTIONABLE

The Board's analysis in *Taracorp* is not entirely persuasive.<sup>98</sup> For one thing, Section 10(c) by its terms does not apply in cases that do not involve the suspension or discharge of the employee whose Section 7 rights were violated.<sup>99</sup> Thus, that statutory provision imposes no apparent limitation on the Board's remedial authority in *Weingarten* cases in which the employee's alleged misconduct results in the imposition of other forms of discipline,<sup>100</sup> such as a demotion or an involuntary transfer.<sup>101</sup>

Moreover, even in suspension and discharge cases,<sup>102</sup> Section 10(c) is susceptible to an alternative interpretation that would preclude an award of make-whole relief in *Weingarten* cases only "where evidence

98. See, e.g., *Communication Workers*, 784 F.2d at 849 ("We have misgivings about the construction of § 10(c) in *Taracorp* . . ."); cf. *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1169 n.31 (5th Cir. 1980) (describing as an "interesting conundrum" the question of "whether, to remedy the abrogation of an employee's right to union representation at an interview, the Board can order his reinstatement . . . despite the fact that Section 10(c) prohibits the reinstatement of an employee who was fired for cause").

99. See *Texaco, Inc.*, 251 N.L.R.B. 633, 639 (1980) (Truesdale, Member, dissenting in part) (noting that "Section 10(c) of the Act is not directly applicable to . . . discipline short of suspension or discharge"), *enforced*, 659 F.2d 124 (9th Cir. 1981); cf. *Dover Garage II, Inc.*, 237 N.L.R.B. 1015, 1019 (1978) (finding it unnecessary to decide whether a "warning issued by [a] supervisor was . . . protected by Section 10(c) of the Act"), *enforcement denied* 607 F.2d 998 (2d Cir. 1979).

100. See *Airco Alloys*, 249 N.L.R.B. 524, 526 (1980) ("[*Weingarten*] rights involve representation of employees at interviews with management where the employee reasonably expects that *any kind of discipline* might follow, not just discipline involving transfers, demotions, layoffs, or discharges.") (emphasis added).

101. See, e.g., *United States Postal Serv.*, 241 N.L.R.B. 141, 156 (1979) (rejecting the employer's contention that make-whole relief was "precluded by Section 10(c) of the Act," in part because the employee whose *Weingarten* rights were violated had merely received a written warning, and had "not been suspended or discharged"); cf. *Penn-Dixie Steel Corp.*, 253 N.L.R.B. 91, 95-96 (1980) (concluding that Section 10(c) did not preclude an award of reinstatement and backpay to an employee whose resignation had been "obtained in violation of his *Weingarten* rights," because the employee "was not actually discharged").

102. It is not clear why Congress chose to limit the Board's remedial authority only in discharge and suspension cases, since reinstatement and backpay also may be awarded in cases involving other types of unlawful discipline. See, e.g., *Ace Beverage Co.*, 250 N.L.R.B. 646, 648 (1980) ("It is uncontested that . . . the Charging Party is entitled to reinstatement to his predemotion position . . . and to backpay commencing on the date he was unlawfully demoted."); *Montgomery Ward & Co.*, 155 N.L.R.B. 482, 485 (1965) (holding that an unlawfully transferred employee was "entitled to reinstatement to his former position"). However, Congress "most assuredly knew how to limit the Board's authority" when it drafted Section 10(c) to include an "express limitation against reinstatement or backpay orders [only] for employees 'suspended or discharged for cause.'" *Gourmet Foods, Inc.*, 270 N.L.R.B. 578, 591 (1984) (Zimmerman, Member, dissenting) (quoting *Conair Corp. v. NLRB*, 721 F.2d 1355, 1394 (D.C. Cir. 1983) (Wald, J., dissenting) and 29 U.S.C. § 160(c) (2000)).

*independent from [the] improper interview*” reveals that the employee was disciplined for cause.<sup>103</sup> This was, in fact, the Board’s view of Section 10(c) prior to *Taracorp*,<sup>104</sup> when the failure to provide union representation at an investigatory interview was typically deemed to render unlawful an otherwise lawful discharge for cause,<sup>105</sup> and make-whole relief was available unless the employer could prove “that there was cause for discipline based on information gathered independently of the unlawful interview.”<sup>106</sup> As one Board administrative law judge explained:

In the cases [in] which the Board has . . . found a make-whole remedy inappropriate, the employers were able to establish that the disciplinary action taken was not based upon any information obtained during the unlawful interview. Thus, the disciplinary actions and the *Weingarten* violations were completely independent of one another.<sup>107</sup>

Ironically, this is also the approach followed in several of the cases upon which the Board in *Taracorp* relied when it interpreted Section 10(c) to preclude an award of make-whole relief for most *Weingarten* violations.<sup>108</sup> In *General Motors Corp. v. NLRB*,<sup>109</sup> for example, the employer argued that Section 10(c) prohibited the reinstatement of an employee whose *Weingarten* rights were violated.<sup>110</sup> Although the court agreed that the Board’s award of make-whole relief was unwarranted, it did so because the employer had presented evidence independent of its

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103. *NLRB v. Kahn’s & Co.*, 694 F.2d 1070, 1072 (6th Cir. 1982) (emphasis added).

104. See Truesdale, *supra* note 19, at 176 (“Section 10(c) of the Act prohibits the Board from reinstating an employee who was discharged for cause, although it is well accepted that the Board can order reinstatement where the employer would not have discovered the employee’s misbehavior but for the employer’s unlawful conduct.”).

105. See *Kahn’s & Co.*, 253 N.L.R.B. 25, 30 (1980), *reconsideration denied*, 256 N.L.R.B. 930 (1981), *enforced in part and enforcement denied in part*, 694 F.2d 1070 (6th Cir. 1982):

The [employer] . . . contends that Section 10(c) of the Act prohibits the Board from ordering the reinstatement of [an employee] . . . discharged for cause. The Board has held, however, that an employer’s unlawful refusal to allow an employee union representation renders “unlawful what was an otherwise lawful discharge for cause,” and that the appropriate remedy is reinstatement with backpay.

*Id.* (quoting *Anchortank, Inc.*, 239 N.L.R.B. 430, 431 n.9 (1978), *enforced in part and enforcement denied in part*, 618 F.2d 1153 (5th Cir. 1980)); *cf.* *L.A. Water Treatment*, 263 N.L.R.B. 244, 249 (1982) (Jenkins, Member, concurring in part and dissenting in part) (asserting that “discipline cannot be lawful if it is based on information which is distorted because of the employer’s unlawful denial of [union] representation”).

106. *Kraft Foods, Inc.*, 251 N.L.R.B. 598, 599 (1980) (Jenkins, Member, dissenting in part) (internal quotation marks omitted), *overruled by Taracorp Indus.*, 273 N.L.R.B. 221, 222–23 (1984).

107. *Northwest Eng’g Co.*, 265 N.L.R.B. 190, 198 (1982).

108. See *Taracorp Indus.*, 273 N.L.R.B. at 222 & n.11 (citing cases).

109. 674 F.2d 576 (6th Cir. 1982).

110. *Id.* at 577.

*Weingarten* violation that would have supported its termination of the employee for cause.<sup>111</sup>

A similar result was reached in *NLRB v. Illinois Bell Telephone Co.*,<sup>112</sup> another case in which the Board awarded reinstatement and backpay to an employee who was terminated after her *Weingarten* rights were violated.<sup>113</sup> The employer in *Illinois Bell* petitioned to set aside that award, arguing that it had discharged the employee for dishonesty,<sup>114</sup> and that Section 10(c) prohibits an award of reinstatement or backpay to employees terminated for cause.<sup>115</sup> Although the Seventh Circuit refused to enforce the Board's remedial order,<sup>116</sup> it effectively held that Section 10(c) permits an award of make-whole relief to an employee purportedly terminated for cause if the discharge was "solely dependent" upon evidence obtained during an interview conducted in violation of *Weingarten*.<sup>117</sup> The court thus remanded the case for further consideration of the proper remedy to be imposed,<sup>118</sup> and specifically for further proceedings "to determine whether independent evidence sufficiently supported the [c]ompany's discharge of [the employee] for cause."<sup>119</sup>

111. *Id.* at 577-78; *see also* Ill. Bell Tel. Co., 275 N.L.R.B. 148, 151 (1985) (noting that the *General Motors* court refused to award make-whole relief "because . . . there was sufficient independent evidence of employee wrongdoing to warrant a discharge, quite apart from the information garnered from an illegally conducted interview"), *enforced sub nom.* Communication Workers v. NLRB, 784 F.2d 847 (7th Cir. 1986); Gregory, *supra* note 22, at 618-19 ("Instead of inquiring into whether the employee was fired for requesting union representation, the [*General Motors*] court considered whether there was 'independent evidence of good cause for discharge.'" (quoting *Gen. Motors*, 674 F.2d at 578).

112. 674 F.2d 618 (7th Cir. 1982) (per curiam).

113. Ill. Bell Tel. Co., 251 N.L.R.B. 932, 934-35 (1980), *enforced in part and enforcement denied in part*, 674 F.2d 618 (7th Cir. 1982).

114. Ill. Bell Tel., 674 F.2d at 623 ("[T]he record here establishes that the Company discharged [the employee] . . . upon a belief that she had been dishonest . . .").

115. *Id.* at 620.

116. *Id.* at 623 ("[W]e enforce the Board's Order in all respects except as to reinstatement, back pay, and expungement of [the employee's] discharge record. Enforcement of those portions of the Order . . . is denied . . .").

117. *Id.*; *see also* Gregory, *supra* note 22, at 619-20:

[T]he [*Illinois Bell*] court initially stated that it was clear that the employee had not been discharged for requesting union representation. However, instead of concluding from this that the Board's remedy was inappropriate, the Seventh Circuit considered, as the Board had done in *Kraft*, whether the discharge could have been supported by evidence obtained outside the interview.

*Id.* (footnotes omitted),

118. Ill. Bell Tel., 674 F.2d at 621.

119. *Id.* at 623. Because the Seventh Circuit essentially "applied the . . . test set down by *Kraft* in determining the propriety of a make-whole remedy," Gregory, *supra* note 22, at 620, the *Taracorp* Board's citation of *Illinois Bell* in overruling *Kraft* is particularly curious. *See Taracorp Indus.*, 273 N.L.R.B. 221, 222 n.11 (1984).



Courts in other cases have also interpreted Section 10(c) to preclude an award of make-whole relief only when the employer establishes, through “evidence independent from [the] improper interview,” that the employee was discharged for cause.<sup>120</sup> In *NLRB v. Southwestern Bell Telephone Co.*,<sup>121</sup> for example, the court assumed that the Board can require an employer to show that its imposition of discipline was not based on information obtained at an unlawful interview, but the court refused to award backpay to an employee suspended after such an interview because the employer had satisfied that evidentiary burden.<sup>122</sup>

Significantly, the analysis in these cases is supported by the legislative history of Section 10(c).<sup>123</sup> As originally enacted, that provision contained no specific limitation on the Board’s authority to remedy unfair labor practices.<sup>124</sup> In an effort to curtail the Board’s seemingly unbridled remedial authority under the original provision,<sup>125</sup> the proviso prohibiting the Board from awarding make-whole relief to employees suspended or discharged for cause was added in 1947<sup>126</sup> as part of the

120. *NLRB v. Kahn’s & Co.*, 694 F.2d 1070, 1072 (6th Cir. 1982) (citing *General Motors Corp.*).

121. 730 F.2d 166 (5th Cir. 1984).

122. *Id.* at 174. In addition, although the analysis in one of the cases the Board cited in *Tara-corp, Montgomery Ward & Co. v. NLRB*, 664 F.2d 1095, 1097 (8th Cir. 1981), arguably does support its interpretation of Section 10(c), one Board administrative law judge has asserted that even *Montgomery Ward* is merely a “somewhat strained” example of a court applying the “independent evidence rule,” because the court implied, even if it did not state, “that there was independent evidence of [the employee’s] wrongdoing.” *Ill. Bell Tel. Co.*, 275 N.L.R.B. 148, 151 (1985), *enforced sub nom. Communication Workers v. NLRB*, 784 F.2d 847 (7th Cir. 1986).

123. *Compare Ill. Bell Tel. Co.*, 674 F.2d at 623 (indicating that reinstatement and backpay may be awarded under Section 10(c) where an employee’s termination “stemmed solely from the Company’s unfair labor practice of forcing her to participate in an interview without representation”), *with Pac. Tel. & Tel. Co.*, 246 N.L.R.B. 1007, 1019 (1979) (“[N]othing in Section 10(c)’s legislative history indicates that it was designed to curtail the Board’s power to fashion remedies, when losses of employment ‘stem directly’ from unfair labor practices found.”) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 217 (1964)).

124. *See Carpenter Steel Co.*, 76 N.L.R.B. 670, 671 (1948):

Section 10(c) of the original National Labor Relations Act directed the Board to order employers found to have engaged in conduct violative of the Act to cease and desist from their illegal conduct. It also gave the Board power to order employers to take affirmative action to remedy the unfair labor practices committed, a power limited only by the requirement that the remedy effectuate the policies of the Act.

125. *See NLRB v. N.Y. Univ. Med. Ctr.*, 702 F.2d 284, 295 (2d Cir. 1983) (“In general, through [the amendment of] § 10(c) and related provisions, Congress sought to limit discretion exercised by the Board under the Wagner Act.”) (footnote omitted), *vacated and remanded*, 464 U.S. 805 (1983); *cf. Local 60, United Bhd. of Carpenters & Joiners v. NLRB*, 365 U.S. 651, 657 (1961) (Harlan, J., concurring) (noting that Section 10(c) as originally enacted “did not pass the Wagner Act Congress without objection to the uncontrolled breadth of [the Board’s] power”).

126. Congress enacted the NLRA in 1935, and significantly amended the Act in 1947 and again in 1959. *See NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 500 (1960); *NLRB v. A.P.W.*

Taft-Hartley amendments to the NLRA.<sup>127</sup>

As originally drafted by the House,<sup>128</sup> the proviso would have prohibited the Board from awarding reinstatement or backpay to “any employee who had been suspended or discharged, *unless the weight of evidence showed that the employee was not suspended or discharged for cause.*”<sup>129</sup> Although the “weight of evidence” language was subsequently eliminated in conference committee,<sup>130</sup> that revision was premised upon the fact that Section 10(c) already authorized the Board to act only upon a preponderance of the evidence.<sup>131</sup>

The fact that the deleted language was deemed redundant<sup>132</sup> suggests that the proviso ultimately included in Section 10(c) is not substantively different “from the earlier House draft which included the specific

Prods. Co., 316 F.2d 899, 904–05 (2d Cir. 1963). The 1947 revisions are commonly referred to as the Taft-Hartley amendments in honor of their principal sponsors, Senator Robert Taft and Congressman Fred Hartley. *See* NLRB v. Wiltse, 188 F.2d 917, 923 (6th Cir. 1951).

127. *See* Zurn Indus., Inc. v. NLRB, 680 F.2d 683, 689 (9th Cir. 1982) (“The ‘discharge for cause’ language was added to Section 10(c) by the 1947 Taft-Hartley amendments.”); Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F.2d 74, 83 (9th Cir. 1960) (noting that “the amendment to § 10(c) . . . that the Board shall not require the reinstatement of any employee who has been suspended or discharged for ‘cause’” was “contained in the Taft-Hartley law”); Fibreboard Paper Prods. Corp., 180 N.L.R.B. 142, 172 (1969) (“The Taft-Hartley amendments added to Section 10(c), a proviso . . . that an employee cannot be reinstated who was discharged ‘for cause.’”).

128. The Taft-Hartley legislation originated in the House of Representatives. *See* Int’l Union of United Ass’n of Journeymen & Apprentices v. NLRB, 675 F.2d 1257, 1260–61 (D.C. Cir. 1982); Enterprise Ass’n of Steam Pipefitters v. NLRB, 521 F.2d 885, 922 (D.C. Cir. 1975) (MacKinnon, J., dissenting) *rev’d* 429 U.S. 507 (1977); *see also* Int’l Ass’n of Bridge, Structural, & Ornamental Iron Workers Local No. 111 v. NLRB, 946 F.2d 1264, 1268 (7th Cir. 1991) (“The House originally passed its own version of section 10(c), but the Senate amended it to its current form.”) (footnote omitted).

129. *N.Y. Univ. Med. Ctr.*, 702 F.2d at 295 (emphasis added) (quoting H.R. REP. No. 510, at 55, *reprinted in* 1947 U.S. CODE CONG. SERV. 1135, 1161); *see also* Zurn Indus., 680 F.2d at 689 (discussing the “bill introduced by Congressman Hartley” that included “the ‘weight of the evidence’ language”).

130. *N.Y. Univ. Med. Ctr.*, 702 F.2d at 295 (“In reaching a compromise, the conference committee deleted the ‘weight of the evidence’ language but inserted the cause provision, reformulating the standard in positive as opposed to negative terms.”); Zurn Indus., 680 F.2d at 689 (“A joint conference drafted a compromise version of the bill, passed by both houses of Congress in June, 1947, which deleted the ‘weight of the evidence’ language . . . and cast the [cause] standard in affirmative rather than negative terms . . .”).

131. *See N.Y. Univ. Med. Ctr.*, 702 F.2d at 295 (“The conference agreement omits the ‘weight of evidence’ language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence . . .”) (quoting H.R. REP. NO. 510, at 55, *reprinted in* 1947 U.S. CODE CONG. SERV. 1135, 1161). In particular, Section 10(c) directs the Board to award the relief authorized by that section, or dismiss the unfair labor practice complaint, based on “the preponderance of the testimony” presented to it. 29 U.S.C. § 160(c) (2000).

132. Zurn Indus., 680 F.2d at 692 (“The . . . deletion of the phrase ‘weight of the evidence’ . . . served only to eliminate a redundancy with regard to the nature of the burden of proof . . .”).

‘weight of the evidence’ language.”<sup>133</sup> If this interpretation of the legislative history is correct,<sup>134</sup> the proviso was clearly intended to preclude an award of reinstatement or backpay only where the Board makes an *evidentiary finding* that the employee was suspended or discharged for cause.<sup>135</sup> Moreover, in assessing that issue, the Board is undoubtedly entitled to prohibit the employer from relying on evidence of cause that has been “tainted by its own misconduct,”<sup>136</sup> as the remedial approach to *Weingarten* it adopted in *Kraft* effectively did.<sup>137</sup>

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133. *N.Y. Univ. Med. Ctr.*, 702 F.2d at 295.

134. In some cases, resort to the legislative history of the Taft-Hartley amendments has been “unilluminating,” *Hotel & Rest. Employees & Bartenders Int’l Union Local 54 v. Danzinger*, 709 F.2d 815, 838 n.5 (3d Cir. 1983), *vacated & remanded sub nom. Brown v. Hotel & Rest. Employees & Bartenders Int’l Union Local 54*, 468 U.S. 491 (1984), and the legislative history of Section 10(c), in particular, has been described as “inconclusive.” *NLRB v. Wright Line*, 662 F.2d 899, 904 n.8 (1st Cir. 1981); *see also* *United Mine Workers*, 92 N.L.R.B. 916, 925 (1950) (Reynolds, Member, dissenting in part and concurring specially) (describing an “inconsistency in the legislative history” of Section 10(c)).

135. *See* *Pittsburgh S.S. Co. v. NLRB*, 180 F.2d 731 (6th Cir. 1950):

In Section 10(c) the House bill provided that the Board should base its decisions upon the ‘weight of the evidence.’ . . . The conference agreement provides that the Board shall act only on the ‘preponderance’ of the testimony—that is to say, on the weight of the credible evidence. . . . [T]he Board’s decisions should show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence, setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that.

*Id.* at 734 n.1 (quoting H.R. REP. NO. 510, at 53, *reprinted in* 1947 U.S. CODE CONG. SERV. 1135, 1159–60).

136. *Craftool Mfg. Co.*, 229 N.L.R.B. 634, 638 (1977); *see also* *Bath Iron Works Corp.*, 302 N.L.R.B. 898, 915 (1991) (holding that “tainted” evidence “may not be used to justify . . . discipline”). *See generally* *Vernon Livestock Trucking Co.*, 172 N.L.R.B. 1805, 1810 (1968) (asserting that the Board is not “required to accept [the employer’s] alleged lawful justification for a discharge merely because it has been put forward with supporting evidence”) (footnote omitted).

137. *See* *Ill. Bell Tel. Co.*, 275 N.L.R.B. 148, 150 (1985) (“In *Kraft* the Board [held] . . . that a wrongdoer could avoid the conventional reinstatement-backpay remedy . . . by showing that the discipline which was meted out was not based on information obtained at the illegal interview but was premised exclusively on data obtained independent of the interview.”), *enforced sub nom. Communication Workers v. NLRB*, 784 F.2d 847 (7th Cir. 1986); Gregory, *supra* note 22, at 619 n.336 (“[T]he Board’s approach in *Kraft* . . . looked to the existence of evidence obtained independent of the unlawful interview.”).

VI. AWARDING MAKE-WHOLE RELIEF FOR *WEINGARTEN* VIOLATIONS  
FURTHERS IMPORTANT POLICY OBJECTIVES

*A. Make-Whole Relief Should be Available Where There is a Sufficient  
“Nexus” Between the Employer’s Weingarten Violation and  
its Disciplinary Decision*

Despite the Board’s contrary assertion,<sup>138</sup> the *Kraft* approach to remedying *Weingarten* violations may be preferable, as a matter of policy,<sup>139</sup> to the one purportedly adopted in *Taracorp* for several reasons.<sup>140</sup> First, even the *Taracorp* Board appears to have recognized that there may be some *Weingarten* cases in which there is a “sufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for the discharge (perceived misconduct) to justify a make-whole remedy.”<sup>141</sup>

Such a nexus presumably can exist even though the employee “was not disciplined for *asserting* his *Weingarten* rights at the interview,”<sup>142</sup> as *Taracorp* is generally deemed to require.<sup>143</sup> Indeed, the Board has noted that the denial of union representation at an investigatory interview violates an employee’s Section 7 rights “for the very reason

138. See *Taracorp Indus.*, 273 N.L.R.B. 221, 221–22 (1984) (“[M]ake-whole relief in the context of a *Weingarten* violation . . . constitutes bad policy.”); see also *Communication Workers*, 784 F.2d at 848 (noting that the Board in *Taracorp* concluded that awarding make-whole relief for *Weingarten* violations was “bad policy because the prospect of reinstatement had made the investigatory and remedial process in *Weingarten* cases too adversarial and complex”).

139. The Board is vested with “primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898 (1984); see also *Rochester Joint Bd., Amalgamated Clothing & Textile Workers Union v. NLRB*, 896 F.2d 24, 28 (2d Cir. 1990) (“The primary responsibility for devising remedies that effectuate the policies of the NLRA is vested in the Board. . . .”) (internal citations omitted).

140. As discussed *infra* notes 141–170 and accompanying text, *Taracorp* itself has been interpreted too narrowly to the extent it is often read to permit an award of make-whole relief in *Weingarten* cases “if, but only if, an employee is discharged or disciplined for asserting the right to representation.” *Circuit-Wise, Inc.*, 308 N.L.R.B. 1091, 1109 (1992) (quoting *Taracorp*, 273 N.L.R.B. at 223 n.12).

141. *Taracorp*, 273 N.L.R.B. at 223; see also *United States Postal Serv.*, 314 N.L.R.B. 227, 227 (1994) (citing *Taracorp* for the proposition that make-whole relief is unavailable where there is “no demonstrated nexus between the wrongful denial of representation and the subsequent discipline”).

142. *Massillon Hosp. Ass’n*, 282 N.L.R.B. 675, 677 (1987) (emphasis added) (applying *Taracorp*).

143. See, e.g., *N.J. Bell Tel. Co.*, 300 N.L.R.B. 42, 55 n.20 (1990) (“A make-whole remedy can be appropriate in a *Weingarten* setting only if an employee is discharged for asserting the right to representation.”) (citing *Taracorp*, 273 N.L.R.B. at 223).

(among others) that if the employer had permitted a union representative to participate in the . . . interview, the adverse personnel action which the employer actually took after the interview might not have been taken or might have been less severe.”<sup>144</sup>

For example, there is a “definite nexus” between an employer’s *Weingarten* violation and its subsequent disciplinary action where the discipline resulted “from the employee’s conduct *during* the unlawful interview.”<sup>145</sup> Such conduct by an unrepresented employee could include a decision to “‘dummy up’ in the face of . . . attempts by his employer to question him,”<sup>146</sup> which—absent a right to reinstatement and other make-whole relief under *Weingarten*<sup>147</sup>—could result in his termination or other disciplinary action.<sup>148</sup> In this situation, there presumably is a sufficient nexus between the discipline imposed by the employer and its denial of the employee’s *Weingarten* rights to support an award of

144. United States Postal Serv., 241 N.L.R.B. 141, 154 (1979); *see also* La. Council No. 17, 250 N.L.R.B. 880, 899–900 (1980) (noting that an award of make-whole relief to a *Weingarten* victim could be premised upon the assumption “that had the employee been granted his statutory right to representation he would not have been disciplined”).

145. Northwest Eng’g Co., 265 N.L.R.B. 190, 198 (1982); *see also* Westside Cmty. Mental Health Ctr., 327 N.L.R.B. 661, 666 (1999) (describing an employee whose “termination was based, in part, on . . . actions she might not have taken if afforded the counsel of her union representative”).

146. *System 99*, 289 N.L.R.B. 723, 727 (1988); *see also* Horwath & Co., 304 N.L.R.B. 805, 810 n.16 (1991) (discussing an employee who “decided . . . to dummy-up; that is, to pretend to an almost total lack of recollection as the best means of ensuring that he could not be blamed”); ITT Lighting Fixtures, 261 N.L.R.B. 229, 231 n.11 (1982) (describing an employee who “refused to answer questions after his request for representation was denied”).

147. In *Glenside Hosp.*, 234 N.L.R.B. 62 (1978), a Board administrative law judge indicated that absent the prospect of a make-whole remedy involving “restoration of the *status quo ante*,” an employer may “deliberately, well knowing the calculated risk, cause[] the discharge of an employee” and thereby “‘profit from a stubborn refusal to abide by the law.’” *Id.* at 70 (quoting *Franks Bros. v. NLRB*, 321 U.S. 702, 705 (1944)). In this context, that result would run afoul of the *Weingarten* principle that “an employer cannot discipline an employee for refusing . . . to answer questions without union assistance.” *Southwestern Bell Tel. Co. v. NLRB*, 667 F.2d 470, 473 (5th Cir. 1982); *see also* *Gen. Motors Corp. v. NLRB*, 674 F.2d 576, 577 (6th Cir. 1982) (“The court’s decision in *Weingarten* is abundantly clear that once . . . a request [for union representation] is made, the employee has the absolute right to refuse to answer any further questions until he receives the representation desired.”).

148. *See, e.g.*, *Good Hope Refineries, Inc. v. NLRB*, 620 F.2d 57, 58 (5th Cir. 1980) (discussing an employee who was disciplined for insubordination after he “refused to answer the personnel manager’s inquiries without the presence of a union representative”); *Pac. Gas & Elec. Co.*, 253 N.L.R.B. 1143, 1145 (1981) (describing an employer that “denied [an employee’s] request for union representation at an interview” and then “suspended [the employee] because [he] refused to answer any questions at the interview without the union representation which he had requested”); *Kraft Foods, Inc.*, 251 N.L.R.B. 598, 599 (1980) (Jenkins, Member, dissenting in part) (“[I]f the employee said nothing at the interview . . . the severity of the discipline imposed may be affected by the employee’s demeanor or his ‘refusal to cooperate’ without representation.”), *overruled by Taracor Indus.*, 273 N.L.R.B. 221, 222–23 (1984).

make-whole relief.<sup>149</sup>

A similar nexus may exist where an employee whose *Weingarten* rights have been violated elects *not* to remain silent,<sup>150</sup> but provides inaccurate or misleading information to the employer during the unlawful investigatory interview.<sup>151</sup> Under these additional circumstances, any ensuing discipline<sup>152</sup> may be causally related to the *Weingarten* violation,<sup>153</sup> because “the central function of a *Weingarten* representative, as the Supreme Court has observed, is to clarify information and to provide assistance to an employee who may be ‘too fearful or inarticulate’ to relate accurate information.”<sup>154</sup>

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149. See, e.g., *Sodexo Marriott Servs., Inc.*, 335 N.L.R.B. 538, 541 (2001) (noting the “direct correlation between the [employer’s] action and [the employee’s] assertion of her rights” where the employee was terminated for refusing to answer questions at an unlawful investigatory interview); *Salt River Valley Water Users’ Ass’n*, 262 N.L.R.B. 970, 975 (1982) (finding that an employee was “entitled to a make-whole remedy” where the employer “conducted an unlawful interview with [the employee] and subsequently discharged [him], at least in part, for his refusal to answer questions at that unlawful interview”); cf. *Safeway Stores, Inc.*, 303 N.L.R.B. 989, 989–90 (1991) (stating that “[t]he nexus between the statutory right and the discharge is clear” where the employee is terminated for “refus[ing] to participate in an investigatory interview . . . without the assistance of a union steward”).

150. See, e.g., *Ohio Masonic Home*, 251 N.L.R.B. 606, 607 (1980) (“The employee asked that another employee be allowed to accompany her as her representative but the [e]mployer refused and the interview proceeded without the employee representative.”); *Exxon Co. U.S.A.*, 223 N.L.R.B. 203, 205 (1976) (describing an employee who “agreed to be interviewed” after “requesting and being denied union representation”).

151. See *United States Postal Serv.*, 241 N.L.R.B. 141, 156 (1979) (“Denial of *Weingarten* rights during an investigatory interview . . . may render the evidence adduced during the interview inaccurate or incomplete.”); *Thrifty Drug Stores Co. v. Warehouse, Processing and Distribution Workers’ Union*, 50 Lab. Arb. Rep. (BNA) 1253, 1260 (1968) (Jones, Arb.) (indicating that fear of the consequences of the employer’s investigation may have “prompted falsification” by employees who were denied union representation at their investigatory interviews).

152. See, e.g., *Turner v. Holbrook*, 278 F.3d 754, 757 (8th Cir. 2002) (describing an employee who was “terminated . . . for providing false information in an official investigation”); *Schafer Bakeries, Inc. v. Bakery Workers Int’l Union Local 326*, 95 Lab. Arb. Rep. (BNA) 759, 762 (1990) (Brown, Arb.) (quoting a company work rule stating that “giving false information during an investigation is cause for disciplinary action, and may be cause for immediate discharge”).

153. See, e.g., *Kraft*, 251 N.L.R.B. at 599 (Jenkins, Member, dissenting in part) (“[T]he employee [who] chooses to deny all accusations although some of them were true . . . might not have made this choice, and so further antagonized the employer, had he been allowed the representation he requested and unlawfully was denied.”); *Ohio Masonic Home*, 251 N.L.R.B. at 607, 610 (finding that the presence of a union representative “might have affected the outcome of [an] interview” in which the employee “did not [provide] a satisfactory explanation in response to the complaints” against her); cf. *L.A. Water Treatment*, 263 N.L.R.B. 244, 249 (1982) (Jenkins, Member, dissenting in part) (asserting that the discipline of an employee whose *Weingarten* rights have been violated is “based on information which, as a result of the denial of representation, is in all likelihood incomplete or inaccurate”) (emphasis added).

154. *L.A. Water Treatment*, 263 N.L.R.B. at 249 (Jenkins, Member, dissenting in part) (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 263–64 (1975)); see also *United States Postal Serv. v. NLRB*, 969 F.2d 1064, 1071 (D.C. Cir. 1992) (discussing the ability of an informed union represen-

In this regard, several labor arbitrators have asserted that evidence elicited in interrogations that occur without a union representative present may be inherently unreliable,<sup>155</sup> and should be “regarded with skepticism and given weight only when other evidence corroborates their substance.”<sup>156</sup> There is also Board authority noting that “the employer who denies representation to an employee during an interview creates circumstances which are conducive to the production of inaccurate and incomplete information concerning the events which prompted the interview.”<sup>157</sup>

In particular, the failure to provide an employee with union representation deprives the employee of assistance in responding to the employer’s charges.<sup>158</sup> In upholding the Board’s extension of *Weingarten* to encompass a right to confer with a union representative *before* an investigatory interview,<sup>159</sup> for example, one court emphasized the representative’s role in “bringing to light justifications, explanations, extenuating circumstances, and other mitigating factors.”<sup>160</sup> As the Board itself has

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tative “to aid in a full and cogent presentation of the employee’s view of the matter”).

155. *See* Maurey Mfg. Co. v. Int’l Bhd. of Teamsters Local 714, 95 Lab. Arb. Rep. (BNA) 148, 155 (1990) (Goldstein, Arb.) (noting that “lack of Union representation, especially if a *Weingarten* violation is found,” is a factor arbitrators use “to test [the] reliability and validity of employee statements”); *cf.* *Thrifty Drug Stores*, 50 Lab. Arb. Rep. (BNA) at 1258 (“If [the employer’s] fact-finding procedures were significantly flawed, then the ‘facts’ which they produced must be discounted as unreliable . . .”).

156. *Rohr Indus. Inc. v. Int’l Ass’n of Machinists & Aerospace Workers Dist. Lodge 964*, 93 Lab. Arb. Rep. (BNA) 145, 157 (1989) (Goulet, Arb.) (quoting *Thrifty Drug Stores*, 50 Lab. Arb. Rep. (BNA) at 1262); *cf.* *Martin v. Consol. Freightways*, No. 84-5966, 1985 U.S. Dist. LEXIS 14122, at \*12 (E.D. Pa. Nov. 6, 1985) (discussing the contention that the denial of union representation in an investigatory interview should have “some effect on the weight that would be given to the statements supposedly given by the [employee]”).

157. *L.A. Water Treatment*, 263 N.L.R.B. at 249 (Jenkins, Member, dissenting in part); *see also* *Montgomery Ward & Co.*, 254 N.L.R.B. 826, 832 (1981) (noting that “coercion that caused [employees] to proceed with their . . . interviews without their requested union representatives could well have tainted the validity of their . . . statements”), *enforced in part and enforcement denied in part*, 664 F.2d 1095 (8th Cir. 1981).

158. *See* United States Dep’t of Justice, Bureau of Prisons, 35 F.L.R.A. 431, 446 (1990) (“[D]enying an employee who is the subject of an examination . . . representation rights . . . deprives the employee of assistance in articulating any available defense and thereby diminishes the possibility of avoiding an unjustified disciplinary action.”); *see also* *NLRB v. Southwestern Bell Tel. Co.*, 730 F.2d 166, 172 (5th Cir. 1984) (“Put simply, the union representative is there to help the employee in his effort to vindicate himself.”).

159. *See* *Climax Molybdenum Co.*, 227 N.L.R.B. 1189, 1189–90 (1977), *enforcement denied*, 584 F.2d 360 (10th Cir. 1978); *see also* *System 99*, 289 N.L.R.B. 723, 727 (1988) (“[I]t is now settled that an employee has the right to consult with an employee representative before undergoing an interview when *Weingarten* protections apply.”).

160. *United States Postal Serv. v. NLRB*, 969 F.2d 1064, 1071 (D.C. Cir. 1992); *see also* *Southwestern Bell Tel. Co. v. NLRB*, 667 F.2d 470, 474 (5th Cir. 1982) (discussing a union representative’s ability “to clarify facts, or to bring additional relevant facts to [the employer’s] atten-

repeatedly noted,<sup>161</sup> depriving an employee of such assistance may be a contributing factor in the employee's discharge,<sup>162</sup> and should perhaps give rise to a presumptive right to make-whole relief.<sup>163</sup>

Indeed, the Board in *Taracorp* itself acknowledged that an employee is entitled to make-whole relief if the employee was "discharged or disciplined for what appears to be a legitimate reason, but further examination reveals that the discharge or discipline was the result of an act that was . . . an unfair labor practice."<sup>164</sup> An employee who would not have been disciplined (or disciplined as severely) if the employer had complied with *Weingarten*<sup>165</sup> clearly has been disciplined as the result of

tion").

161. See *Pac. Tel. & Tel. Co.*, 246 N.L.R.B. 1007, 1019 (1979) ("In several cases, briefed to courts of appeals, the Board has argued that [an] employer's refusal to permit union representation during 'interviews' arguably prevented discussions during which representatives of concerned workers could have raised extenuating circumstances, which might have convinced the [employer] involved not to impose discipline.").

162. See, e.g., *Bureau of Prisons*, 35 F.L.R.A. at 446 ("[B]ecause the employee's union representative was denied the ability to assist the employee in presenting a defense to the charges being investigated, the employee may have suffered an unjustified disciplinary action."); see also *Cont'l-Indianapolis, Inc. v. Local 135, Int'l Bhd. of Teamsters*, 78 Lab. Arb. Rep. (BNA) 409, 416 (1982) (House, Arb.) (describing an employer that denied its employee's request for union representation and then "misled [him] into a false sense of security and, as a consequence, secured from him a confession that he had stolen . . . Company merchandise"); *Thrifty Drug Stores v. Warehouse, Processing and Distribution Workers Union*, 50 Lab. Arb. Rep. (BNA) 1253, 1260 (1960) (Jones, Arb.) (finding evidence to support the conclusion that employees denied union representation were "gulled into a false sense of reliance so that fabricated disclosures would appear to them as a desirable way to save their jobs").

163. See *System 99*, 289 N.L.R.B. at 728 (noting that *Kraft* held make-whole relief to be "presumptively appropriate" if the employer "conducted an investigatory interview in violation of *Weingarten* and . . . the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview") (quoting *Kraft Foods, Inc.*, 251 N.L.R.B. 598, 598 (1980), *overruled by Taracorp Indus.*, 273 N.L.R.B. 221, 222-23 (1984)); *Gold Kist Inc. v. United Food & Commercial Workers*, 89 Lab. Arb. Rep. (BNA) 66, 70 (1987) (Byars, Arb.) (indicating that make-whole relief is appropriate "if there is a possibility, regardless of how remote, that the [employee] was prejudiced" by the denial of union representation).

164. *Taracorp Indus.*, 273 N.L.R.B. at 222 (emphasis added) (citing *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964)); see also *United Rubber Workers of Am., Local 250*, 279 N.L.R.B. 1074, 1076 n.4 (1986) (Dennis, Member, dissenting in part), *overruled by Iron Workers Local Union 377*, 326 N.L.R.B. 375 ("*Taracorp* recognized that a make-whole remedy is appropriate . . . if the discharge, though apparently for a legitimate reason, is the result of an act that was an unfair labor practice . . .").

165. The right to union representation under *Weingarten* is based in part upon the assumption that a union representative who participates in an investigatory interview "may be able, through informal discussion and persuasion conducted at the threshold, to serve as the catalyst in the amicable resolution of disputes." *E.I. Du Pont de Nemours & Co. v. NLRB*, 724 F.2d 1061, 1065 (3d Cir. 1983), *vacated on other grounds*, 733 F.2d 296 (3d Cir. 1984); see also *Southwestern Bell Tel. Co.*, 227 N.L.R.B. 1223, 1224 (1977) ("[U]nion stewards all over the nation adjust thousands of grievances every day in an informal, expeditious, and satisfactory manner.").



an “act”—the denial of union representation—that is an unfair labor practice.<sup>166</sup>

In short, when an employee’s discipline was based solely or even primarily upon “information obtained at an unlawful interview,”<sup>167</sup> or upon “the employee’s conduct *during* the unlawful interview,”<sup>168</sup> there is at least arguably a sufficient nexus between the employer’s denial of the employee’s right to union representation and its disciplinary decision to warrant the award of make-whole relief even under the reasoning of *Taracorp*.<sup>169</sup> As one commentator has explained:

[W]hen an employer inflicts discipline putatively in response to an employee’s underlying misconduct, and a *Weingarten* violation takes place, if the employer disciplines the employee on the basis of information elicited during the course of the violative interview, one could argue that the cause-in-fact for the discipline was the *Weingarten* violation.<sup>170</sup>

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166. See *Southwestern Bell Tel. Co. v. NLRB*, 667 F.2d 470, 473 (5th Cir. 1982) (“It is clear that investigatory confrontation without requested union representation is an unfair labor practice . . . .”); *Orozco v. County of Monterey*, 941 F. Supp. 930, 939 n.8 (N.D. Cal. 1996) (noting that the “denial of a [sic] employee’s request that a union representative be present at an investigatory interview constitutes an unfair labor practice”).

167. *Salt River Valley Water Users’ Ass’n*, 262 N.L.R.B. 970, 971 (1982) (Jenkins, Member, concurring).

168. *Northwest Eng’g Co.*, 265 N.L.R.B. 190, 198 (1982).

169. See *Bath Iron Works Corp.*, 302 N.L.R.B. 898, 915 (1991) (noting that “make-whole remedies including reinstatement and backpay are appropriate” under *Taracorp* where the “loss of employment stems directly from an unfair labor practice”) (quoting *Taracorp*, 273 N.L.R.B. at 222); *Redway Carriers, Inc.*, 274 N.L.R.B. 1359, 1359 n.4 (1985) (stating that *Taracorp* “held that a make-whole remedy is appropriate to remedy a discharge . . . in those instances [in which] the loss of employment stems directly from the conduct that is the unfair labor practice”); cf. *Page Litho, Inc.*, 313 N.L.R.B. 960 (1994):

The Board held in *Taracorp* that the employer’s violation of an employee’s *Weingarten* rights did not *automatically* entitle the employee to reinstatement where there was not a sufficient nexus between the unfair labor practice—denial of [union] representation at an investigatory interview—and the reason for the employee’s discharge—perceived misconduct.

*Id.* at 962 (emphasis added and footnote omitted).

170. Steven J. Silverman, Comment, *The Differing Nature of the Weingarten Right to Union Representation in the NLRB and Arbitral Forums*, 44 U. MIAMI L. REV. 467, 478–79 n.55 (1989). A Board administrative law judge has similarly noted that the conclusion that an employee’s discharge resulted from the employer’s *Weingarten* violation may be “based on . . . a legal construct derived from the facts that he was denied his right to union representation and was discharged.” *Louisiana Council No. 17*, 250 N.L.R.B. 880, 900 (1980); see also *NLRB v. S. Bell Tel. & Tel.*, 676 F.2d 499, 502 n.2 (11th Cir. 1982) (reserving judgment on the question of whether “the revelation by the employee of incriminating information not [previously] known to the employer” in an interview in which union representation was denied “would support the inference that the disciplinary decision was based in part on the assertion of the *Weingarten* right or on the interview”).

*B. The Prevailing Interpretation of Taracorp Discourages the Use of Board Procedures for Remediating Weingarten Violations*

1. Employees Can Still Obtain Make-Whole Relief for *Weingarten* Violations in Arbitration Proceedings

An additional policy argument for returning to the *Kraft* approach to remediating *Weingarten* violations arises from the ability of employees to circumvent the remedial limitations established in *Taracorp* by asserting their *Weingarten* claims in arbitration proceedings,<sup>171</sup> rather than in Board unfair labor practice proceedings.<sup>172</sup> In particular, labor arbitrators, who generally regard the right to union representation at an investigatory interview as “an implied right of procedural ‘just cause’ in management’s disciplinary process,”<sup>173</sup> do not appear to view Section 10(c) of the NLRA as an impediment to the award of make-whole relief in *Weingarten* cases.<sup>174</sup>

In *Combustion Engineering, Inc. v. International Brotherhood of*

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171. Because “alleged *Weingarten* violations involve basic due process rights,” they “may properly be considered in arbitration.” *Anchorage Hilton Hotel v. Hotel Employees, Local 878*, 102 Lab. Arb. Rep. (BNA) 55, 58 (1993) (Landau, Arb.). *But see Coca-Cola Bottling Group v. Gen. Truck Drivers Local 952*, 97 Lab. Arb. Rep. (BNA) 343, 349 (1991) (Weckstein, Arb.) (“Not all arbitrators agree that so-called *Weingarten* rights apply in arbitrations.”).

172. However, one arbitrator has observed that “the National Labor Relations Board is the primary custodian of the *Weingarten* doctrine.” *Simkins Indus., Inc. v. United Paperworkers Int’l Union, Local 214*, 106 Lab. Arb. Rep. (BNA) 551, 557 (1996) (Fullmer, Arb.). Thus, unless the Board acquiesces, arbitrators may be “without authority to interpret [that decision] and the precedent thereunder.” *Norfolk Shipbuilding & Drydock Corp. v. Int’l Bhd. of Boilermakers Local 684*, 105 Lab. Arb. Rep. (BNA) 529, 533 (1995) (Hockenberry, Arb.). *See generally* *Ryan Aeronautical Co. v. UAW, Local 506*, 179 F. Supp. 1, 4 (S.D. Cal. 1959) (“[A] submission to arbitration would not and could not oust the National Labor Relations Board of jurisdiction to consider the unfair labor practice dispute involved if the Board has not ceded jurisdiction.”).

173. *Maui Pineapple Co. v. ILWU, Local 142*, 86 Lab. Arb. Rep. (BNA) 907, 910 (1986) (Tsukiyama, Arb.); *see also Anchorage Hilton Hotel*, 102 Lab. Arb. Rep. (BNA) at 58 (“Alleged due process violations, including alleged *Weingarten* violations, are simply part of the inquiry into whether the employer conducted a fair investigation under the ‘seven tests of just cause.’”) (citing ADOLPH M. KOVEN & SUSAN L. SMITH, *JUST CAUSE: THE SEVEN TESTS* 179–216 (2d ed. 1992)).

174. Section 10(c) merely “prevents the Board from providing a [make-whole] remedy for an employee’s discharge if that discharge was for cause.” *Cirker’s Moving & Storage Co.*, 313 N.L.R.B. 1318, 1318 n.1 (1994) (emphasis added). Thus, labor arbitrators, *unlike* the Board, appear to “have the authority to reinstate employees terminated for cause.” United States Dep’t of Justice, Fed. Bureau of Prisons, 48 F.L.R.A. 908, 912 (1993); *see also Maui Pineapple Co.*, 86 Lab. Arb. Rep. (BNA) at 910 (awarding backpay to an employee who “was denied his ‘*Weingarten* right’ to union representation during [the] Employer’s investigative interrogation” even though he was “found to have committed a dischargeable offense”).

*Boilermakers*,<sup>175</sup> for example, an arbitrator relied on *Weingarten*<sup>176</sup> in holding that an employee's termination "was not supported by just cause because [he] was denied Union representation during a meeting in which he was questioned regarding alleged misconduct."<sup>177</sup> Because the employer failed to comply with *Weingarten*,<sup>178</sup> the arbitrator refused to consider whether the employee's termination was otherwise justified,<sup>179</sup> and ordered the employer to reinstate the employee and make him whole for any losses he incurred as the result of his termination.<sup>180</sup>

*Combustion Engineering* predated the Board's decision in *Kraft*,<sup>181</sup> when the Board itself also ordered employers "to reinstate, with back-pay, employees fired after interviews from which union representatives had been excluded."<sup>182</sup> In *Tokheim Corp.*,<sup>183</sup> for example, a Board administrative law judge noted that pre-*Kraft* Board law<sup>184</sup> authorized an award of make-whole relief even when the denial of an employee's request for union representation "had no influence at all on her discharge

175. 67 Lab. Arb. Rep. (BNA) 349 (1976) (Clarke, Arb.).

176. See generally *City of Edina v. Int'l Assoc. of Fire Fighters, Local 1275*, 90 Lab. Arb. Rep. (BNA) 209, 211 (1987) (Ver Ploeg, Arb.) ("[T]he vast majority of arbitrators . . . have concluded that *Weingarten* provides guidance . . . even where . . . a right [to union representation] is not explicitly provided in the [collective bargaining] agreement.").

177. *Combustion Eng'g*, 67 Lab. Arb. Rep. (BNA) at 350.

178. See *id.* at 351 (citing *Weingarten* in discussing the "defect in the discharge caused by the Company's failure to allow Union representation").

179. See *id.* at 352 ("In view of the nature of the defect in the procedure used by the Company to discharge the Grievant, the Arbitrator will not inquire into the alleged misconduct of the Grievant to determine if some penalty should be imposed.").

180. See *id.*; cf. *Anaconda Co. v. Dist. Lodge No. 27, Int'l Ass'n of Machinists*, 693 F.2d 35, 36 (6th Cir. 1982) (describing an arbitrator who "did not reach the issue of whether [an employee's] discharge was for just cause but rather ordered [his] reinstatement because of the lack of union representation").

181. Labor arbitrators' recognition of a right to union representation at an investigatory interview, and the corresponding need to remedy violations of that right, predated *Weingarten*, let alone *Kraft*. See *Ill. Bell Tel. Co. v. Int'l Bhd. Of Elec. Workers*, 63 Lab. Arb. Rep. (BNA) 968, 978 (1974) (Dolnick, Arb.) (referring to pre-*Weingarten* arbitration decisions that "have generally held that an employee is entitled to Union representation where the interrogation is related to a prospective discipline or when the employee has reasonable grounds to expect to be disciplined"); Silverman, *supra* note 170, at 469 ("Industrial arbitrators had long recognized the right to union representation at investigatory interviews before the Supreme Court handed down its *Weingarten* decision.").

182. *Communication Workers v. NLRB*, 784 F.2d 847, 848 (7th Cir. 1986) (citing *Certified Grocers of Cal., Ltd.*, 227 N.L.R.B. 1211 (1977), *enforcement denied*, 587 F.2d 449 (9th Cir. 1979)); see also *Dobranski*, *supra* note 67, at 324 (noting that prior to its decision in *Kraft*, the Board's practice was to award make-whole relief "whenever an employee was discharged after being denied his *Weingarten* rights").

183. 265 N.L.R.B. 1658 (1982).

184. Although the Board's own decision in *Tokheim* post-dated *Kraft*, the administrative law judge's decision was issued in August 1979, a year before *Kraft* was decided. See *id.* at 1658.

for cause.”<sup>185</sup>

In cases decided subsequent to *Kraft*, both arbitrators and the Board retreated from this categorical view,<sup>186</sup> holding that a *Weingarten* violation ordinarily “must prejudice the employee before the disciplinary action should be overturned.”<sup>187</sup> In *Marquette Inn v. Hotel & Restaurant Employees*,<sup>188</sup> for example, an arbitrator denied the grievance of an employee who was not afforded union representation at a “disciplinary meeting,”<sup>189</sup> because the employee did not make any self-incriminating admissions during the meeting, and his discharge was based entirely on evidence obtained from others.<sup>190</sup> However, the arbitrator indicated that he would have overturned the discharge if evidence obtained during the meeting had played any significant role in the employer’s termination decision,<sup>191</sup> because the “substantive body of proof” would then have been “tainted by the procedural defect.”<sup>192</sup>

A similar result was reached in *Newport News Shipbuilding & Drydock Co. v. United Steel Workers*,<sup>193</sup> where several employees implicated in illegal drug activity were interviewed without the assistance of a union representative.<sup>194</sup> During their interviews, each of the employees admitted their use, sale, or possession of illegal drugs on the employer’s

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185. *Id.* at 1662 n.4 (citing *Certified Grocers*, 227 N.L.R.B. at 1215, and *Anchortank, Inc.*, 239 N.L.R.B. 430, 431 n.9 (1978), *enforcement denied in part*, 618 F.2d 1153 (5th Cir. 1980)); *see also* *Penn-Dixie Steel Corp.*, 253 N.L.R.B. 91, 96 n.17 (1980) (noting that the Board in *Anchortank* ordered an employer “to reinstate an employee, with back pay, for violation of his *Weingarten* rights even though the Board recognized that, apart from the *Weingarten* violation, the discharge was lawful”).

186. *Kraft* itself was a departure from the Board’s “longstanding practice of ordering a ‘make whole’ remedy whenever it has been established that an employer has disciplined an employee for conduct which was [the] subject of an interview conducted in violation of *Weingarten*.” *Kraft Foods, Inc.*, 251 N.L.R.B. 598, 599 (1980) (Jenkins, Member, dissenting in part), *overruled by* *Taracorp Indus.*, 273 N.L.R.B. 221, 222–23 (1984).

187. *Bi-State Dev. Agency v. Amalgamated Transit Div.* 788, 105 Lab. Arb. Rep. (BNA) 319, 324 (1995) (Bailey, Arb.); *see also* *Anchorage Hilton Hotel v. Hotel Employees, Local 878*, 102 Lab. Arb. Rep. (BNA) 55, 58 (1993) (Landau, Arb.) (“Absent a showing of prejudice, it is not appropriate to overturn the disciplinary action against [a] grievant [whose *Weingarten* rights have been violated].”).

188. 79 Lab. Arb. Rep. (BNA) 1259 (1982) (Flagler, Arb.).

189. *Id.* at 1264. The Board has indicated that “the full purview of protections accorded employees under *Weingarten* apply to both ‘investigatory’ and ‘disciplinary’ interviews, save only those conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action.” *Baton Rouge Water Works Co.*, 246 N.L.R.B. 995, 997 (1979).

190. *See Marquette Inn*, 79 Lab. Arb. Rep. (BNA) at 1264.

191. *See id.* (“If the self-incriminating evidence of the accused were the primary or even a significant element in support of the charge, I would have no choice but to vacate the discharge.”).

192. *Id.*

193. 78 Lab. Arb. Rep. (BNA) 921 (1982) (Garrett, Arb.).

194. *Id.* at 921–22.

premises.<sup>195</sup> When the employees were subsequently discharged, the union brought grievances on their behalf challenging the validity of the employer's disciplinary decisions.<sup>196</sup>

The union argued that the employer had violated the employees' statutory and contractual rights to union representation<sup>197</sup> and thus was prohibited from relying on evidence that originated in its investigatory interviews.<sup>198</sup> The union also argued that all of the employer's evidence originated in the unlawful interviews, and that, under *Kraft*, the discharges should therefore be set aside and the employees reinstated with backpay.<sup>199</sup>

The employer responded to the union's argument by noting that the Board in *Kraft* had *refused* to overturn a discharge despite the denial of union representation because the discharge "was based on evidence obtained independently from the improper interview."<sup>200</sup> Because most of the employees admitted in their testimony at the arbitration hearing that they were involved in illegal drug activity,<sup>201</sup> the employer asserted that its failure to provide them with union representation during their prior investigatory interviews should not invalidate their discharges.<sup>202</sup>

The arbitrator agreed that the Board's analysis in *Kraft* was instructive,<sup>203</sup> and concluded that the remedy for a *Weingarten* violation should be sufficient to deter future violations,<sup>204</sup> while nevertheless providing

195. *Id.* at 922.

196. *Id.* at 921–22.

197. *Id.* at 923–24; *cf.* *Coca-Cola Bottling Group v. Gen. Truck Drivers Local 952*, 97 Lab. Arb. Rep. (BNA) 343, 349 (1991) (Weckstein, Arb.) ("A failure to provide union representation to an employee, upon request, at an investigative meeting that might lead to discipline can be an unfair labor practice . . . , but it is not necessarily a breach of the contractual rights owed to an employee . . .").

198. *See Newport News*, 78 Lab. Arb. Rep. (BNA) at 923 ("Having failed to offer [union] representation, [the union] says, the Company cannot now rely on any admissions by the grievants which originated in such meetings.").

199. *Id.* at 924.

200. *Id.* at 925.

201. *Id.* at 922, 928 ("With a single exception, . . . none of the grievants denied having engaged in [the] conduct during testimony at the hearing. . . . [A]ll but one of the . . . grievants consistently and freely have admitted engaging in [the illicit] conduct . . . all the way through the hearing.").

202. *See id.* at 927.

203. *See id.* at 928 (looking to *Kraft* for guidance in a "somewhat comparable situation[] under *Weingarten*").

204. *See id.* at 927 ("[I]t reasonably may be inferred that revocation of the discipline normally would follow where such action properly may be regarded as essential to assure full compliance with the [obligation to provide union representation] . . ."); *cf.* *Ind. Convention Ctr. v. Plumbers & Steamfitters Union, Local 400*, 98 Lab. Arb. Rep. (BNA) 713, 721 (1992) (Wolff, Arb.) (concluding that "a substantial remedy must be afforded so that in the future the Employer will not breach this particular [right]").

the employer with an opportunity to produce independent evidence of an employee's misconduct.<sup>205</sup> The arbitrator characterized the employees' admissions of illicit activity as the "dominant fact" in the case,<sup>206</sup> and concluded that those admissions required that their discharges be upheld despite the employer's violation of their right to union representation.<sup>207</sup>

This remedial approach to *Weingarten* violations, like the Board's approach in *Kraft*,<sup>208</sup> essentially applies an exclusionary rule to evidence obtained in an unlawful investigatory interview.<sup>209</sup> Moreover, the arbitral approach to *Weingarten* does *not* appear to have been altered by the Board's overruling of *Kraft* in *Taracorp*.<sup>210</sup> In *Kimberly-Clark Corp. v. United Paperworkers International Union*,<sup>211</sup> for example, *Kraft* was cited with apparent approval in a case decided after *Taracorp*<sup>212</sup> for the proposition that an employee denied union representation during an investigatory interview "is not entitled to a make-whole remedy if the [c]ompany's decision to discipline was not based on information obtained during that interview."<sup>213</sup>

205. See *Newport News*, 78 Lab. Arb. Rep. (BNA) at 928.

206. *Id.* The arbitrator acknowledged that one of the employees had "disavowed the statements attributed to him in his . . . interview" when he subsequently testified at the arbitration hearing, and that his situation therefore required "additional comment." *Id.* However, the arbitrator concluded that the employee's failure to disavow his admission until shortly before the arbitration hearing deprived the employer of "any opportunity to produce its additional independent evidence" of the employee's misconduct, and that the disavowal therefore did not provide a basis for invalidating his termination. *Id.*

207. See *id.* However, the arbitrator emphasized that the employees' admissions made the case "unique," and stated that his decision therefore "in no way constitute[d] a precedent in future situations where the facts may differ." *Id.*

208. See *supra* notes 70–79 and accompanying text.

209. See *Toledo Bd. of Educ. v. Toledo Assoc. of Admin. Pers.*, 117 Lab. Rel. Rep. (BNA) 1409, 1413 (October 16, 2002) (Frankiewicz, Arb.) (observing that the exclusion of evidence obtained in violation of an employee's *Weingarten* rights "is analogous to the criminal law rule excluding the confession of a defendant who was not informed of his right to silence"); *Montgomery Ward & Co. v. Int'l Bhd. of Teamsters, Local 243*, 80 Lab. Arb. Rep. (BNA) 321, 325 & n.8 (1983) (Dobry, Arb.) (characterizing a prohibition on the use of evidence obtained during an interview in which an employee was denied union representation as a "bastardized version of the . . . exclusionary rule" applicable in cases involving "confessions garnered in violation of *Miranda*").

210. In addition, one state counterpart to the NLRB, the Pennsylvania Labor Relations Board, recently declined to follow *Taracorp*, and instead held that "the proper remedy [for a *Weingarten* violation] is a make-whole order consistent with the [Board's] decision . . . in *Kraft*." *Commonwealth v. Pa. Labor Relations Bd.*, 768 A.2d 1201, 1206 (Pa. Commw. Ct. 2001). *But see* *AFG Indus. v. Aluminum, Brick & Glass Workers, Local 456*, 87 Lab. Arb. Rep. (BNA) 568, 572 (1986) (Clarke, Arb.) ("In applying the National Labor Relations Act the Arbitrator must, of course, be bound by decisions of the National Labor Relations Board . . .").

211. 107 Lab. Arb. Rep. (BNA) 554 (1996) (Byars, Arb.).

212. See *id.* at 558 n.6.

213. *Id.* at 558 (emphasis added). *But cf.* *Longmont Turkey Processors, Inc. v. United Food & Commercial Workers, Local 7*, 84 Lab. Arb. Rep. (BNA) 638, 641 (1985) (Cohen, Arb.) (finding it

In another post-*Taracorp* arbitration decision, *Briggs & Stratton Corp. v. United Paperworkers International Union, Local 7232*<sup>214</sup> an employee suspected of participating in drug-related criminal activity was denied union representation during a police investigation conducted on the employer's premises.<sup>215</sup> After reviewing a copy of the police report,<sup>216</sup> which described a significant admission obtained from the employee during his interview,<sup>217</sup> the employer discharged the employee.<sup>218</sup> Without specifically discussing *Kraft*, *Taracorp*, or even *Weingarten* itself,<sup>219</sup> the arbitrator concluded that the employer was precluded from disciplining the employee based on evidence obtained by the police because the employee had not been afforded union representation during his interview.<sup>220</sup>

In summary, labor arbitrators, who bear the primary responsibility for determining whether employees have been disciplined for cause,<sup>221</sup> generally continue to follow *Kraft* and, at least where employees have been prejudiced by a denial of union representation,<sup>222</sup> “grant substantive

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unnecessary to address an employer's contention that “reinstatement . . . is not the penalty for violation of the *Weingarten* rights of an employee”) (emphasis added).

214. 107 Lab. Arb. Rep. (BNA) 1023 (1997) (Briggs, Arb.).

215. *See id.* at 1024. Although the employee inquired about his right to have a union representative present, *Id.* at 1027, neither the union nor the employer was permitted to participate in, or even observe, the police interview. *See id.* at 1026, 1029.

216. *See id.* at 1024.

217. *See id.* at 1026 (describing a reference in the police report to the employee's alleged statement that he was “not going to deny being involved with [drug] dealing”).

218. *See id.* at 1024.

219. Because the employee in *Briggs & Stratton Corp.* invoked a contractual right to union representation, the arbitrator analyzed a prior arbitration decision construing the pertinent contract provision, and did not specifically discuss *Weingarten* or any Board cases interpreting the statutory right to representation. *See id.* at 1027 & n.5, 1030 n.7. *See generally* Pan Am. Airways Corp. v. Air Line Pilots Ass'n, 206 F. Supp. 2d 12, 22 (D.D.C. 2002) (“Arbitrators often look to related arbitration decisions in an effort to construe similar provisions of a collective bargaining agreement.”).

220. *See Briggs & Stratton Corp.*, 107 Lab. Arb. Rep. (BNA) at 1030. The arbitrator nevertheless upheld the employer's disciplinary decision because the evidence the employer had obtained independently provided it with “just and sufficient cause to discharge the [employee].” *Id.*

221. *See* Ill. Bell Tel. Co., 275 N.L.R.B. 148, 152 (1985), *enforced sub nom.* Communication Workers v. NLRB, 784 F.2d 847 (7th Cir. 1986):

[T]he Board . . . [is] in the unaccustomed position of determining whether there was just cause for [a] discharge and whether there was lawful and probative evidence to support a finding of just cause. This is normally the role of the arbitrator in applying the grievance provisions of a contract. The Board does not usually sit in judgment on the expediency, wisdom, or necessity of employee terminations.

222. *See* Trailways, Inc. v. Amalgamated Transit Union, 88 Lab. Arb. Rep. (BNA) 941, 947 (1987) (Heinsz, Arb.) (“Arbitrators have refused to sustain terminations where management has denied employees the right to have present a Union steward when such . . . could have influenced the outcome of the event.”).

remedies to employees whose *Weingarten* right has been violated, whereas the NLRB does not.”<sup>223</sup> The prevailing arbitral approach can be summarized in the following terms: “An employer’s failure to comply with procedural requirements does not always result in the arbitrator refusing to uphold the discipline or discharge. However, if there is a possibility, regardless of how remote, that the grievant was prejudiced by the employer’s omission, the employer’s action should be set aside.”<sup>224</sup>

## 2. Both The Board and the FLRA are Likely to Defer to Arbitrators’ Awards of Make-Whole Relief for *Weingarten* Violations

### a. The Board’s Policy of Deferring to Arbitration

The practical policy implications of the arbitral approach to *Weingarten* are apparent when the approach is considered in conjunction with the Board’s “decades-old policy of deferral to arbitration awards resolving unfair labor practice charges.”<sup>225</sup> This policy has been summarized in the following terms:

In recognition of both the fact that it has authority to interpret collective bargaining agreements only in connection with unfair labor practice charges, and the importance of the principle of freedom of contract in labor law, the Board has long had a policy of deferring to arbitration when a contract provides for that means of dispute resolution. Under [this] policy . . . when the parties to a dispute have provided for arbitration, the Board will not begin an unfair labor practice proceeding until arbitration has run its course. Under a closely related policy, the Board also defers to the *results* of arbitration, so long as those results meet certain general criteria designed to insure fairness and consistency with the NLRA.<sup>226</sup>

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223. Silverman, *supra* note 170, at 482 & n.79 (citing Taracorp, Indus., 273 N.L.R.B. 221 (1984)); *see also* Marion Gen. Hosp. v. Local No. 4371, Communications Workers, 90 Lab. Arb. Rep. (BNA) 735, 738 (1988) (Curry, Jr., Arb.) (“[The union] argues that under the *Weingarten* doctrine the Grievant was denied due process and that arbitrators have often disaffirmed or modified the discipline issued by the employer in such cases.”).

224. Gold Kist Inc. v. United Food & Commercial Workers, 89 Lab. Arb. Rep. (BNA) 66, 70 (1987) (Byars, Arb.); *see also* Bake Rite Rolls v. Bakery, Confectionery & Tobacco Workers Int’l Union, 90 Lab. Arb. Rep. (BNA) 1133, 1136–37 (1988) (DiLauro, Arb.) (quoting and applying *Gold Kist*, 89 Lab. Arb. Rep. (BNA) at 70).

225. Yellow Freight Sys., Inc. v. Martin, 983 F.2d 1195, 1200 (2d Cir. 1993).

226. NLRB v. United States Postal Serv., 8 F.3d 832, 837 (D.C. Cir. 1993).



As this summary suggests, the Board actually has two distinct, but closely related, deferral policies.<sup>227</sup> Its “post-arbitral” deferral policy was first established in *Spielberg Manufacturing Co.*,<sup>228</sup> and later refined in other Board cases.<sup>229</sup> Under the *Spielberg* doctrine, the Board grants deference to an arbitration award where the arbitration proceedings appear to have been fair and regular, all parties agreed to be bound, the arbitrator’s decision is not “clearly repugnant” to the purposes and policies of the NLRA,<sup>230</sup> and the arbitrator considered the unfair labor practice issue.<sup>231</sup> According to the Board, “an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.”<sup>232</sup> The burden is on the party opposing deferral to affirmatively demonstrate the defects in the arbitral process or award.<sup>233</sup>

Under the Board’s “pre-arbitral” deferral policy, which is an outgrowth of the *Spielberg* doctrine,<sup>234</sup> the Board defers its consideration of unfair labor practice charges pending the exhaustion of any applicable grievance and arbitration procedures.<sup>235</sup> In *Collyer Insulated Wire*,<sup>236</sup> the

227. See *Hammontree v. NLRB*, 925 F.2d 1486, 1490 (D.C. Cir. 1991) (referring to “the Board’s two ‘deferral’ policies”).

228. 112 N.L.R.B. 1080 (1955).

229. See *Hammontree*, 925 N.L.R.B. at 1491 (noting that the deferral policy established in *Spielberg* “has undergone several subsequent revisions”); *Ad-Art, Inc.*, 290 N.L.R.B. 590, 606 (1988) (finding that in *Olin Corp.*, 268 N.L.R.B. 573 (1984), the Board “clarified its *Spielberg* standards”). See generally *NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367, 380 n.4 (3d Cir. 1980) (Garth, J., concurring) (“The Board appears to change its policies on deference with some regularity.”).

230. An award is “clearly repugnant” to the Act only if it is “palpably wrong.” See *Olin Corp.*, 268 N.L.R.B. at 574 (“[W]ith regard to the inquiry into the ‘clearly repugnant’ standard, we would not require an arbitrator’s award to be totally consistent with Board precedent. Unless the award is ‘palpably wrong,’ i.e., unless the arbitrator’s decision is not susceptible to an interpretation consistent with the Act, we will defer.”) (footnote omitted); *Inland Steel Co.*, 263 N.L.R.B. 1091, 1091 (1982) (“The test of repugnancy under *Spielberg* is not whether the Board would have reached the same result as an arbitrator, but whether the arbitrator’s award is palpably wrong as a matter of law.”).

231. See *Spielberg Mfg. Co.*, 112 N.L.R.B. at 1082; *Raytheon Co.*, 140 N.L.R.B. 883, 884–85 (1963), *enforcement denied*, 326 F.2d 471 (1st Cir. 1964).

232. *Olin Corp.*, 268 N.L.R.B. at 574.

233. See *id.*

234. See *Plumbers & Pipefitters Local Union No. 520 v. NLRB*, 955 F.2d 744, 746 n.1 (D.C. Cir. 1992) (noting that the Board’s pre-arbitral deferral policy is “an outgrowth of the older *Spielberg* policy”). But see *Pincus Bros.*, 620 F.2d at 373 n.12 (“There is some debate as to whether [the Board’s pre-arbitral deferral policy] evolved from *Spielberg* or whether it was a new, and broader, doctrine.”).

235. See *Hammontree v. NLRB*, 925 F.2d 1485, 1490 (D.C. Cir. 1991) (“Under [its pre-arbitral deferral policy], the Board refers [unfair labor practice] complaints filed by the General Counsel to

Board held that it will defer to the arbitration process where (1) there is a long and productive collective bargaining relationship between the parties, (2) there is no enmity by the employer toward the employee's exercise of protected rights, (3) the employer indicates a willingness to arbitrate, (4) the collective bargaining agreement provides for the arbitration of a broad range of disputes, including the dispute at issue, and (5) the contract and its meaning lie at the center of the dispute such that the dispute is "eminently well suited" to resolution by arbitration.<sup>237</sup> When a case is deferred prior to arbitration, the Board retains jurisdiction to determine whether the arbitrator's ultimate award actually satisfies its requirements for post-arbitral deferral under *Spielberg*.<sup>238</sup>

#### b. Board Deferral to Arbitration in the *Weingarten* Context

In *Pacific Southwest Airlines, Inc.*,<sup>239</sup> the Board was faced with the question of whether to defer to an arbitrator's decision addressing the denial of two employees' right to union representation during telephone interviews.<sup>240</sup> The employees, who were terminated after they refused to answer the employer's questions during the interviews,<sup>241</sup> were provided with union representation during personal interviews conducted both before and after their telephone interviews.<sup>242</sup>

The arbitrator held that the employer violated the employees' contractual right to union representation<sup>243</sup> and, in all likelihood, their statutory right to such representation under *Weingarten* as well.<sup>244</sup> However,

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arbitration procedures established in the governing [collective bargaining agreement]; in doing so, the Board *defers* or delays its consideration of the complaint.").

236. 192 N.L.R.B. 837 (1971).

237. *Id.* at 841-42; *see also* *United Techs. Corp.*, 268 N.L.R.B. 557, 558 (1984) (reaffirming the *Collyer* doctrine).

238. *See Collyer Insulated Wire*, 192 N.L.R.B. at 843; *United Techs.*, 268 N.L.R.B. at 560.

239. 242 N.L.R.B. 1169 (1979).

240. *See id.* at 1169.

241. *See id.*

242. *See id.* at 1169, 1176.

243. *See Pac. Southwest Airline v. Airline, Aerospace & Employees Teamsters, Local 2707*, 70 Lab. Arb. Rep. (BNA) 205, 215 (1977) (Jones, Jr., Arb.). Arbitrators have occasionally noted that a collective bargaining agreement may grant employees "broader rights to representation" than those available to them under *Weingarten*. *Ralphs Grocery Co. v. Int'l Ass'n of Machinists Local 1186*, 101 Lab. Arb. Rep. (BNA) 634, 638 (1993) (Ross, Arb.); *see also* *Heinz, USA, v. United Food & Commercial Workers, Local 325*, 113 Lab. Arb. Rep. (BNA) 500, 502 (1999) (Grupp, Arb.) (discussing "contractual language . . . [that] exceeds the requirements of the *Weingarten* line of cases").

244. *See Pac. Southwest Airline*, 70 Lab. Arb. Rep. (BNA) at 215. Obviously, both "contractual and statutory rights . . . [may be] violated as a result of the same factual occurrence." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974).

he refused to hold that the denial of union representation invalidated the employer's disciplinary decision in its entirety<sup>245</sup> because he found that the violation was "not material."<sup>246</sup> In ordering the employees reinstated without backpay,<sup>247</sup> thus effectively converting their discharges to disciplinary suspensions,<sup>248</sup> the arbitrator explained:

[I]n this . . . telephone situation, all that the two employees did was to repeat their insistence [sic]—mistakenly—on a right not to respond which they had formulated and persisted in the day before while given not only the presence of Union representation but also periodic opportunities to bolster that representation by telephone calls to the Union. So, although the failure of the [employer] to allow the presence of a Union representative in a disciplinary setting did violate the Agreement—and quite possibly the statute, as interpreted in . . . *Weingarten* . . .—the violation in this context was not a material one and should be given no significance in this proceeding. In no way did it disadvantage these two employees.<sup>249</sup>

The Board's administrative law judge refused to defer to the arbitrator's resolution of this issue.<sup>250</sup> In particular, the judge rejected the ar-

245. See *Pac. Southwest Airlines, Inc.* 242 N.L.R.B. at 1171 ("[T]he arbitrator found that . . . the violation . . . does not invalidate [the employer's] action."). In this regard, other arbitrators have also held that the "failure to comply with an employee's *Weingarten* rights should not necessarily render the discipline void." *Bi-State Dev. Agency v. Amalgamated Transit Union Div. 788*, 105 Lab. Arb. Rep. (BNA) 319, 324 (1995) (Bailey, Arb.); see also *County of Cook v. Retail, Wholesale & Dep't Store Union, Local 200*, 105 Lab. Arb. Rep. (BNA) 974, 980 (1995) (Wolff, Arb.) (finding it "most appropriate not to void the Employer's action completely and only to exclude any adverse evidence gathered at the . . . investigative meeting").

246. *Pac. Southwest Airlines, Inc.*, 242 N.L.R.B. at 1171 (characterizing the arbitrator's ruling).

247. See *Pac. Southwest Airline*, 70 Lab. Arb. Rep. (BNA) at 216. In considering the arbitrator's remedial order, it is important to note that "in fashioning remedies for unfair labor practices, the Board [itself] has discretion under Section 10(c) to order reinstatement with *or without* backpay." *Golay & Co. v. NLRB*, 371 F.2d 259, 263 (7th Cir. 1966) (emphasis added).

248. See *Pac. Southwest Airlines, Inc.*, 242 N.L.R.B. at 1169 ("[T]he arbitrator found that . . . [the] discharges shall be converted to suspensions."). It is not uncommon for arbitrators to reduce terminations to suspensions where they find mitigating circumstances for an employee's misconduct. See, e.g., *CSX Hotels, Inc. v. Hotel & Rest. Employees Local 863*, 107 Lab. Arb. Rep. (BNA) 702, 704 (1996) (Tharp, Arb.) ("This Arbitrator has reduced discharges to suspensions in many cases over the years . . ."). Indeed, at least among arbitrators themselves, the authority to reduce discipline in this manner appears to be an "accepted principle." *City of Boca Raton v. Fire Fighters of Boca Raton, Local 1560*, 77 Lab. Arb. Rep. (BNA) 759, 764 (1981) (Hoffman, Arb.). For an academic discussion of this issue, see Peter Seitz, *Substitution of Disciplinary Suspension for Discharge (A Proposed "Guide to the Perplexed" in Arbitration)*, 35 ARB. J. 27 (1980).

249. *Pac. Southwest Airline*, 70 Lab. Arb. Rep. (BNA) at 215.

250. *Pac. Southwest Airlines, Inc.*, 242 N.L.R.B. at 1170:

The Administrative Law Judge did not defer the . . . [Section] 8(a)(1) allegations of the

bitrator's conclusion that the employer's denial of union representation was not material because it did not prejudice the interrogated employees.<sup>251</sup> While acknowledging that the arbitrator's reasoning had "a great deal of logic behind it,"<sup>252</sup> the judge found no authority supporting the proposition that an alleged lack of prejudice to the employee is a relevant consideration in analyzing a *Weingarten* violation.<sup>253</sup>

However, the Board disagreed with the judge.<sup>254</sup> Relying on *Spielberg*, the Board held that the arbitrator's analysis satisfied its traditional requirements for deferral.<sup>255</sup> The Board explained that, under *Spielberg*,<sup>256</sup> it generally defers to arbitration decisions that are "not clearly repugnant to the purposes and policies of the Act."<sup>257</sup> While declining to adopt the arbitrator's reasoning,<sup>258</sup> the Board found that his analysis did not do "substantial violence" to the principles announced in *Weingar-*

complaint to the arbitration decision; instead he found that [the employer's] telephone conversations with [the employees], which were conducted without the presence of a union representative as requested by [the employees], violated the Act under the principles explained in . . . *Weingarten* . . . .

251. *See id.* at 1176 ("I am not persuaded nor convinced that these . . . were *de minimis* violations, nor were they remedied by the fact that a union representative was present during the [other] interviews . . . ."); *cf.* *Westside Cmty. Mental Health Ctr.*, 327 N.L.R.B. 661, 666 (1999) (holding that the provision of union representation at a subsequent interview "does not work in mitigation or repudiation" of a denial of representation at an initial interview, "nor does it render the [statutory] violation[] *de minimis* [sic]").

252. *Pac. Southwest Airlines, Inc.*, 242 N.L.R.B. at 1176; *cf.* *Cook Paint & Varnish Co.*, 246 N.L.R.B. 646, 647 (1979) ("[T]he arbitrator's award in *Pacific Southwest Airlines, Inc.* represents that arbitrator's effort to accommodate conflicting legitimate interests."), *enforcement denied*, 648 F.2d 712 (D.C. Cir. 1981).

253. *See Pac. Southwest Airlines, Inc.*, 242 N.L.R.B. at 1176:

[I]n reviewing numerous Board Decisions and court decisions, I have not ascertained that a question of whether a *Weingarten* . . . type of violation has occurred can be determined by what might have occurred if a union representative had been present during the interview. Accordingly, I conclude that violations did occur during the telephone conversations involved herein, whether or not the presence of a union representative during those telephone conversations would have altered the responses given by [the employees].

254. *See id.* at 1169 ("Contrary to the Administrative Law Judge, . . . we would . . . defer the 8(a)(1) [*Weingarten*] allegations to the arbitrator's award.").

255. *See id.* at 1170 ("In our opinion the arbitrator's discussion of both the contractual and statutory issues and his resolution of the matter meets [sic] the *Spielberg* standards for deferral.").

256. Although the Board's deferral policy has since gone through "various twists and turns," *Darr v. NLRB*, 801 F.2d 1404, 1408 (D.C. Cir. 1986), "*Spielberg* remains the seminal statement of the Board's deference policy." *Hammontree v. NLRB*, 925 F.2d 1486, 1491 (D.C. Cir. 1991).

257. *Pac. Southwest Airlines, Inc.*, 242 N.L.R.B. at 1170 (citing *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955)).

258. *Id.* at 1171 ("[W]e neither approve the arbitrator's nor reject the Administrative Law Judge's analysis of *Weingarten*.").

ten,<sup>259</sup> and thus was not repugnant to the Act's objectives.<sup>260</sup> Accordingly, the Board elected to defer to the arbitrator's treatment of the employer's *Weingarten* violation,<sup>261</sup> and dismissed the General Counsel's complaint.<sup>262</sup>

The Board did not specifically focus on the remedial aspects of the arbitrator's decision.<sup>263</sup> However, the effect of its ruling was to defer to the arbitrator's refusal to award complete make-whole relief<sup>264</sup> at a time when the Board itself awarded such relief "whenever . . . an employer [had] disciplined an employee for conduct which was [the] subject of an interview conducted in violation of *Weingarten*."<sup>265</sup> The propriety of deferral under these circumstances has since been affirmed in other Board cases.<sup>266</sup>

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259. *Id.*; see also *Liberal Mkt., Inc.*, 264 N.L.R.B. 807, 816 (1982) ("[T]he majority [in *Pacific Southwest Airlines, Inc.*] declined to pass upon whether they would have applied Board precedent in the same fashion as the arbitrator, noting that the arbitrator's analysis did 'no substantial violence thereto.'").

260. See *Pac. Southwest Airlines, Inc.*, 242 N.L.R.B. at 1171; see generally *Laborers Int'l Union of N. Am.*, 331 N.L.R.B. 259, 261 (2000) ("The 'clearly repugnant' standard does not require that the arbitrator's award be totally consistent with Board precedent.").

261. See *Penn-Dixie Steel Corp.*, 253 N.L.R.B. 91, 96 (1980) ("[T]he Board [in *Pacific Southwest Airlines*] deferred to an arbitral award upholding the suspension of employees who, despite having union representation, refused to be interviewed in preparation for arbitration of another employee's discharge. The absence of representation in a telephone conversation was held immaterial to the result.").

262. See *Pac. Southwest Airlines, Inc.*, 242 N.L.R.B. at 1171. When the Board finds deferral appropriate, "the arbitration award becomes the sole remedy for both contractual and statutory violations." *Local Union No. 715, Int'l Bhd. of Elec. Workers v. NLRB*, 494 F.2d 1136, 1138 (D.C. Cir. 1974). Thus, where "the arbitration proceeding itself met the tests of *Spielberg*, and . . . [the employer] has, in fact, complied with the arbitrator's award, the complaint . . . should be dismissed." *Arnold Junior Fenton, Inc.*, 240 N.L.R.B. 202, 205 (1979).

263. See generally *Cook Paint & Varnish Co.*, 246 N.L.R.B. 646, 647 (1979) ("[W]hen the Board defers to an arbitrator's award under *Spielberg*, the Board does not pass on the merits of the controversy."), *enforcement denied*, 648 F.2d 712 (D.C. Cir. 1981). However, the Board did quote the portion of the arbitrator's decision ordering the employer to reinstate the employees "without any retroactive compensation," *Pac. Southwest Airlines, Inc.*, 242 N.L.R.B. at 1169, and thus obviously recognized that the arbitrator had refused to award them backpay. See *Schrank v. Bliss*, 412 F. Supp. 28, 39 (M.D. Fla. 1976) ("A claim for back pay seeks retroactive compensation . . .").

264. The Board has stated that "[t]he guiding principle underlying the award of backpay is that [employees] must be made whole for the losses that they have suffered by reason of the employer's unfair labor practice." *Cont'l Ins. Co.*, 289 N.L.R.B. 579, 583 (1988). Thus, an award of backpay may be "one of the most important components of a 'make-whole' . . . award." *Dushaw v. Roadway Express, Inc.*, 816 F. Supp. 1229, 1235 (N.D. Ohio 1992), *rev'd on other grounds*, 66 F.3d 129, 133 (6th Cir. 1995).

265. *Kraft Foods, Inc.*, 251 N.L.R.B. 598, 599 (1980) (Jenkins, Member, dissenting in part), *overruled by Taracorp Indus.*, 273 N.L.R.B. 221, 222-23 (1984).

266. See, e.g., *Cone Mills Corp.-White Oak Plant*, 273 N.L.R.B. 1515, 1516 (1985) ("It is well settled that a failure to give a complete make-whole remedy does not render an [arbitrator's] award clearly repugnant [to the Act].").

In particular, the Board has interpreted *Spielberg* to authorize deferral to an arbitrator's decision that is not "palpably wrong"<sup>267</sup>—that is, the Board may defer "unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act."<sup>268</sup> In *Combustion Engineering, Inc.*,<sup>269</sup> the Board specifically held that "an arbitration decision awarding reinstatement without backpay where such backpay would have been included in any Board directed remedy [is] not palpably wrong and [is] susceptible to an interpretation consistent with the Act."<sup>270</sup>

Thus, on the same day it decided *Kraft* and awarded backpay and other make-whole relief in several other *Weingarten* cases,<sup>271</sup> the Board in *Amoco Texas Refining Co.*<sup>272</sup> again deferred to an arbitrator's decision reinstating an alleged *Weingarten* victim without an award of backpay.<sup>273</sup> In finding that deferral was "appropriate under the *Spielberg* principles," the Board effectively rejected the General Counsel's contention that the arbitrator's award was repugnant to the Act because it failed to "make [the employee] whole for the loss of backpay."<sup>274</sup>

These cases make it clear that deferral to arbitration may be appropriate even though the relief awarded by the arbitrator "is not coextensive with the Board's remedy in unfair labor practice cases."<sup>275</sup> Although

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267. *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984) (quoting *Int'l Harvester Co.*, 138 N.L.R.B. 923, 929 (1962), *aff'd sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964)); *Int'l Union of Elec. Workers, Local Union No. 130*, 200 N.L.R.B. 760, 764 (1972):

In determining whether it would effectuate statutory policy to give binding effect to an arbitration proceeding, the Board does not require that the arbitrator must have ruled on the issues in the same way the Board would have done; it is enough to satisfy its policy standard that the arbitrator's decision and remedy is not 'palpably' wrong . . . .

268. *Olin Corp.*, 268 N.L.R.B. at 574.

269. 272 N.L.R.B. 215 (1984).

270. *Derr & Gruenwald Constr. Co.*, 315 N.L.R.B. 266, 273 (1994) (construing *Combustion Eng'g, Inc.*, 272 N.L.R.B. at 215); *see also Texaco, Inc.*, 279 N.L.R.B. 1259, 1260 (1986) ("[W]e find that the arbitrator's award is in no way repugnant to the purposes and policies of the Act. . . . The fact that the arbitrator effectively reduced the discipline by directing the employees reinstated without backpay does not diminish our finding.").

271. *See Dobranski*, *supra* note 67, at 325 & n.171.

272. 251 N.L.R.B. 1528 (1980).

273. *See id.* at 1529.

274. *Id.*

275. *Derr & Gruenwald Constr. Co.*, 315 N.L.R.B. at 267 n.7; *see also Laborers Int'l Union*, 331 N.L.R.B. 259, 261 (2000) ("Deferral may be appropriate even where an arbitrator has not imposed the same remedy that the Board would impose."); *Consol. Freightways*, 290 N.L.R.B. 771, 773 (1988) ("Certainly, there may be circumstances that the Board will defer to an arbitrator's award that does not include the same remedy as the Board would require to remedy an unfair labor practice."). On the other hand, deferral may not be appropriate where "the arbitrator's remedial power . . . is not coextensive with that of the Board." *Kan. Meat Packers*, 198 N.L.R.B. 543, 550 (1972) (emphasis added).

there is no authority specifically addressing the issue,<sup>276</sup> the Board undoubtedly would apply this principle in the converse situation and defer to an arbitrator's award of make-whole relief to a *Weingarten* victim,<sup>277</sup> even in cases in which *Taracorp* would now prohibit the Board itself from granting such relief.<sup>278</sup> Indeed, one Board member has asserted that an arbitrator's ability to award employees more "potent" and "valuable" relief than the Board exemplifies the desirability of deferral."<sup>279</sup>

c. The FLRA is also Likely to Defer to Arbitration Awards  
in *Weingarten* Cases

The FLRA, which generally shares the Board's view of arbitration,<sup>280</sup> is equally likely to defer to an arbitrator's remedial treatment of a

276. Although "the issue of deferral raises a question of law," resolution of the question in individual cases "frequently turns on the facts." *Dayton Power & Light Co.*, 267 N.L.R.B. 202, 202 (1983). Thus, it is not uncommon for "a search of the Board's decisions with respect to deferral [to] provide[] no precedent." *Prestige Bedding Co.*, 212 N.L.R.B. 690, 699 (1974).

277. See, e.g., *United States Postal Serv.*, 275 N.L.R.B. 430, 432 (1985) (deferring to an arbitrator's resolution of a *Weingarten* claim even though the arbitrator's decision may not have "comport[ed] precisely with certain Board decisional precedent"); cf. *Anaconda Co. v. Dist. Lodge No. 27, Int'l Ass'n of Machinists*, 693 F.2d 35, 38 (6th Cir. 1982) (upholding an arbitrator's reinstatement of an employee who had been denied union representation even though the arbitrator "may not have applied *Weingarten* correctly"). See generally *Crown Zellerbach Corp.*, 215 N.L.R.B. 385, 387 (1974) ("Certainly in reaching his decision and issuing an award, an arbitrator may . . . determine to give a complete award or a partial award, depending on how he assesses the merits of the situation.").

278. In *Howard Elec. Co.*, 166 N.L.R.B. 338 (1967), for example, the Board deferred to an arbitrator's award of backpay to an employee who, "according to the usually prescribed [Board] remedy, would not receive backpay or reinstatement." *Id.* at 341. Noting that *Spielberg* itself "specifically states the arbitration award need not necessarily be the one the Board would issue," the Board held that the arbitrator's award of backpay was "clearly not repugnant to the policies or purposes of the Act." *Id.* But see *Southwestern Bell Tel. Co.*, 212 N.L.R.B. 396, 398 (1974) (Fanning & Jenkins, Members, dissenting) (criticizing Board doctrine that "substitutes the award of a private arbitrator for the mandate of Section 10(c)").

279. *Texaco, Inc.*, 233 N.L.R.B. 375, 378 (1977) (Penello, Member, dissenting); cf. *Toyota of S.F.*, 280 N.L.R.B. 784, 798 (1986) (finding deferral to be appropriate because the arbitrators had "entered a full and complete remedy," and a Board remedy "would add nothing to what the Union [could already] enforce"); *Int'l Ass'n of Machinists v. NLRB*, 525 F.2d 237, 246 (2d Cir. 1975):

[The Board has] emphasized that its policy is to honor arbitration awards which satisfy the *Spielberg* criteria, regardless of whether or not it would have made similar awards, or granted similar relief had the matters been before it *de novo*. . . . That does not mean that if an arbitrator finds an unfair labor practice to have been committed, the Board may not impose *further* remedies available to it under the Act.

*Id.* (emphasis added).

280. See, e.g., *Dep't of Air Force*, 51 F.L.R.A. 675, 687 (1995) (noting that "arbitrators bring their 'informed judgment to bear in order to reach a fair solution to a problem, [which] is especially true when it comes to formulating remedies [where] the need is for flexibility in meeting a wide variety of situations'") (quoting *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593,

*Weingarten* violation,<sup>281</sup> even though there is a “distinction between deference to arbitration in the federal sector . . . and deference to arbitration in the private sector.”<sup>282</sup> The difference stems from the fact that Section 16(d) of the FSLMRS<sup>283</sup> generally gives aggrieved parties the option of pursuing unfair labor practice claims in proceedings before the Authority or in arbitration,<sup>284</sup> but not in both forums.<sup>285</sup> This provision, which has no direct counterpart in the NLRA,<sup>286</sup> has prompted the FLRA to ques-

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597 (1960)); *see also* United States Dep’t of Justice v. FLRA, 981 F.2d 1339, 1343 n.2 (D.C. Cir. 1993) (“[T]he Authority has consistently recognized that arbitrators have ‘great latitude in fashioning remedies.’”) (quoting United States Dep’t of Air Force, 25 F.L.R.A. 969, 971 (1987)).

281. *See* United States Dep’t of Navy, 53 F.L.R.A. 390, 399 (1997) (“Authority precedent establishes that arbitrators have broad authority to fashion remedies; the Authority has consistently denied [challenges to arbitration awards] that attempt to substitute another remedy for that formulated by the arbitrator.”); *cf.* Portsmouth Fed. Employees Metal Trades Council, 34 F.L.R.A. 1150, 1152 (1990) (discussing the contention that “the question of whether a disciplinary action should be overturned because of the [employer’s] failure to afford union representation should be determined by an arbitrator on a case-by-case basis”).

282. Michele L. Adelman, *The D.C. Circuit Struggles With Standards of Reviewability*, 56 GEO. WASH. L. REV. 960, 988 (1988); *see also* I.R.S., 47 F.L.R.A. 1091, 1109 (1993) (“[T]he basis for deferral . . . in the Federal sector is not nearly as compelling as in the private sector.”); *see generally* United States v. Prof’l Air Traffic Controllers Org., 653 F.2d 1134, 1139 (7th Cir. 1981) (“[T]here are important differences between labor relations in the private and public sectors, and . . . these differences compel different treatment of the two groups.”).

283. 5 U.S.C. § 7116(d) (2000). The provision states, in pertinent part, that “issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice [before the Authority], *but not under both procedures.*” *Id.* (emphasis added).

284. *See* Dep’t of Commerce v. FLRA, 976 F.2d 882, 888 (4th Cir. 1992) (“The import of . . . [Section 7116(d)] is clear: federal employees generally have the right to choose between bringing their employment-related complaints as [unfair labor practice] charges, or as grievances under the employees’ negotiated grievance procedure.”); *Yates v. United States Soldiers’ & Airmen’s Home*, 533 F. Supp. 461, 463 (D.D.C. 1982) (“An employee aggrieved by [an employer’s] action has the option of either filing an unfair labor practice charge with the FLRA, or pursuing the matter through the grievance mechanism in the collective bargaining agreement.”); *Nat’l Treasury Employees Union*, 48 F.L.R.A. 566, 570 (1993) (noting that Section 16(d) gives an aggrieved party “the option of raising an issue as an unfair labor practice or as a grievance”).

285. *See* United States Marshals Serv. v. FLRA, 708 F.2d 1417, 1419 (9th Cir. 1983) (“[W]here an issue can be raised either as a grievance under the contract or as an unfair labor practice complaint, the complainant must elect one or the other procedure.”); *I.R.S.*, 47 F.L.R.A. at 1104 (“[U]nder the Authority’s established interpretation of Section 7116(d) of the Statute, the issue raised as an unfair labor practice [is] precluded from being raised in arbitration.”).

286. Unlike the FSLMRS, the NLRA permits a party to “concurrently pursue both the arbitration and the unfair labor practice routes.” *Cloverleaf Div. of Adams Dairy Co.*, 147 N.L.R.B. 1410, 1423 (1964) (Brown, Member, concurring) (emphasis added); *see also* F.A.A. *Spokane Tower/Approach Control*, 15 F.L.R.A. 668, 676 (1984) (citing Section 7116(d) in observing that “the Statute itself is unlike the National Labor Relations Act in that it provides for an election by an aggrieved party to proceed under the negotiated agreement or via the unfair labor practice route”); *cf. I.R.S.*, 47 F.L.R.A. at 1110 (asserting that “one of the prudential considerations strongly supporting the NLRB’s policy of deferral is absent in the Federal sector” because Section 16(d) “expressly



tion its authority to adopt “a deferral policy similar to that of the NLRB under *Collyer*.”<sup>287</sup>

However, the FSLMRS, like the NLRA,<sup>288</sup> clearly “endorses arbitration as an effective means of resolving disputes,”<sup>289</sup> and the FLRA has been no less inclined than the Board to bind parties to the consequences of their election to arbitrate.<sup>290</sup> Thus, even if the FLRA is statutorily precluded from deferring to contractual grievance and arbitration procedures in *Collyer*-type situations,<sup>291</sup> it may nevertheless defer to prior ar-

provid[es] the aggrieved party with a choice”).

287. *I.R.S.*, 47 F.L.R.A. at 1106; *see also F.A.A.*, 15 F.L.R.A. at 675 (“[T]he Authority has never adopted a deferral policy analogous to that in *Collyer*.”); *I.R.S.*, 11 F.L.R.A. 655, 666 n.7 (1983) (“[I]t does not appear that the Federal Labor Relations Authority has embraced [the *Collyer*] doctrine . . .”). *But see IRS v. FLRA*, 963 F.2d 429, 438 n.11 (D.C. Cir. 1992) (rejecting the contention that “section 7116(d) affirmatively prevents the Authority from following a policy of deferring to arbitration like that adopted by the National Labor Relations Board in *Collyer*”); Dep’t of Treasury, 19 F.L.R.A. 421, 434 n.9 (1985) (“I would recommend application of the so-called *Collyer* doctrine . . .”).

288. *See Int’l Longshoremen’s Union, Local No. 151*, 294 N.L.R.B. 674, 674 (1989) (“[O]ur national labor policy, as set out in Section 203(d) of the Act, encourages resort to the grievance-arbitration procedure as the preferred method of resolving labor-management disputes.”); *L. A. R. Elec., Inc.*, 274 N.L.R.B. 702, 703 (1985) (“[B]oth national labor policy and congressional mandate establish consensual grievance-arbitration procedures as the preferred method for the resolution of labor disputes between parties to a labor contract.”); *Taft Broad. Co.*, 185 N.L.R.B. 202, 211 (1970) (noting that “the national labor policy expressed in the Act favors arbitration”).

289. *I.R.S.*, 47 F.L.R.A. at 1105; *see also IRS*, 963 F.2d at 439 n.11 (referring to “the FSLMRS’s strong policy in favor of arbitration and private dispute resolution”); *United States Marshals Serv.*, 708 F.2d at 1419 (“The centrality of arbitration is recognized in the [FSLMRS], which requires the inclusion of grievance and arbitration procedures in all collective bargaining contracts.”) (citing 5 U.S.C. § 7121 (2000)); *see generally Office & Prof’l Employees Int’l Union, Local 251*, 331 N.L.R.B. 1417, 1443 n.142 (2000) (Brame, Member, dissenting) (discussing “the policies of the NLRA and other federal labor statutes that strongly encourage the use of voluntary arbitration in the resolution of labor disputes”) (emphasis added).

290. *See Veterans Admin. Reg’l Office*, 5 F.L.R.A. 463, 471 (1981) (“Parties, having agreed to an arbitration of their differences, are bound by the arbitration award made upon the testimony before the arbitrator.”) (quoting *Bridgeport Rolling Mills Co. v. Brown*, 314 F.2d 885, 886 (2d Cir. 1963)); *see also Soc. Sec. Admin. & N.E. Program Serv. Ctr.*, No. 2-CA-50066, 1985 FLRA LEXIS 123, at \*17 (Sept. 23, 1985) (“Our statute requires parties to abide by the consequences of final and binding arbitration.”); *cf. Kan. City Star Co.*, 236 N.L.R.B. 866, 868 (1978) (Truesdale, Member, concurring) (“Under *Spielberg*, the Board will respect the parties’ choice of the arbitral forum, and will accord recognition to the arbitrator’s resolution of their dispute . . .”).

291. Unlike deferral to arbitration under *Spielberg*, which occurs “after an [arbitration] award has been made,” deferral under *Collyer* occurs “before arbitration has been sought.” *McLean Trucking Co.*, 202 N.L.R.B. 710, 713 (1973) (Fanning & Jenkins, Members, dissenting), *remanded sub nom. Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974); *see also Local Union No. 2188, Int’l Bhd. of Elec. Workers v. NLRB*, 494 F.2d 1087, 1090 (D.C. Cir. 1974) (“*Collyer* is not the familiar case of deferral to an arbitration award, but deferral to the arbitration procedure which is available but not yet invoked.”). The FLRA’s view is that because the FSLMRS specifically authorizes employees to pursue their grievances before the FLRA if they are willing to forego the right to pursue them in arbitration, a deferral policy analogous to that in *Collyer* “is neither necessary nor warranted in

bitration *decisions* in accordance with the *res judicata* and collateral estoppel principles underlying the Board's decision in *Spielberg*.<sup>292</sup> As one federal court has explained:

In the private sector, a principal reason for deference to arbitration is to allow the law of the shop and the industrial workplace to come into play. Federal employment, circumscribed as it is by statute and regulation, may leave less room for this development, but there remains a compelling explanation for the congressional encouragement to arbitrate, and that is the integrity of the bargaining and contract process itself. Expedient enforcement of arbitration awards . . . encourages resort to negotiated grievance procedures.<sup>293</sup>

Indeed, the FLRA has noted that, like the Board's *Spielberg* doctrine,<sup>294</sup> Section 7116(d) of the FSLMRS is actually intended "to prevent relitigation of an issue in another forum after a choice of procedures in which to raise the issue has been made by the aggrieved party."<sup>295</sup> Thus, the FLRA has occasionally relied upon *Spielberg* to bind a party to an arbitration decision that "overlaps" with a matter being considered by the FLRA,<sup>296</sup> notwithstanding the unique forum-selection rights codified

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the public sector." *F.A.A.*, 15 F.L.R.A. at 676.

292. See, e.g., *Soc. Sec. Admin. & N.E. Program Serv. Ctr.*, 1985 FLRA LEXIS 123, at \*11 ("While there is, and can be, no deferral doctrine under our Statute, given the presence of Section 7116(d), the question nevertheless arises whether some form of . . . 'collateral estoppel' should . . . be invoked so as to bar relitigation of [an] issue . . ."); cf. *Collyer Insulated Wire*, 192 N.L.R.B. 837, 854 (1971) (Jenkins, Member, dissenting) ("*Spielberg* represents a sort of *res judicata* rule, designed to prevent relitigation of issues."); Paul Alan Levy, *Deferral and the Dissident*, 24 U. MICH. J.L. REF. 479, 495 n.88 (1991) ("Later developments have made it clear that deferral to arbitration [under *Spielberg*] constitutes a form of *res judicata* or collateral estoppel.>").

293. *United States Marshals Serv.*, 708 F.2d at 1420 (citation omitted); cf. *Soc. Sec. Admin. & N.E. Program Serv. Ctr.*, 1985 FLRA LEXIS 123, at \*12 ("Arbitration is no less important to the labor relations program for federal agencies and their employees, than it is in the private sector . . . . If I do not defer to the Arbitrator's determination, I undercut a process which establishes a major disputes-resolution mechanism.>").

294. See *L. A. R. Elec., Inc.*, 274 N.L.R.B. 702, 703 (1985) ("*Spielberg* . . . recognizes the traditional notion that it is not the function of judicial or administrative tribunals to relitigate issues which previously had been heard and decided under fair and final and binding procedures."); *Pac. Intermountain Express Co.*, 264 N.L.R.B. 388, 391 (1982) (Zimmerman, Member, concurring) ("[L]ike the doctrines of *res judicata* and collateral estoppel, *Spielberg* was intended to promote economy of litigation. A party having had the opportunity to litigate an issue in one forum and who lost ought not to be permitted to try the same issue in another forum.>").

295. *Fed. Bureau of Prisons*, 18 F.L.R.A. 314, 316 (1985); see also *Am. Fed'n of Gov't Employees v. FLRA*, 960 F.2d 176, 178 (D.C. Cir. 1992) ("[T]he purpose of § 7116(d) . . . is to preclude duplicative proceedings by requiring an aggrieved party to make an election of remedies.>").

296. *Soc. Sec. Admin. & N.E. Program Serv. Ctr.*, 1985 FLRA LEXIS 123, at \*\*16-17; see also *United States Dep't of Def., Def. Contract Audit Agency*, F.L.R.A. ALJ Dec. No. 110, 1993 FLRA LEXIS 245, at \*18 (Sept. 30, 1993) (relying in part upon *Spielberg* in dismissing an unfair

in Section 7116(d) of the FSLMRS.<sup>297</sup>

In addition, although arbitrators have the statutory authority to award the same relief in unfair labor practice cases as the FLRA can award in its own unfair labor practice proceedings,<sup>298</sup> deferral to an arbitrator's decision is not precluded by the FSLMRS "simply because the remedy directed by the Arbitrator is different from that ordered by the Authority in [comparable] unfair labor practice cases."<sup>299</sup> In *National Treasury Employees Union*,<sup>300</sup> for example, the Authority rejected the contention that an arbitrator's award was deficient because he failed to award backpay or other make-whole relief to employees who were terminated or downgraded as the result of an employer's unfair labor practice,<sup>301</sup> even though the Authority itself might have awarded such relief to the employees.<sup>302</sup> Conversely, and even more significantly, the Au-

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labor practice complaint where an earlier arbitration decision had "resolved all issues raised by the Complaint". See generally *United States Dep't of Health & Human Servs. v. FLRA*, 976 F.2d 229, 234 (4th Cir. 1992) ("[I]t has been the practice of the FLRA, at least in some instances, to dismiss unfair labor practice charges . . . in favor of arbitration.").

297. See generally *United States Dep't of Health & Human Servs.*, 976 F.2d at 234 n.4 (discussing "the FLRA's self-imposed policy to defer" in unfair labor practice cases involving the interpretation of a collective bargaining agreement, despite "the explicit language of section 7116(d), . . . which provides a clear choice of forum to an aggrieved employee").

298. See *Nat'l Treas. Employees Union*, 48 F.L.R.A. 566, 570 (1993):

[A]n arbitrator is empowered to fashion the same remedies in the arbitration of a grievance alleging the commission of an unfair labor practice as those [the Authority is] authorized [to award] under section 7118 of the Statute. For arbitrators to . . . determine that they are not empowered to grant such relief is not consistent with the framework of the Statute . . . .

*Id.* See generally *United States Dep't of Health & Human Servs.*, 976 F.2d at 234–35 ("[T]he only way the choice of forum provision contained in section 7116(d) can have meaning is if a similar analytic approach is followed by both the arbitrator and the Authority with respect to matters over which there is concurrent jurisdiction.") (internal punctuation and citation omitted).

299. *Am. Fed'n of Gov't Employees*, 29 F.L.R.A. 1283, 1283 (1987); see also *NLRB 57 F.L.R.A. 880, 881* (2002) ("[A]n arbitrator is granted broad discretion to fashion a remedy that *the arbitrator* considers to be appropriate.") (emphasis added).

300. 48 F.L.R.A. 566 (1993).

301. See *id.* at 571 ("We reject the Union's claims that the [arbitrator's] award is deficient because it fails to award a *status quo ante* remedy and backpay.").

302. The Authority explained its decision in terms that mirror the reasoning in many of the Board's deferral cases:

In choosing to file a grievance rather than filing an unfair labor practice [charge] with the Authority, the Union chose the judgment and discretion of the Arbitrator rather than that of the Authority. We will not disturb that choice by substituting our judgment for that of the Arbitrator when there is no basis . . . for concluding that a *status quo ante* remedy or a backpay remedy is compelled by the Statute.

*Id.* at 571; cf. *Andersen Prestress Div. Andersen Sand & Gravel Co.*, 277 N.L.R.B. 1204, 1205 n.6 (1985) ("Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining.").

thority has also specifically held that an arbitrator's award of make-whole relief to an employee whose *Weingarten* rights were violated is not "contrary to law,"<sup>303</sup> despite citing another FLRA decision<sup>304</sup> in which it held that an administrative law judge's award of such relief was precluded by its previous adoption of the Board's remedial analysis in *Taracorp*.<sup>305</sup>

d. The Prospect of Deferral Discourages *Weingarten* Victims from Invoking Board Procedures

The Board's refusal to award make-whole relief in *Weingarten* cases offers employees no assurance that "they will receive meaningful redress if they pursue a denial of their statutory right to representation through unfair labor practice procedures."<sup>306</sup> Because employees are likely to seek vindication of their rights in the forum in which their potential recovery is greatest,<sup>307</sup> *Weingarten* victims and their unions may prefer to challenge violations of the right to union representation in arbitration,<sup>308</sup> rather than in Board proceedings.<sup>309</sup> As one commentator has

303. United States Dep't of Veterans Affairs Med. Ctr., 39 F.L.R.A. 717, 720 (1991). The FLRA's "contrary to law" standard derives from the language of the FSLMRS itself. See 5 U.S.C. § 7122 (2000) (authorizing the FLRA to refuse to enforce arbitration awards that are "contrary to any law, rule, or regulation"). However, the Board's administratively-established standards for deferring to arbitration under *Spielberg* are also occasionally characterized in the same language. See, e.g., Hershey Chocolate Corp., 129 N.L.R.B. 1052, 1067 (1960) (noting that application of the *Spielberg* deferral standards does not prejudice the right of employees to "resort to the Board" if the arbitrator's decision is "contrary to law").

304. See *United States Dep't of Veterans Affairs Med. Ctr.*, 39 F.L.R.A. at 720 (citing United States Dep't of Justice, Bureau of Prisons, 35 F.L.R.A. 431 (1990)).

305. See *Bureau of Prisons*, 35 F.L.R.A. at 443-44 (discussing Dep't of Navy, Charleston Naval Shipyard, 32 F.L.R.A. 222 (1988)). The FLRA's remedial approach to *Weingarten*, as adopted in *Charleston Naval Shipyard* and subsequently modified in *Bureau of Prisons*, is discussed in more detail *infra* at notes 353-371 and accompanying text. For a prior academic discussion of the approach, see Labor & Employment Law Notes, ARMY LAW., Sept. 1990, at 50, 51-52.

306. See *Bureau of Prisons*, 35 F.L.R.A. at 447.

307. See United States Dep't of Treasury, I.R.S., 44 F.L.R.A. 1306, 1311-12 (1992) ("[I]nformed employees . . . can be expected to select the forum where their award is worth more.") (internal quotation marks omitted).

308. One pair of commentators has observed that "under current law an arbitrator's power to formulate a specific remedy is limited only by the limits of the parties' bargaining and submission agreement." MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, REMEDIES IN ARBITRATION 11 (2d ed. 1990); see also Margolis, McTernan, Scope, Sacks & Epstein v. Official & Prof'l Employees Int'l Union Local 30, 81 Lab. Arb. Rep. (BNA) 740, 744 (1983) (Richman, Arb.) ("Absent restrictive contract language, broad remedial power is deemed *inherent* in the Arbitrator.") (emphasis added).

309. See *Unnico Serv. Co. v. Int'l Ass'n of Machinists & Aerospace Workers Local Lodge 2541*, 113 Lab. Arb. Rep. (BNA) 432, 436 (1999) (Marcus, Arb.) ("The *Weingarten* result has been adopted in arbitration jurisprudence to provide some relief to employees who have been deprived of

explained:

[I]f the Board had not retreated from the original reinstatement remedy for *Weingarten* violations, the most likely forum for a favorable union result would be the Board and not an arbitrator. The more Board and court doctrines favor employers, however, the more likely it will be that unions will turn to arbitrators to resolve workplace disputes involving both statutory and contract entitlements.<sup>310</sup>

Encouraging parties to pursue their rights in arbitration is, of course, the principal objective of the Board's deferral doctrine.<sup>311</sup> In that regard, the Board has indicated that "the flexibility of remedies is a major advantage of arbitration,"<sup>312</sup> because "[i]ndustrial peace is more likely to result from awards tailored to specific circumstances than those applied mechanically to diverse situations."<sup>313</sup> Nevertheless, although the flexibility of arbitration may often be a valid reason for deferring to

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the right to union representation when they reasonably believe they face disciplinary action."); *cf.* *Naval Surface Weapons Ctr. v. Int'l Ass'n of Machinists & Aerospace Workers*, District 160, 118 Lab. Arb. Rep. (BNA) 55, 58 (2002) (Allen, Arb.) (describing a union that "withdrew [an] Unfair Labor Practice Charge and sought remedy by way of the arbitration process").

310. Dennis O. Lynch, *Special Topics in Labor Relations: The Role of Arbitration in Collective Bargaining Dispute Proceedings: Essay: Statutory Rights and Arbitral Values: Some Conclusions*, 44 U. MIAMI L. REV. 617, 641 (1989). *But see* *Lancaster City Schs. v. Lancaster Educ. Ass'n*, 81 Lab. Arb. Rep. (BNA) 1024, 1028 (1983) (Abrams, Arb.) ("The National Labor Relations Board enforces *Weingarten*, not labor arbitrators.") (emphasis added).

311. *See* *NLRB v. Pincus Bros., Inc.-Maxwell*, 620 F.2d 367, 383 (3d Cir. 1980) (Garth, J., concurring) ("Deference to arbitration under the three-prong *Spielberg* test contributes significantly to . . . the encouragement of arbitration as a critical factor in labor-management relations."); *Clara Barton Terrace Convalescent Ctr.*, 225 N.L.R.B. 1028, 1034 (1976) ("[T]he purpose of the *Spielberg* doctrine is to enhance the status of grievance and arbitration proceedings and to encourage the parties to collective-bargaining agreements to resort to such remedies rather than to the Board . . .").

312. *Combustion Eng'g, Inc.*, 272 N.L.R.B. 215, 217 n.11 (1984); *see also* *Triple A Mach. Shop*, 245 N.L.R.B. 136, 139 (1979) (Penello, Member, dissenting) (asserting that flexibility in fashioning remedies "is one of the values of arbitration"). The courts have also noted that "the formulation of remedies by the arbitrator is an area in which flexibility and broad discretion are particularly appropriate." *Communication Workers v. Forward Telecasting, Inc.*, NO. 83-C-325-C, 1983 U.S. Dist. LEXIS 16339, at \*14 (W.D. Wis. June 10, 1983) (citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 563, 567 (1960)).

313. *Combustion Eng'g*, 272 N.L.R.B. at 217 n.11; *see also* *Hammermill Paper Co.*, 252 N.L.R.B. 1236, 1238 (1980) (Penello, Member, dissenting) (discussing "the efficacy of deferral to arbitration and of arbitration to achieve a fair and just result and to foster industrial peace"); *William J. Burns Int'l Detective Agency, Inc.*, 182 N.L.R.B. 348, 351 (1970) (Jenkins, Member, dissenting) (referring to "arbitration and its inherent flexibility and adjustment to unforeseen circumstances"). *See generally* *Peabody Galion v. Dollar*, 666 F.2d 1309, 1320 (10th Cir. 1981) ("Federal labor law looks favorably on binding arbitration, based on sound policies like promotion of labor peace . . .").

an arbitrator's award,<sup>314</sup> deferral in this context will undoubtedly result in the inconsistent remedial treatment of *Weingarten* violations.<sup>315</sup>

Thus, to the extent the limited remedy available under *Taracorp* creates an incentive for employees and their unions to arbitrate their *Weingarten* claims,<sup>316</sup> that approach may be “destructive of that uniformity of interpretation and effectuation of the policies of the Act vital to the proper administration of the law.”<sup>317</sup> For this reason, the Board should adopt a remedial approach to *Weingarten* violations that is generally consistent with the *Kraft* approach still followed by most labor arbitrators,<sup>318</sup> in order to avoid creating an undesirable incentive for employees to circumvent the Board's procedures for remedying unfair labor practices in favor of contractual provisions for doing so.<sup>319</sup>

### C. The Availability of Make-Whole Relief Would More Effectively Deter

314. See *Exxon Corp. v. Local Union 877*, 980 F. Supp. 752, 760 (D.N.J. 1997) (“Deference to arbitration serves to ‘promote the benefits of labor arbitration—speed, flexibility, informality and finality.’”) (quoting *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 360 (3d Cir. 1993)); *Hammermill Paper Co.*, 252 N.L.R.B. at 1238 (Penello, Member, dissenting) (“It is . . . flexibility which has made arbitration one of the most important tools in industrial relations in this country today. . . . [R]efusing to defer [to arbitration] . . . ultimately serves to undermine the flexibility which makes arbitration the valuable tool that it is.”).

315. See *Bi-State Dev. Agency v. Amalgamated Transit Div.* 788, 105 Lab. Arb. Rep. (BNA) 319, 324 (1995) (Bailey, Arb.) (noting that “arbitration decisions concerning a violation of [an] employee[']s *Weingarten* rights vary across the board in their outcome”). In this regard, “the parties and the process are both better served by the stability provided by . . . precedential decisions,” I.R.S., 47 F.L.R.A. 1091, 1108 (1993), and arbitration decisions, unlike those of the Board, generally have “no precedential value.” *Collyer Insulated Wire*, 192 N.L.R.B. 837, 851 (1971) (Jenkins, Member, dissenting).

316. See *supra* notes 306–315 and accompanying text; *infra* notes 317–19 and accompanying text.

317. *Newspaper Web Pressmen's Union No. 6*, 207 N.L.R.B. 856, 861 (1973); see also *Authorized Air Conditioning Co.*, 236 N.L.R.B. 131, 137 & n.23 (1978) (“[T]he effective administration of the Act is best served by remedies which are uniformly applicable”) (ellipses omitted) (quoting *Russell Motors, Inc.*, 198 N.L.R.B. 351, 351 (1972)); *Bowman Transp., Inc.*, 120 N.L.R.B. 1147, 1151 (1958) (discussing the Board's effort to “assure uniformity in [its] remedial orders”). But see *NLRB v. Pincus Bros., Inc.—Maxwell*, 620 F.2d 367, 374 (3d Cir. 1980) (“The national policy in favor of labor arbitration recognizes that the societal rewards of arbitration outweigh a need for uniformity of result . . .”).

318. See *generally* *Consolidation Coal Co.*, 263 N.L.R.B. 1306, 1321 (1982) (Hunter, Member, dissenting) (“Of course the Board is not bound by arbitral precedent. To ignore this remarkably consistent ‘industrial common law,’ however, . . . is neither good sense, nor good law.”) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581–82 (1961)).

319. See *generally* *NLRB v. Gen. Warehouse Corp.*, 643 F.2d 965, 969 n.15 (3d Cir. 1981) (“Regardless of its deferral policy, the Board retains the primary responsibility and power to adjudicate unfair labor practices.”); *NLRB v. Gen. Drivers, Local Union No. 886*, 264 F.2d 21, 23 (10th Cir. 1959) (“It is the primary responsibility of the Board to fashion an appropriate remedy for an unfair labor practice in order to effectuate the purposes of the Act . . .”).

### *Future Weingarten Violations*

#### 1. The Cease-and-Desist Order Presently Available Under *Taracorp* is not a Sufficient Deterrent

There is yet another compelling policy argument for rejecting the limited remedial approach to *Weingarten* violations the Board adopted in *Taracorp*.<sup>320</sup> This argument is premised upon the fact that one of Congress' primary purposes in enacting the NLRA was "to stop and to prevent unfair labor practices."<sup>321</sup> Deterrence of future unlawful conduct is therefore an important consideration in formulating the appropriate remedy for the violation of an employee's *Weingarten* rights.<sup>322</sup>

The analysis in *Taracorp*, which generally limits the remedy for a *Weingarten* violation to the issuance of a cease-and-desist order,<sup>323</sup> does not adequately serve this statutory objective.<sup>324</sup> In this regard, one fed-

320. One Board administrative law judge has suggested that the availability of make-whole relief for a *Weingarten* violation can be justified on the ground that "restoration of the *status quo ante* [is] essential in order to give meaning to the statutory right." La. Council No. 17, 250 N.L.R.B. 880, 900 (1980); see also *NLRB v. Potter Elec. Signal Co.*, 600 F.2d 120, 123 (8th Cir. 1979) (referring to several unidentified Board cases holding that "restoration of the status quo is . . . the only effective remedy" for a *Weingarten* violation).

321. *Int'l Union, United Auto Workers v. Russell*, 356 U.S. 634, 643 (1957); see also *Int'l Bhd. of Elec. Workers, Local 1547*, 225 N.L.R.B. 331, 346 (1976) ("A major purpose of the Board's remedies for . . . violations [of the Act] is to deter future repetition . . ."); *Southland Dodge, Inc.*, 205 N.L.R.B. 276, 280 (1973) (describing deterrence of unfair labor practices as "a remedial objective of the Act").

322. See, e.g., *Bi-State Dev. Agency v. Amalgamated Transit Union, Div. 788*, 105 Lab. Arb. Rep. (BNA) 319, 324 (1995) (Bailey, Arb.) (stating that the remedy for a denial of union representation should "ensure that the [employer] accords employees their *Weingarten* rights in the future"); cf. *United States Dep't of Justice, Bureau of Prisons*, 35 F.L.R.A. 431, 445 (1990) ("Although not in itself a sufficiently justifying effect, deterrence is also certainly a desirable effect of a remedy."). See generally *Gourmet Foods, Inc.*, 270 N.L.R.B. 578, 593 (1984) (Zimmerman, Member, dissenting) ("[The Board's statutory remedial authority] includes the power to devise remedies which will deter employers . . . from engaging in unfair labor practices. This policy of deterrence accords with the general principle that a wrongdoer should not be allowed to benefit from misconduct.") (footnote omitted).

323. See *Communication Workers v. NLRB*, 784 F.2d 847, 852 (7th Cir. 1986) ("If the employer violates *Weingarten* by excluding the union's representative from a disciplinary interview and fires the employee solely because of the employee's misconduct, the Board enters only a cease and desist order."); *Martin v. Consol. Freightways, No. 84-5966*, 1985 U.S. Dist. LEXIS 14122, at \*13 (E.D. Pa. Nov. 6, 1985) (citing *Taracorp* for the proposition that "the appropriate remedy for the violation of *Weingarten* rights is a cease and desist order and not reinstatement").

324. See, e.g., *Davis Supermarkets, Inc.*, 306 N.L.R.B. 426, 469 (1992) (concluding that "a mere cease-and-desist order would not deter the recurrence of unfair labor practices"); *R.L. White Co.*, 262 N.L.R.B. 575, 578 (1982) (finding it "doubtful that a cease-and-desist order would deter the recurrence of unfair labor practices"); *Union Nacional de Trabajadores*, 219 N.L.R.B. 414, 417

eral appellate court has concluded that “[a]lthough Section 10(c) of the Act gives the Board some discretion to determine when backpay is an appropriate remedy, the need to compensate a wrongfully discharged employee *and the importance of deterring future wrongful conduct by the employer* generally require that the Board award a make-whole remedy.”<sup>325</sup>

The Board itself has expressed a similar view,<sup>326</sup> noting that a cease-and-desist order will often be insufficient to achieve the policy objectives of the Act.<sup>327</sup> In *Sinclair Glass Co.*,<sup>328</sup> for example, the Board noted that a failure to award make-whole remedies such as backpay and reinstatement<sup>329</sup> may leave an employer that has committed an unfair labor practice “with nothing more than a cease-and-desist slap on the wrist rather than a monetary deterrent to the commission of the same or similar unfair labor practices.”<sup>330</sup>

The unfair labor practice at issue in *Sinclair Glass* did not involve

(1975) (Kennedy, Member, dissenting in part) (asserting that “cease-and-desist orders will be meaningless as a deterrent to the commission of similar unlawful conduct in the future”).

325. *Darr v. NLRB*, 801 F.2d 1404, 1407 (D.C. Cir. 1986) (emphasis added) (footnote and citations omitted). In applying the FSLMRS, the same court has similarly stated that “to effect the deterrent and remedial goals of the Statute, the Authority must award the fullest measure of ‘make whole’ relief.” *Nat’l Treasury Employees Union v. FLRA*, 856 F.2d 293, 296 (D.C. Cir. 1988).

326. *See Iron Workers Local Union 377*, 326 N.L.R.B. 375 (1998) (Hurtgen & Brame, Members, dissenting in part):

Under Section 10(c) of the Act, the Board must fashion an appropriate remedy for the unfair labor practices committed by respondents. In carrying out this responsibility, the Board has traditionally been guided by the goal of restoring the status quo ante and fashioning a remedy which will eradicate the consequences of the unfair labor practice which it has found. Significantly, . . . we know of no area in which the Board has [previously] established a stated goal of giving less than a full make-whole remedy for employee losses suffered from unfair labor practices.

*Cf. Farmers Co-Operative Gin Ass’n*, 161 N.L.R.B. 887, 911–12 (1966) (“No remedial principle is clearer than that restoration of the status quo *ante* tends to effectuate the policies of the Act.”).

327. *See, e.g., Cardinal Sys.*, 259 N.L.R.B. 456, 457 (1981) (“[A] cease-and-desist order, standing alone, is insufficient to return the parties to the status quo existing prior to the commission of the unfair labor practice and . . . effectuate the purposes and policies of the Act.”); *Local 425, United Ass’n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus.*, 125 N.L.R.B. 1161, 1164 (1959) (stating that a remedy that deters future unlawful conduct “more properly effectuates the purposes of the Act” than a “mere cease and desist order [that] will have little impact”).

328. 188 N.L.R.B. 362 (1971).

329. *See generally Dean Gen. Contractors*, 285 N.L.R.B. 573, 573 (1987) (noting that “the Board’s traditional remedy is a make-whole order of reinstatement and backpay when an employee has been discharged in violation of the Act”).

330. *Sinclair Glass Co.*, 188 N.L.R.B. at 363; *see also Fikse Bros.*, 220 N.L.R.B. 1301, 1301–02 (1975) (Fanning, Member, dissenting) (asserting that the availability of make-whole relief “is a matter of the utmost importance in the effectuation of [the Act],” so that employers and employees “will know that an employer cannot violate this Act and escape with a slap on the wrist”), *rev’d and remanded sub nom. Stephenson v. NLRB*, 550 F.2d 535 (9th Cir. 1977).



the denial of union representation at an investigatory interview,<sup>331</sup> but discrimination against employees for exercising their statutory right to strike.<sup>332</sup> An employer's interference with its employees' right to strike is the type of serious unfair labor practice<sup>333</sup> that warrants an award of make-whole relief even under the reasoning of *Taracorp*.<sup>334</sup> Nevertheless, a cease-and-desist order is likely to be as ineffective in deterring future *Weingarten* violations as it is in deterring any other unfair labor practice,<sup>335</sup> including interference with the statutorily protected right to strike.<sup>336</sup>

Indeed, the FLRA has specifically noted that limiting the remedy for *Weingarten* violations to the issuance of a cease-and-desist order does not create a sufficient incentive for employers to afford representa-

331. *Sinclair Glass* predated *Weingarten*, when Board law was still unclear with respect to "whether or not an employee summoned by management to an interview which the employee reasonably believed might result in his discipline was entitled to representation by his union at such conference." *Texaco, Inc.*, 251 N.L.R.B. 633, 642 (1980), *enforced*, 659 F.2d 124 (9th Cir. 1981).

332. The right of employees to engage in a strike is specifically protected by Section 13 of the Act. *See Nat'l Football League*, 309 N.L.R.B. 78, 81 n.12 (1992) (referring to 29 U.S.C. § 163 (2000)). The employer in *Sinclair Glass* was found to have interfered with that right by paying its nonstriking employees "hourly wage rates higher than those paid employees who participated in the strike, even though the former strikers were performing comparable work." *Sinclair Glass Co.*, 188 N.L.R.B. at 363. As a general proposition, "the grant of special benefits to [employees] who have chosen not to strike unlawfully interferes with the right of those and other employees to strike in the future." *NLRB v. Rubatex Corp.*, 601 F.2d 147, 150 (4th Cir. 1979).

333. *See generally Rubatex Corp.*, 601 F.2d at 149:

Section 8(a)(1) of the National Labor Relations Act declares it an unfair labor practice for an employer to interfere with rights guaranteed in § 7 of the Act, and § 7 guarantees employees the right, generally, to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Not only is a strike one such concerted activity, but it has also been accorded special deference in the enactment of federal labor laws.

(quoting 29 U.S.C. § 157 (2000)).

334. In addition to being protected by section 13 of the NLRA, a strike constitutes concerted activity generally protected from employer interference under sections 7 and 8(a)(3) of the Act. *See NLRB v. Transp. Co. of Tex.*, 438 F.2d 258, 263 (5th Cir. 1971). The Board in *Taracorp* noted that discrimination against employees "for engaging in union or other protected concerted activities" constitutes the "clearest example of when a make-whole remedy . . . is appropriate." *Taracorp Indus.*, 273 N.L.R.B. 221, 222 (1984).

335. *See, e.g., N.J. Bell Tel. Co.*, 300 N.L.R.B. 42, 55 (1990) (acknowledging that cease-and-desist orders may "not discourage employers from violating an employee's *Weingarten* rights"). *See generally Margolis, McTernan, Scope, Sacks & Epstein v. Official & Prof'l Employees Int'l Union*, Local 30, 81 Lab. Arb. Rep. (BNA) 740, 744 (1983) (Richman, Arb.) (characterizing the denial of union representation at an investigatory interview as a "serious" violation of an employee's rights that "warrants the imposition of a remedy which will prevent any further violation").

336. *See Rubatex Corp.*, 601 F.2d at 151 ("A cease and desist order . . . might well be ineffective in dispelling the apprehensions of those employees who are aware that non-strikers were treated more favorably in the past and know of no restriction on the company's ability to engage in the same behavior in the future.").

tional rights to their employees.<sup>337</sup> As one FLRA administrative law judge explained,<sup>338</sup> “[i]t is hard to see how an [employer] can effectively be deterred from ignoring *Weingarten* rights if it is . . . free to use the fruits of the unlawful examination,”<sup>339</sup> which is often the effect of a remedy limited to a cease-and-desist order.<sup>340</sup>

The Board has also acknowledged that the unavailability of make-whole relief for *Weingarten* violations may permit an employer “to benefit directly from the commission of proscribed conduct; namely, forcing [an employee] to submit to the unlawful interview, during which information was obtained concerning the subject matter for which he was disciplined.”<sup>341</sup> In other words, the remedial approach to *Weingarten* adopted in *Taracorp* effectively encourages employers to violate their employees’ *Weingarten* rights,<sup>342</sup> and then use the fruits of their unlawful interviews to impose discipline on the employees whose rights they have violated.<sup>343</sup>

This incentive is illustrated by the analysis in *A.P.R.A. Fuel Oil Buyers Group, Inc.*,<sup>344</sup> where the Board observed that an employer who can commit unfair labor practices “secure in the knowledge that the

337. See United States Dep’t of Justice, Bureau of Prisons, 35 F.L.R.A. 431, 447–48 (1990).

338. The FSLMRS authorizes the FLRA to “delegate to an administrative law judge the power to determine whether a person is engaging or has engaged in an unfair labor practice.” Am. Fed’n of Gov’t Employees v. FLRA, 944 F.2d 922, 924 n.12 (D.C. Cir. 1991) (citing 5 U.S.C. § 7105(e)(2) (1988)).

339. F.A.A., 35 F.L.R.A. 645, 662 (1990).

340. See *Glenside Hosp.*, 234 N.L.R.B. 62, 70 n.33 (1978) (“A mere cease and desist order . . . may serve only to represent formal acknowledgment of the law while the offender maintains full possession of the fruits of its violation.”) (quoting *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889, 894 (6th Cir. 1965)). See generally *Int’l Union of Elec., Radio & Mach. Workers v. NLRB*, 426 F.2d 1243, 1249 (D.C. Cir. 1970) (“Effective redress for a statutory wrong should . . . withhold from the wrongdoer the ‘fruits of its violation.’”) (quoting *Montgomery Ward*, 339 F.2d at 894).

341. *Montgomery Ward & Co.*, 254 N.L.R.B. 826, 827 n.4 (1981), *enforced in part and enforcement denied in part*, 664 F.2d 1095 (8th Cir. 1981); see also *N.J. Bell Tel. Co.*, 300 N.L.R.B. 42, 55 (1990) (“[P]ermitt[ing] [an employer] to use [a] statement unlawfully obtained from [the employee] would essentially reward [it] for its unlawful conduct and would constitute a ‘windfall’ to [the employer] . . .”).

342. See *Southeastern Pipe Line Co.*, 103 N.L.R.B. 341, 344 (1953) (“[R]efusing to apply the usual reinstatement remedy would permit the [employer] to enjoy the fruits of its unlawful conduct and would serve to encourage rather than discourage unfair labor practices by others.”); *Truesdale*, *supra* note 19, at 176 (“The victims of unlawful interviews . . . argue that a mere cease-and-desist order rewards the employer for violating employee rights.”).

343. See *Preferred Transp., Inc.*, 339 N.L.R.B. 2, 17 (2003) (Battista, Chairman, concurring in part and dissenting in part) (“[W]here an employer violates the *Weingarten* principle and conducts an unlawful investigation of employee misconduct, the fruit of that investigation can nonetheless be used to discipline the employee for the misconduct. Phrased differently, the fruit of the poisoned investigation can be used to discipline the employee.”) (footnotes omitted).

344. 320 N.L.R.B. 408 (1995).

Board can generally do no more than require it to cease and desist<sup>345</sup> is essentially at liberty to ignore its obligations under the Act.<sup>346</sup> Thus, an employer that can violate its employees' *Weingarten* rights knowing that only a potentially insignificant remedy can be awarded<sup>347</sup> is unlikely to be deterred from violating those rights.<sup>348</sup>

## 2. The FLRA has Modified the Board's Approach in Order to Deter Future *Weingarten* Violations

In an effort to avoid the undesirable result under *Taracorp*,<sup>349</sup> the FLRA has elected not to limit the remedy for *Weingarten* violations to the issuance of a cease-and-desist order,<sup>350</sup> but instead requires an employer that has violated an employee's *Weingarten* rights to repeat its investigatory interview and afford the employee full statutory rights to union representation.<sup>351</sup> If it is then determined that the employer's original disciplinary action was unwarranted, the employee must be made whole for any losses found to have been suffered as the result of

345. *Id.* at 415 n.38.

346. *See id.* at 415 (noting that such employers "would be free to flout their obligations under the Act, secure in the knowledge that the Board would be powerless fully to remedy their violations").

347. *See* Soc. Sec. Admin., Boston Region, 57 F.L.R.A. 264, 273 n.2 (2001) (Wasserman, Member, dissenting in part) (asserting that "a relatively insignificant cease and desist order . . . may have little or no effect on future behavior").

348. *See* Vt. Dep't of Soc. Welfare v. Individual Grievant, 86 Lab. Arb. Rep. (BNA) 324, 329 (1986) (Cheney, Arb.) ("If the [employer] can violate [an employee's right to union representation at an investigatory interview] knowing only a token penalty or no penalty is imposed, it is invited to continue ignoring [the] procedural rights of [its] employees."); *cf.* County of Cook v. Retail, Wholesale, & Dep't Store Union, Local 200, 105 Lab. Arb. Rep. (BNA) 974, 980 (1995) (Wolff, Arb.) (concluding that a remedial approach to a denial of union representation that essentially would have enabled the employer to escape responsibility for its conduct "would reduce, if not eliminate" its incentive to provide such representation "in future cases").

349. The ineffectiveness of the *Taracorp* approach to *Weingarten* is implicit in the Board's observation, in another context, that "[a]n appropriate remedy contemplates that the employer shall not retain the fruits of his unfair labor practices." Indianapolis Glove Co., 167 N.L.R.B. 479, 482 (1967); *see also* Nello Pistoressi & Son, Inc., 203 N.L.R.B. 905, 906 (1973) (asserting that "a remedy is necessary . . . to prevent the wrongdoer from enjoying the fruits of his unfair labor practice"), *enforcement denied*, 500 F.2d 399 (9th Cir. 1974).

350. In considering the FLRA's remedial approach to *Weingarten* violations, it is important to note that in some respects, the FLRA has "broader remedial authority than is possessed by the NLRB." Prof'l Air Traffic Controllers Org. v. FLRA, 685 F.2d 547, 584 n.79 (D.C. Cir. 1982). Of particular potential significance in this context is the fact that the FSLMRS "does not contain a provision similar to Section 10(c) of the NLRA." Dep't of Navy, Charleston Naval Shipyard, 32 F.L.R.A. 222, 233 (1988).

351. *See* United States Dep't of Justice, Bureau of Prisons, 35 F.L.R.A. 431, 447 (1990).

the discipline.<sup>352</sup>

The evolution of this approach can be traced to the FLRA's decision in *Department of Navy, Charleston Naval Shipyard*,<sup>353</sup> where it initially purported to adopt the Board's analysis in *Taracorp*.<sup>354</sup> Specifically, the FLRA joined the Board in holding that make-whole remedies are unavailable in *Weingarten* cases in which an employee is disciplined for misconduct independent of the unlawful interview,<sup>355</sup> and "the employer's only violation is the denial of [the] employee's request for union representation at [the] interview."<sup>356</sup>

However, the FLRA also indicated that an award of make-whole relief remains appropriate when an employee is disciplined "as the result of an act that was . . . an unfair labor practice."<sup>357</sup> In *United States Department of Justice, Bureau of Prisons*,<sup>358</sup> a FLRA administrative law judge subsequently asserted that the Authority had thus recognized "exceptions" to the *Taracorp* approach in which it would continue to award make-whole relief, such as revoking discipline that "flowed" from the unlawful investigatory interview, in cases in which *Weingarten* has been violated.<sup>359</sup> The judge relied on this reasoning in recommending that the Authority rescind the discipline of an employee who appeared to have been suspended, at least in part, on the basis of information obtained in

352. See *id.* at 447–48.

353. 32 F.L.R.A. 222 (1988).

354. See *id.* at 233 ("We agree with the analysis and conclusion of the NLRB regarding remedies for *Weingarten* violations.") (discussing *Taracorp Indus.*, 273 N.L.R.B. 221 (1984)). The FLRA has elsewhere indicated that in the "absence of Authority precedent concerning [an] issue, it is both useful and appropriate to examine [Board] precedent." Fed. Trade Comm'n, 35 F.L.R.A. 576, 584 (1990); see also *Am. Fed'n of Gov't Employees v. FLRA*, 785 F.2d 333, 336 (D.C. Cir. 1986) ("It is . . . appropriate [to] consider the decisions of the NLRB in [FLRA] cases.").

355. Cf. *N.J. Bell Tel. Co.*, 300 N.L.R.B. 42, 55 (1990) ("In *Taracorp*, . . . the Board, reversing prior precedent, held that it will not impose a make-whole remedy, where the employer's only violation is the denial of an employee's request for representation at an investigatory interview.") (footnotes omitted).

356. See *Dep't of Navy, Charleston Naval Shipyard*, 32 F.L.R.A. at 233; see also *United States Dep't of Justice, United States Immigration & Naturalization Serv.*, 39 F.L.R.A. 1431, 1437–38 (1991) ("The Authority in [*Charleston*] found that a make whole remedy is not appropriate 'where the disciplinary action taken relates solely to employee misconduct independent of' the management action found to constitute the unfair labor practice.") (quoting *Dep't of Navy, Charleston Naval Shipyard*, 32 F.L.R.A. at 233).

357. *Dep't of Navy, Charleston Naval Shipyard*, 32 F.L.R.A. at 232–33 (interpreting *Taracorp*).

358. 35 F.L.R.A. 431 (1990).

359. *Id.* at 473–74; cf. *United States Immigration & Naturalization Serv.*, 39 F.L.R.A. at 1437 (finding a characterization of *Charleston* as precluding make-whole relief "when an employee is disciplined or discharged for misconduct or any other nondiscriminatory reason" to be "inappropriately broad").

an unlawful investigatory interview.<sup>360</sup>

The FLRA held that the judge's reliance on *Charleston* to support an award of "traditional" make-whole relief was misplaced<sup>361</sup> because *Charleston* had adopted the Board's analysis in *Taracorp*,<sup>362</sup> and *Taracorp* generally precludes such relief unless the employee was discharged for asserting the right to union representation.<sup>363</sup> However, the Authority then proceeded to articulate its own view of the proper remedy for *Weingarten* violations<sup>364</sup> in cases in which the employee was not disciplined solely for asserting the right to union representation.<sup>365</sup>

Rather than limiting the relief for such violations to the issuance of a cease-and-desist order,<sup>366</sup> as the Board in *Taracorp* had done,<sup>367</sup> the FLRA held that an employer that has violated an employee's *Weingarten* rights must also repeat its investigatory interview with a union representative present, and then reconsider any disciplinary action imposed as the result of the original unlawful interview.<sup>368</sup> In awarding this relief, the FLRA emphasized "the need for a remedy, in addition to the traditional cease and desist [sic] order, in cases where a denial of representation rights has occurred."<sup>369</sup> By requiring an employer to repeat its investiga-

360. See United States Dep't of Justice, Bureau of Prisons, 35 F.L.R.A. 431, 474-75 (1990).

361. *Id.* at 441 ("[I]n recommending a traditional make-whole remedy encompassing rescission of the disciplinary action, backpay, and restoration of any lost rights and privileges the Judge has misapplied the Authority's decision in *Charleston Naval Shipyard*.").

362. *Id.*

363. See Radisson Muehlebach Hotel, 273 N.L.R.B. 1464 (1985):

[W]e provide only a cease-and-desist order in situations where an employer interviews an employee in violation of the requirements set forth in . . . *Weingarten* . . . , except in cases where an employee is discharged for asserting his *Weingarten* rights or where the reason for the discharge is itself an unfair labor practice.

*Id.* at 1464 n.3 (citing *Taracorp*).

364. See generally Dep't of Treasury, BATF, 24 F.L.R.A. 521, 531 (1986) (noting that the legislative history of the FSLMRS "indicates that . . . private sector decisions interpreting *Weingarten* were not to be 'determinative for the Federal Sector'" (quoting H.R. CONF. REP. NO. 95-1717, at 156 (1978), reprinted in 1978 U.S.C.C.A.N. 2860, 2890).

365. See Dep't of Justice, United States Immigration & Naturalization Serv., 36 F.L.R.A. 41, 52-53 (1990) ("In [*Bureau of Prisons*], we considered in depth what remedy is appropriate where a violation . . . has occurred.").

366. The FLRA has elsewhere indicated that:

[A]n order directing that [an employer] cease and desist from violating the Statute and post a notice of its commission of an unfair labor practice and the action it will take to remedy the violation are routine elements of any relief ordered by the Authority to remedy an unfair labor practice.

Nat'l Treasury Employees Union, 48 F.L.R.A. 566, 571 (1993).

367. See Radisson Muehlebach Hotel, 273 N.L.R.B. at 1464 n.3 (construing *Taracorp*).

368. See *Bureau of Prisons*, 35 F.L.R.A. at 447-48.

369. *Id.* at 444; cf. N.J. Bell Tel. Co., 300 N.L.R.B. 42, 55 (1990) (discussing the contention that "the Board's responsibility to devise remedies to 'undo the effects of violations of the Act[]' . . .

tion when *Weingarten* has been violated,<sup>370</sup> the FLRA thus effectively requires the employer “to show that no discipline . . . has occurred or will occur in the future based on information obtained from the unlawful investigative interview.”<sup>371</sup>

### 3. The Practical Implications of the FLRA’s Approach

Ironically, the FLRA’s remedial treatment of *Weingarten* violations is actually more analogous to the Board’s pre-*Taracorp* approach than to the one it adopted in *Taracorp*,<sup>372</sup> which the FLRA still occasionally professes to follow.<sup>373</sup> Prior to the Board’s decision in *Kraft*, for example, one Board administrative law judge asserted that once an employer has rescinded the disciplinary action taken against an employee whose *Weingarten* rights were violated,<sup>374</sup> it is “free, so far as the NLRA is concerned, to conduct a lawful investigation . . . and, by using lawful procedures, to take such consequent and lawfully motivated personnel action as it wishes.”<sup>375</sup> This view was subsequently embraced by the Board itself in *Illinois Bell Telephone Co.*,<sup>376</sup> a case decided on the same day as *Kraft*,<sup>377</sup> where it stated that awarding make-whole relief for a

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warrants a remedy [in *Weingarten* cases] more substantial than a cease-and-desist order”) (quoting *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 220 (1964)).

370. See *Bureau of Prisons*, 35 F.L.R.A. at 449 n.4 (“[A] rerun of the interview is the only way truly to restore the *status quo ante*.”).

371. *Dep’t of Justice, United States Immigration & Naturalization Serv.*, 36 F.L.R.A. at 53–54 (construing *Bureau of Prisons*).

372. Despite the similarities in the two acts, the statutorily protected rights of employees occasionally “evolve differently” under the FSLMRS and the NLRA. *Headquarters Nat’l Aeronautics & Space Admin.*, 50 F.L.R.A. 601, 608 n.5 (1995), *enforced*, 120 F.3d 1208 (11th Cir. 1997), *aff’d*, 527 U.S. 229 (1999). In particular, “Congress sought to appropriate the general principles of *Weingarten* and allow those principles to evolve in the unique and varying circumstances of federal employment.” *Am. Fed’n of Gov’t Employees, Local 1941 v. FLRA*, 837 F.2d 495, 500 (D.C. Cir. 1988).

373. See, e.g., *Dep’t of Veterans Affairs Med. Ctr.*, 49 F.L.R.A. 1624, 1643 (1994) (relying on the purported adoption of *Taracorp* in *Charleston Naval Shipyard* in asserting that the FLRA follows “the National Labor Relations Board policy . . . to grant a make whole remedy only when an employee is discharged or disciplined for engaging in union or other protected concerted activity”).

374. See generally *United States Postal Serv.*, 241 N.L.R.B. 141, 154 (1979) (noting that “the Board has required the restoration of the *status quo ante* by requiring affirmative correction of [the] personnel action”).

375. *Id.* at 156.

376. 251 N.L.R.B. 932 (1980), *enforced in part and enforcement denied in part*, 674 F.2d 618 (7th Cir. 1982).

377. See *Ill. Bell Tel. Co.*, 275 N.L.R.B. 148, 150 (1985) (“*Kraft Foods* . . . [was] issued the same day as the Board’s original decision in this case . . .”), *enforced sub nom.* *Communication Workers v. NLRB*, 784 F.2d 847 (7th Cir. 1986). Significantly, one Board member has asserted that it was actually in *Illinois Bell*, rather than *Kraft*, that “the Board set forth the remedial standard ap-

*Weingarten* violation

does not mean . . . that, if [the employee] accepts reinstatement, [the employer] is forever foreclosed from discharging her for [the conduct that was the subject of the unlawful interview]. It cannot, however, do so on the basis of any information obtained from the interview . . . . This procedure remedies the unfair labor practice, while preserving [the employer's] right to discipline or discharge its employees, so long as its actions do not contravene the Act.<sup>378</sup>

a. Employees may have Difficulty Vindicating Themselves Once Discipline has been Imposed

The principal problem with the FLRA's approach stems from the difficulty employees are likely to have vindicating themselves, even with the assistance of union representation, once an employer has made a disciplinary decision.<sup>379</sup> In particular, because an employer whose initial disciplinary decision has been overturned may remain convinced that the discipline it imposed was warranted,<sup>380</sup> it may be inclined to "discount corrections or amplifications of the tainted evidence on which [it] based its initial [decision] about what action should be taken."<sup>381</sup>

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propriate for *Weingarten* violations." *Texaco, Inc.*, 251 N.L.R.B. 633, 638 (1980) (Truesdale, Member, dissenting in part), *enforced*, 659 F.2d 124 (9th Cir. 1981).

378. *Ill. Bell Tel.*, 251 N.L.R.B. at 935 n.20; *see also Penn-Dixie Steel Corp.*, 253 N.L.R.B. 91, 96 (1980) (holding that an employer found to have violated its employee's *Weingarten* rights was "not precluded from [thereafter] discharging [him] for cause" as long as it did not base the discharge on any "statements he may have made in the [unlawful] interview"); *Southwestern Bell Tel. Co.*, 251 N.L.R.B. 612, 615 n.19 (1980) ("[I]f [the employee] does accept reinstatement, the [employer] is not foreclosed from disciplining him for [the conduct that was the subject of the unlawful interview] so long as such action is not taken on the basis of any information obtained at the . . . interview."), *enforcement denied*, 667 F.2d 470 (5th Cir. 1982).

379. *See Pac. Tel. & Tel. Co.*, 262 N.L.R.B. 1048, 1056 (1982) (concluding that the "status quo cannot . . . be restored" by providing union representation "following the imposition of disciplinary action," because "representation at this stage would likely be ineffective"); *United States Postal Serv.*, 241 N.L.R.B. at 156 ("[O]nce the employer [has made] a decision on the basis of . . . defective evidence, 'it becomes increasingly difficult for the employee to vindicate himself, and the value of [union] representation is correspondingly diminished.'") (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 263-64 (1975)).

380. *See Penn-Dixie Steel Corp.*, 253 N.L.R.B. at 96 (noting that an employer whose initial disciplinary decision has been "nullified" due to its failure to comply with *Weingarten* may continue to "believe it has evidence of . . . just cause" for discharge). Indeed, the Board has long presumed that "a condition once established," including specifically an "employer's refusal to employ [an] employee," will "continue in the absence of evidence showing that a change has occurred." *Winn Dixie Stores, Inc.*, 206 N.L.R.B. 777, 778 (1973), *enforced*, 502 F.2d 1151 (4th Cir. 1974).

381. *United States Postal Serv.*, 241 N.L.R.B. at 156; *cf. Weingarten*, 420 U.S. at 264 ("The

This suggests that where an employer has conducted an investigatory interview in violation of *Weingarten*, the Board should perhaps assume—as it effectively did under *Kraft*<sup>382</sup>—that the information obtained at the unlawful interview “had a direct and causal relationship to the employer’s disciplinary decision,”<sup>383</sup> and that “restoration of the *status quo ante* [is] the *prima facie* appropriate remedy.”<sup>384</sup> Although such an approach has been criticized on the ground that it is likely to result in an award of make-whole relief whenever *Weingarten* has been violated,<sup>385</sup> that concern appears to be somewhat overstated, as demonstrated by the analysis in *Kraft* itself.<sup>386</sup>

In particular, the employer in *Kraft* argued that even if it had violated the *Weingarten* rights of the employee it discharged, make-whole relief was precluded by Section 10(c) in view of an arbitrator’s finding that there was just cause for the discharge.<sup>387</sup> The administrative law judge concluded that this argument was contrary to the rationale of *Weingarten*, which emphasized the difficulty employees have in vindicating themselves once an employer has conducted an unlawful investi-

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employer [that has previously made a determination of guilt] may . . . be more concerned with justifying [its] actions than with re-examining them.”) *But see* United States Dep’t of Justice, Bureau of Prisons, 35 F.L.R.A. 431, 449 n.4 (1990) (“[I]t is not clear that requiring the [employer] to lawfully conduct the interview and reconsider the disciplinary action would not produce a different outcome.”).

382. *See* *Communication Workers v. NLRB*, 784 F.2d 847, 850 (7th Cir. 1986) (noting that under the *Kraft* approach, the Board “presume[d] in cases under *Weingarten* that, but for the violation of the Act, the employer would not have discharged the employee”); Dobranski, *supra* note 67, at 326 (“The presumption [under *Kraft Foods*] is that the discipline stemmed from information derived from the [unlawful] interview.”).

383. *Texaco, Inc.*, 251 N.L.R.B. 633, 638 (1980) (Truesdale, Member, dissenting in part), *enforced*, 659 F.2d 124 (9th Cir. 1981); *cf.* *Westside Cmty. Mental Health Ctr., Inc.*, 327 N.L.R.B. 661, 666 (1999) (characterizing an employer’s assertion that its employees were not prejudiced by its denial of their right to union representation as “speculative and unconvincing”).

384. *Texaco*, 251 N.L.R.B. at 638 n.33 (Fanning & Penello, Members, concurring).

385. *See id.* at 638 (Truesdale, Member, dissenting in part).

386. *See* Dobranski, *supra* note 67, at 325 (“Under the facts presented in *Kraft*, the Board majority found that the employer met its burden by showing that its decision to discharge the employee was not based on information obtained from the unlawful interview of that employee.”); Truesdale, *supra* note 19, at 176 (“In *Kraft*, the majority concluded that the employer had met its burden, and therefore . . . did not order reinstatement.”) *See generally* *Northwest Eng’g Co.*, 265 N.L.R.B. 190, 198 & n.13 (1982) (“The Board has held that a make-whole order will *not be routinely granted* in every case in which a *Weingarten* violation has been found.”) (emphasis added) (citing *Kraft* and *Coyne Cylinder Co.*, 251 N.L.R.B. 1503 (1980)).

387. *See Kraft*, 251 N.L.R.B. at 604. *But see* *Burlington N. Motor Carriers, Inc. v. Individual Grievant*, 90 Lab. Arb. Rep. (BNA) 585, 591 (1987) (Goldstein, Arb.) (alluding to the distinction between “the way the term just cause has developed under labor arbitration principles” and “the development of ‘cause’ as it has been defined under Section 10(c) of the National Labor Relations Act”).



gatory interview.<sup>388</sup> Thus, the judge concluded that the arbitration hearing had come too late to overcome the initial investigatory taint, which had “rendered unlawful that which may have otherwise been a lawful discharge for cause.”<sup>389</sup>

However, the Board refused to adopt the judge’s recommendation that the employee be reinstated with backpay.<sup>390</sup> The Board agreed that the employer had violated the employee’s *Weingarten* rights, and acknowledged that the General Counsel had made the prima facie showing necessary to support an award of make-whole relief.<sup>391</sup> However, because the misconduct for which the employee was discharged was witnessed by several other employees who were lawfully interviewed before the terminated employee’s interview took place, the Board held that the employer had satisfied its burden of showing that its disciplinary decision was not based on information obtained at the unlawful interview.<sup>392</sup>

In several other cases decided prior to *Taracorp*, employers were able to satisfy the evidentiary burden necessary to avoid an award of make-whole relief under *Kraft*.<sup>393</sup> In *Coyne Cylinder Co.*,<sup>394</sup> for example, the Board again refused to adopt an administrative law judge’s recommendation that an employee whose *Weingarten* rights were violated be reinstated and awarded backpay.<sup>395</sup> Relying on *Kraft*, the Board held that make-whole relief was inappropriate because the employer’s disciplinary decision was based “solely on information obtained prior to the unlawful interview rather than anything obtained therein.”<sup>396</sup>

The Board subsequently reached a similar result in *Ball Plastics Division, Ball Corp.*,<sup>397</sup> where an employee was discharged for insubor-

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388. See *Kraft*, 251 N.L.R.B. at 604 (discussing *NLRB v. J. Weingarten, Inc.* 420 U.S. 251, 263–64 (1975)).

389. *Id.*

390. *Id.* at 598.

391. *Id.*

392. *Id.*

393. This was the Board’s alternative holding in *McLean Hosp.*, 264 N.L.R.B. 459 (1982), for example, where it affirmed an administrative law judge’s refusal to award make-whole relief on the ground that the General Counsel had not shown that the employer’s discipline of the employee “was based on the subject of the alleged unlawful interviews.” *Id.* at 473. However, the judge also concluded that even if the General Counsel had made such a showing, the employer had “negated [that] showing by demonstrating that its decision to discipline was not based on information sought by the interview.” *Id.* at 474 (citing *Kraft*).

394. 251 N.L.R.B. 1503 (1980).

395. See *id.* at 1504.

396. *Id.*

397. 257 N.L.R.B. 971 (1981).

dination after she refused to do her assigned job.<sup>398</sup> The Board found that the employer violated the employee's *Weingarten* rights in a series of investigatory interviews pertaining to the incident, and that the General Counsel made a prima facie showing of the appropriateness of a make-whole remedy.<sup>399</sup> However, the Board also found that the employer had established that its disciplinary decision was not based on information obtained at the unlawful interviews because there was "no indication that any information was gleaned from the interviews which [the employer] did not already possess before the interviews."<sup>400</sup>

Finally, in *Axelson, Inc.*,<sup>401</sup> an employee was terminated for conduct that was the subject of an interview conducted in violation of *Weingarten*.<sup>402</sup> Relying on *Kraft*,<sup>403</sup> the administrative law judge held that because the discharge decision was actually based on information the employer obtained prior to the unlawful interview, "and not on anything obtained therein,"<sup>404</sup> the employer was not required to reinstate the employee or provide him with backpay.<sup>405</sup> Although the Board subsequently affirmed the judge's ruling on the basis of *Taracorp*, it did not dispute his finding that "there was no evidence that the employee was discharged on the basis of information obtained during the unlawful interview[]." <sup>406</sup>

b. The *Kraft* Presumption Made it Difficult to Discipline Employees for Misconduct

Despite the analysis in the preceding cases, the fact that a denial of union representation may taint "not only the conduct of the interview but any investigation subsequently conducted"<sup>407</sup> undoubtedly did make it

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398. *See id.* at 974-75.

399. *See id.* at 971.

400. *Id.*

401. 285 N.L.R.B. 49 (1987).

402. *See id.* at 53.

403. Although the Board's decision in *Axelson* was issued after *Taracorp* had "overruled *Kraft Foods*," *id.* at 49 n.1, the administrative law judge's decision predated *Taracorp*. *See id.* at 49 (noting that the administrative law judge's decision was issued in "September 1981," more than three years before *Taracorp* was decided).

404. *Id.* at 53.

405. *See id.*

406. *Id.* at 49 n.1.

407. *Potter Elec. Signal Co.*, 237 N.L.R.B. 1289, 1292 n.8 (1978), *enforced in part and enforcement denied in part*, 600 F.2d 120 (8th Cir. 1979); *see also* *Ill. Bell Tel. Co.*, 275 N.L.R.B. 148, 150 (1985) (describing circumstances in which information obtained in violation of *Weingarten* "taints the [employer's] lawful evidence"), *enforced sub nom.* *Communication Workers*, 784

difficult for many employers to avoid an award of make-whole relief under the *Kraft* test.<sup>408</sup> As explained in *Texaco, Inc.*,<sup>409</sup> another Board decision issued on the same day as *Kraft*.<sup>410</sup>

It is extremely difficult to discern how an employer could (1) decide to [investigate] employee misconduct through an interview of the accused employee, (2) affirmatively solicit from the employee information relating to the misconduct, and (3) in fact succeed in obtaining perhaps the most telling information available to merit a decision to discipline and yet be found not to have based its disciplinary decision, in any way, on the information it was so successful in securing.<sup>411</sup>

This suggests that the Board in *Taracorp* was correct in overruling *Kraft* to the extent the employer had been required to prove that the employee was not prejudiced by its unlawful interview (that is, to the extent the Board effectively assumed the employee *was* prejudiced),<sup>412</sup> despite the questionable reasoning upon which its decision to overrule *Kraft* was actually based.<sup>413</sup> Indeed, even before *Taracorp* was decided, one Board member maintained that the Board had effectively altered the *Kraft* approach by requiring the General Counsel, acting on behalf of an employee,<sup>414</sup> to “establish affirmatively” that the employer’s disciplinary decision was based upon information obtained in its unlawful inter-

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F.2d 847 (7th Cir. 1986).

408. See Truesdale, *supra* note 19, at 176 (asserting that *Kraft* placed “a heavy burden” on the employer). One Board member, dissenting from the Board’s decision in *Kraft*, asserted that “the majority’s analysis . . . [would] almost inevitably result in a finding that the employer has not met its burden.” *Kraft Foods, Inc.*, 251 N.L.R.B. 598, 600 (1980) (Jenkins, Member, dissenting in part), *overruled in Taracorp Indus.*, 273 N.L.R.B. 221, 222–23 (1984). Indeed, he maintained that an employer was likely to be able to establish that it did not rely on information obtained at an unlawful interview only in those rare instances in which its disciplinary decision had already been made when it conducted the unlawful interview. See *id.* (Jenkins, Member, dissenting in part).

409. 251 N.L.R.B. 633 (1980), *enforced*, 659 F.2d 124 (9th Cir. 1981).

410. See Dobranski, *supra* note 67, at 325 n.171 (discussing *Texaco* and “other cases decided the same day” as *Kraft*).

411. *Texaco*, 251 N.L.R.B. at 638 (Fanning & Penello, Members, concurring).

412. See, e.g., *NLRB v. Southwestern Bell Tel. Co.*, 730 F.2d 166, 174 (5th Cir. 1984) (leaving open the question of whether “the employer properly bears [the] burden” of proving that its disciplinary decision “was not based on information obtained at the [unlawful] interview”).

413. See, e.g., *Kraft*, 251 N.L.R.B. at 599 (Jenkins, Member, dissenting in part) (asserting that a limitation on the Board’s ability to award make-whole relief where the employer “has disciplined an employee for conduct which was [the] subject of an interview conducted in violation of *Weingarten*” is “neither required by Section 10(c) nor justified”).

414. See *generally* *Zurn Indus., Inc. v. NLRB*, 680 F.2d 683, 692 n.15 (9th Cir. 1982) (discussing “cases [holding] that under the Act the employee (i.e., the General Counsel) bore the burden of proof”).

view.<sup>415</sup>

Significantly, this is essentially the approach followed by the Sixth Circuit in *General Motors Corp. v. Allen*,<sup>416</sup> one of the cases that, as discussed earlier,<sup>417</sup> the Board in *Taracorp* relied upon when it overruled *Kraft*.<sup>418</sup> In *General Motors*, the Board had awarded make-whole relief to an employee whose *Weingarten* rights were violated on the ground that the employer had “not sustained its burden of establishing that it would have discharged [the employee] even in the absence of the unlawful interview.”<sup>419</sup>

Despite acknowledging that the employer had not established that it discharged the employee solely on the basis of information obtained independently from the unlawful interview,<sup>420</sup> the Sixth Circuit refused to enforce the Board’s remedial order.<sup>421</sup> The court reasoned that because the employee *could* have been discharged on the basis of evidence obtained prior to the interview,<sup>422</sup> the employer should not be “penalized” for giving him an opportunity to explain that evidence.<sup>423</sup> The court thus effectively held that make-whole relief is precluded by Section 10(c) unless the employee shows that the employer’s only evidence of “cause” for discipline was obtained in, or as the result of, an unlawful investigatory interview.<sup>424</sup>

The Sixth Circuit’s reasoning is consistent with the Board’s own analysis in *United States Postal Service*,<sup>425</sup> where it refused to award make-whole relief to an employee who was terminated after admitting to theft in an interview conducted in violation of *Weingarten*.<sup>426</sup> The Board

415. *ITT Lighting Fixtures*, 261 N.L.R.B. 229, 232 n.16 (1982) (Jenkins, Member, dissenting in part).

416. 674 F.2d 576 (6th Cir. 1982).

417. *See supra* notes 109–111 and accompanying text.

418. *See Taracorp Indus.*, 273 N.L.R.B. 221, 222 n.11 (1984).

419. *Gen. Motors Corp.*, 251 N.L.R.B. 850, 850 n.2 (1980), *enforced in part and enforcement denied in part*, 674 F.2d 576 (6th Cir. 1982).

420. *See Gen Motors Corp.*, 674 F.2d at 578.

421. *See id.* at 577–78 (“[W]e decline to enforce the backpay and reinstatement remedy imposed by the NLRB . . .”).

422. *Id.* at 578. In particular, the court noted that the employer could have based the termination on a security officer’s report prepared prior to the employee’s unlawful interview that contained “independent evidence of good cause for discharge.” *Id.*

423. *Id.*; *cf. Truesdale*, *supra* note 19, at 176 (stating that “there is every indication that the employee’s fate was no worse than it would have been had there been no interview at all” where an employer with “enough evidence to justify . . . disciplinary action” nevertheless proceeds to interview the employee “to get his or her side of the story”).

424. *See Gen. Motors Corp.*, 674 F.2d at 578.

425. 254 N.L.R.B. 703 (1981).

426. *See id.* at 703, 707.

based its decision on the fact that the terminated employee was the last person interviewed in the employer's investigation, and the information the employer obtained in its earlier interviews of other employees, who were eyewitnesses to the theft, was sufficient to warrant termination even in the absence of the employee's admission.<sup>427</sup>

Under those circumstances, the Board indicated that the most that could be said was that the information the employer obtained in its unlawful interview had not "deterred" it from terminating the employee.<sup>428</sup> In other words, even though the right to representation recognized in *Weingarten* is premised in part upon the belief that the presence of a union representative *might* deter an employer from taking disciplinary action,<sup>429</sup> the Board in *Postal Service* assumed that, even without the employee's confession,<sup>430</sup> the employer would have terminated him for theft because he had also been implicated in that misconduct "by the statements of others."<sup>431</sup>

The Board was able to reach this result only by ignoring the employer's burden under *Kraft* of demonstrating *affirmatively* that it would have imposed the same discipline even if its investigatory interview had been conducted in accordance with *Weingarten*.<sup>432</sup> In this regard, it is

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427. *See id.* at 703 ("[I]t is evident that the investigation leading to [the] discharge was undertaken as a result of information received from eyewitnesses . . . whose accounts were alone sufficient to justify the disciplinary action taken.")

428. *Id.* at 704 n.2. *But cf.* *Southwestern Bell Tel. Co.*, 251 N.L.R.B. 612, 615 n.17 (1980), *enforcement denied*, 667 F.2d 470 (5th Cir. 1982) (finding it "highly improbable that the [employer] did not rely on [an employee's] . . . confession in its decision to suspend and terminate him").

429. *See Pac. Tel. & Tel. Co.*, 262 N.L.R.B. 1048, 1056 (1982) ("If the right to union representation at investigatory interviews is the basic right described in *Weingarten*, . . . then one can only conclude that such representation, if granted, might possibly affect the outcome of such interviews."); *cf. Airco Alloys*, 249 N.L.R.B. 524, 526 (1980) ("[T]he fact that the Union may be powerless to alter or reverse the discipline does not obviate its representative function, where requested, in attempting to insure [sic] that management's decision on the discipline is fairly reached with all pertinent facts considered.")

430. *See generally N.J. Bell Tel. Co.*, 308 N.L.R.B. 277, 302 (1992) ("[T]he union representative's role in actively assisting an employee . . . includes the right to protect the employee from making unwarranted admissions of improper conduct, which might lead to the discipline of that employee.")

431. *United States Postal Serv.*, 254 N.L.R.B. at 704 n.2; *cf. Pac. Tel. & Tel. Co.*, 246 N.L.R.B. 1007, 1019 (1979) ("[S]peculative suggestions . . . that union representatives[] permitted to participate [in investigatory interviews] might have convinced the concerned employer to mitigate or waive discipline for certain workers . . . can hardly be considered sufficiently persuasive to warrant determination that their disciplinary suspensions stemmed . . . from [an] improper denial of *Weingarten* rights.") (internal quotation marks omitted).

432. Indeed, one Board member specifically noted that the Board's decision "undermined its own criteria for determining the appropriate remedy [for a *Weingarten* violation] as . . . stated in *Kraft Foods*," which made it "incumbent upon the [employer] to demonstrate affirmatively that it did not rely on the information gained from [its unlawful] interview." *United States Postal Serv.*,

impossible to reconcile the Board's decision in *Postal Service* with its prior analysis in *Ohio Masonic Home*.<sup>433</sup> In that case, the Board concluded that in cases where an employer elects to interview an employee after receiving complaints or gathering other evidence sufficient to discipline the employee,<sup>434</sup> it could "only conclude that [the employee] was [disciplined] because she did not have a satisfactory explanation in response to the complaints, rather than merely because there had been some complaints."<sup>435</sup>

Labor arbitrators have also occasionally placed the burden on the employee (or the union representing an employee)<sup>436</sup> to prove that an employer's denial of union representation prejudiced the employee.<sup>437</sup> In *United States Sugar Corp. v. Int'l Assoc. of Machinists*,<sup>438</sup> for example, the arbitrator relied on *Kraft* in upholding the discipline of an employee whose *Weingarten* rights were allegedly violated,<sup>439</sup> because the union representing the employee failed to establish that the discharge decision

254 N.L.R.B. at 704 (Jenkins, Member, dissenting in part).

433. 251 N.L.R.B. 606 (1980).

434. See generally Truesdale, *supra* note 19, at 176:

A *Weingarten* violation often occurs when the employer already has at least some evidence of employee misbehavior. In some cases, it is evident that the employer had enough evidence to justify the disciplinary action it took. Nevertheless, some employers with an airtight case will still interview the employee, perhaps to get his or her side of the story or to provide an opportunity to "come clean."

435. *Ohio Masonic Home*, 251 N.L.R.B. at 607; cf. PPG Indus., Inc., 251 N.L.R.B. 1146 & n.2 (1980) (describing an employer that "originally told [its employee] he was discharged, but changed the discipline to a written reprimand upon investigating the matter further and asking [him] questions about his alleged misconduct").

436. Many collective bargaining agreements permit arbitration to be invoked "only by the union, and not by an individual" employee. *Collyer Insulated Wire*, 192 N.L.R.B. 837, 855 (1971) (Jenkins, Member, dissenting); see, e.g., *Mudge v. United States*, 308 F.3d 1220, 1222 n.1 (Fed. Cir. 2002) (discussing a bargaining agreement that "authorize[d] the union, rather than the individual employee, to take a matter to arbitration"). In that event, the union is responsible for presenting the aggrieved employee's case to the arbitrator. See generally *Peabody Galion v. Dollar*, 666 F.2d 1309, 1320 (10th Cir. 1981) ("Arbitration procedures supplement the union's status as exclusive bargaining representative by assigning it responsibility for the handling of individual grievances.").

437. This result is occasionally premised upon the parties' incorporation of the right to union representation into a collective bargaining agreement, because "[t]he burden of proving a contractual violation on the part of [the] Employer rests with the Union." *Fort Wayne Cmty. Schs. v. Am. Fed. of State, County & Municipal Employees*, Local 561, 78 Lab. Arb. Rep. (BNA) 928, 936 (1982) (Deitch, Arb.). See generally *Wolf Creek Nuclear Operating Corp. v. Int'l Union, Sec. Police & Fire Prof'ls*, 117 Lab. Arb. Rep. (BNA) 769, 774 (2002) (O'Grady, Arb.) ("[Where] the . . . matter concerns an allegation of a contract violation, the Union traditionally in arbitration bears the burden of proof . . .").

438. 82 Lab. Arb. Rep. (BNA) 604 (1984) (Hanes, Arb.).

439. *Id.* at 607 ("The Union states that at the time the Grievant was first interviewed . . . regarding the incident he requested Union representation but same was denied him.").

was based on information obtained in the employer's allegedly unlawful interview.<sup>440</sup> The arbitrator explained:

For . . . the Union to prevail [it] must demonstrate the decision of the Company to discharge the Grievant was based on facts gained through [its] interview directly with the Grievant. In this case there is no question that [the Company] did not gain the information [it] used for discharge purposes through the Grievant but did gain such information from other sources.<sup>441</sup>

Even in Board proceedings, requiring *Weingarten* victims to show prejudice, obtaining make-whole relief<sup>442</sup> should not be precluded by Section 10(c) of the NLRA,<sup>443</sup> which “does not speak to burdens of persuasion, fruits of violations, exclusionary rules, and the other paraphernalia of trials and inferences.”<sup>444</sup> In other words, as an aspect of its inherent control over its own proceedings,<sup>445</sup> the Board has the authority to “establish presumptions about causal chains,”<sup>446</sup> to allocate burdens of

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440. See *id.* at 609; *cf.* *Ind. Convention Ctr. v. Plumbers & Steamfitters Union, Local 400*, 98 Lab. Arb. Rep. (BNA) 713, 721 (1992) (Wolff, Arb.) (upholding the discharge of a grievant who was denied union representation in an investigatory interview because the employer “probably would have fired the Grievant anyway”).

441. *U.S. Sugar Corp.*, 82 Lab. Arb. Rep. (BNA) at 609 (citing *Kraft*).

442. In this context, “prejudice” would be shown by establishing that the employee would not have been discharged or suspended for “cause” in the absence of the employer’s unlawful interview. See, e.g., *La. Council No. 17*, 250 N.L.R.B. 880, 894, 900 (1980) (suggesting that an employee who was terminated for cause “was not harmed or prejudiced” by the employer’s denial of his *Weingarten* rights if “there are no facts to support a finding that [his] discharge resulted from, or was a consequence of, the . . . meeting at which he was denied union representation”).

443. Indeed, as originally drafted by the House, the proviso to Section 10(c) “placed the burden squarely on the General Counsel,” acting on behalf of an employee claiming to have been terminated in violation of the Act, “to prove that [the] employee was not discharged for cause.” *NLRB v. N.Y. Univ. Med. Ctr.*, 702 F.2d 284, 295 (2d Cir. 1983). In the view of at least one court, Congress’ failure to include that language in the proviso as ultimately adopted “served only to eliminate a redundancy with regard to the nature of the burden of proof while preserving the House’s intent with respect to its allocation.” *Zum Indus., Inc. v. NLRB*, 680 F.2d 683, 692 (9th Cir. 1982) (emphasis added). Although that court was specifically addressing the Board’s burden-shifting approach to determining whether an employer had cause for terminating an employee in “mixed, dual or pretextual motive” cases, *id.* at 686, “[t]he burden shift established in *Kraft* is very similar.” *Dobranski*, *supra* note 67, at 325 n.165.

444. *Communication Workers v. NLRB*, 784 F.2d 847, 851 (7th Cir. 1986); *cf.* *Standard Oil Co.*, 91 N.L.R.B. 783, 791 (1950) (“Section 10(c) does not operate to overturn the well established principle of law that the burden of establishing an affirmative defense is on the party alleging it.”).

445. See *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 n.13 (D.C. Cir. 1999); *Stow Mfg. Co.*, 103 N.L.R.B. 1280, 1306 n.36 (1953).

446. *Communication Workers*, 784 F.2d at 850 (citing *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 402–03 (1983)).

proof in accordance with those presumptions,<sup>447</sup> and ultimately to fashion appropriate remedies in unfair labor practice cases in which employees are able to satisfy the evidentiary burdens the Board has allocated to them.<sup>448</sup> Although there are countervailing policy arguments supporting the Board's allocation of the respective burdens in *Kraft*,<sup>449</sup> requiring *Weingarten* victims to prove that they were prejudiced by an employer's unlawful conduct is more responsive to the policy concerns that prompted the Board to overrule that decision.<sup>450</sup>

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447. See *Garrett R.R. Car & Equip., Inc. v. NLRB*, 683 F.2d 731, 741 (3d Cir. 1982) (“[P]lacing the burden on [a particular party] is a type of decision allowable for an agency which has the primary responsibility for formulating remedies designed to minimize the impact of unfair labor practices.”). *But cf.* *NLRB v. N.Y. Univ. Med. Ctr.*, 702 F.2d 284, 293 (2d Cir. 1983) (“[D]eciding the proper allocation of burdens is not within the Board’s special competence . . .”).

448. In *Alwin Mfg. Co.*, 326 N.L.R.B. 646 (1998), *enforced*, 192 F.3d 133 (D.C. Cir. 1999), the Board held that it has the “inherent authority” to formulate remedies for an employer’s unfair labor practices even when it does “not have the [statutory] authority, under Sec[ti]on 10(c) of the Act, to [do so].” *Id.* at 647 n.6. *But see* *NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 717 (6th Cir. 1993) (Nelson, J., concurring in part and dissenting in part) (“The Board has broad discretion to devise remedies that will effectuate the policies of the National Labor Relations Act, to be sure, but the Board has no discretion to do that which [Section 10(c) of] the Act says it shall not do.”).

449. For one thing, *Kraft* placed the burden of proof with respect to the issue of prejudice on the party—the employer—whose “own unlawful conduct” prompted the need to determine whether it would have imposed the same discipline even if it had complied with *Weingarten*. *United States Postal Serv.*, 241 N.L.R.B. 141, 154 (1979). If the employer’s *Weingarten* violation has “created a situation where it [is] impossible to determine what would have happened had the employee been granted his statutory right,” it may well be appropriate to require the employer to “suffer the consequences” of its unlawful conduct. *La. Council No. 17*, 250 N.L.R.B. 880, 900 (1980); *see also* *Pac. Tel. & Tel. Co.*, 262 N.L.R.B. 1048, 1056 (1982) (noting that where the employer’s conduct “has caused the uncertainty as to what [the] effect [of union representation] would have been, it is only fair that the uncertainty be resolved against [it]”). In this sense, the *Kraft* approach reflects the Board’s general policy “that the party which violated the Act should bear the greater burden . . .” *Iron Workers Local 377*, 326 N.L.R.B. 375, 375 (1998); *see also* *Arthur F. Derse, Sr.*, 173 N.L.R.B. 214, 223 (1968) (stating that it is the employer “who should bear the brunt of . . . the consequences of its unfair labor practices . . .”).

450. The Board overruled *Kraft* in part because the imposition of make-whole relief in cases in which employers have disciplined employees “for reasons wholly independent of any unfair labor practice” provides “a windfall to [the] employees.” *Taracorp Indus.*, 273 N.L.R.B. 221, 223 (1984). In this regard, awarding make-whole relief to employees who fail to establish that a denial of union representation “tainted the validity” of the evidence upon which their discipline was based may be “rewarding [them] for wrongdoing.” *Montgomery Ward & Co.*, 254 N.L.R.B. 826, 832, 833 n.15, *enforced in part and enforcement denied in part*, 664 F.2d 1095 (8th Cir. 1981); *see also* *Pac. Tel. & Tel.*, 262 N.L.R.B. at 1056 (acknowledging the contention that where “discipline was imposed because of the misconduct which prompted the investigatory interview rather than because the employees asserted a right protected under the Act, a reinstatement and backpay remedy would . . . award the employees with an undeserved benefit”).



## VII. CONCLUSION

The overruling of *Kraft* has been described as an example of the Board reversing course as its political makeup changes.<sup>451</sup> Future changes in the Board's composition could likewise result in the emergence of a new Board majority favoring a return to the *Kraft* approach.<sup>452</sup> Indeed, one Board member who had "not passed on the *Taracorp* rule in previous cases" recently suggested just this possibility,<sup>453</sup> stating that she "would consider overruling *Taracorp*" in order to award reinstatement to an employee whose *Weingarten* rights were violated.<sup>454</sup>

In this regard, the Board's discretion in fashioning remedies to be imposed for an employer's unfair labor practices is particularly broad,<sup>455</sup> as is its authority to modify a remedial approach it has previously adopted.<sup>456</sup> Thus, just as the Board "was entitled to adopt the *Taracorp*

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451. See Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 178 & n.78 (2002); see also *Communication Workers v. NLRB*, 784 F.2d 847, 848 (7th Cir. 1986) (noting that "the Board changed course" when it "overruled *Kraft Foods*"); N.J. Bell Tel. Co., 300 N.L.R.B. 42, 55 (1990) (noting that the Board's decision in *Taracorp* "revers[ed] prior precedent").

452. See, e.g., *NLRB v. Ensign Elec. Div. of Harvey Hubble, Inc.*, 767 F.2d 1100, 1102 n.1 (4th Cir. 1985) (describing a Board decision "coming on the heels of changes in the composition of the Board . . . [that] was a clear example of an administrative body reviewing its earlier decisions which were replete with arguments on all sides of the issue, and creating a new majority to support an earlier viewpoint . . ."); see also *Spencer v. NLRB*, 548 F. Supp. 256, 264 (D.D.C. 1982) (asserting that "existing Board precedent is inevitably, and necessarily, subject to some modification as the composition of the Board changes in response to electoral developments").

453. *Southwestern Bell Tel. Co.*, No. 17-CA-21366, 2002 WL 31717856, at \*6 n.5 (N.L.R.B. Nov. 20, 2002) (Liebman, Member, dissenting); see also *Alltel Pa., Inc.*, No. 6-CA-26073R, 1995 NLRB LEXIS 362, at \*3 n.2 (Apr. 26, 1995) ("Under *current* Board policy, an employee terminated for cause in a situation involving violation of *Weingarten* rights is not entitled to individual relief by way of reinstatement, backpay or otherwise.") (emphasis added) (citing *Taracorp*).

454. *Southwestern Bell Tel.*, 2002 WL 31717856, at \*6 n.5 (Liebman, Member, dissenting). In addition, one commentator who was of the view that the *Kraft* approach "addresse[d] the legitimate disciplinary concern of the employer while still protecting the rights of the employee who was forced to take part in the unlawful interview" has asserted that changes in the Board's composition "create some uncertainty as to the future direction of the Board in this area of the law." Dobranski, *supra* note 67, at 326, 327 n.177.

455. See *Truck Drivers & Helpers Local No. 728 v. NLRB*, 415 F.2d 986, 990 (D.C. Cir. 1969) ("The Board's wide discretion is at its broadest in matters of remedial policy.") (citing *Fibreboard Paper Prods. Co. v. NLRB*, 379 U.S. 203, 215-16 (1964)); cf. *Sinclair Glass Co.*, 188 N.L.R.B. 362, 363 (1971) ("It is a principle too well established in Board law to require citation of authority that a question of remedy is within the discretion of the Board.").

456. In *International Brotherhood of Operative Potters v. NLRB*, 320 F.2d 757 (D.C. Cir. 1963), for example, the court noted that the Board has "broad discretion in framing remedies which will effectuate the policies of the Act," as well as the "authority to *change* [a] longstanding [remedial] policy." *Id.* at 761 (emphasis added). The courts therefore "cannot regard changes in remedial mechanisms as beyond the Board's power so long as they reasonably effectuate the congressional

doctrine as an exercise of its discretion over remedies for violations of the Act,<sup>457</sup> it retains the authority to return to an approach in which it remedies *Weingarten* violations by “apply[ing] an exclusionary rule, as it did in *Kraft*.”<sup>458</sup>

However, if the Board does elect to abandon the debatable interpretation of Section 10(c) it adopted in *Taracorp*<sup>459</sup> and return to *Kraft*'s more traditional approach to remedying *Weingarten* violations,<sup>460</sup> it should modify that approach to require employees seeking an award of make-whole relief to prove that they were prejudiced by the employer's unlawful conduct.<sup>461</sup> By leaving open the prospect of make-whole relief,<sup>462</sup> this approach, like the one employed by the FLRA,<sup>463</sup> would be more likely to deter future *Weingarten* violations than the limited cease-and-desist order presently available under *Taracorp*,<sup>464</sup> and thus would

policies underlying the statutory scheme.” *Id.*; see also *Garrett R.R. Car & Equip., Inc. v. NLRB*, 683 F.2d 731, 742 (3d Cir. 1982) (“Even if on policy grounds, we might have let the ‘old rule’ stand, we will not intrude on the administrative process so deeply that the [Board] is precluded from . . . changing standards in an effort to implement its [remedial] responsibilities under the Act.”).

457. *Communication Workers*, 784 F.2d at 849; cf. *Silverman*, *supra* note 170, at 477 n.50 (“[I]t is not surprising that the Board overruled *Kraft Foods* in *Taracorp*.”).

458. *Communication Workers*, 784 F.2d at 851. See generally *Ereno Lewis*, 217 N.L.R.B. 239, 241 (1975) (Penello, Member, dissenting) (“[S]tare decisis plays a more limited role in the administrative process, as compared to the judicial process . . .”).

459. See, e.g., *Communication Workers*, 784 F.2d at 849 (noting the contention that the Board in *Taracorp* “misunderstood the meaning of § 10(c) of the Act”).

460. See *Penn-Dixie Steel Corp.*, 253 N.L.R.B. 91, 95 (1980) (“In *Weingarten* cases, the Board has generally ordered restoration of the *status quo ante*.”). Even the *Taracorp* Board referred to the award of make-whole relief as its “traditional . . . remedy in such cases.” *Taracorp Indus.*, 273 N.L.R.B. 221, 223 n.12 (1984); see also *Ill. Bell Tel. Co.*, 275 N.L.R.B. 148, 150 (1985) (discussing the availability, under *Kraft*, of “the conventional reinstatement-backpay remedy which normally arises in [a Section] 8(a)(1) discharge case”), *enforced sub nom. Communication Workers*, 784 F.2d 847 (7th Cir. 1986); *Consol. Casinos Corp.*, 266 N.L.R.B. 988, 1015 (1983) (describing the “test . . . set forth in *Kraft Foods*” as “the Board’s standard remedy analysis in *Weingarten* violations”).

461. See *Iron Workers Local Union 377*, 326 N.L.R.B. 375, 394 (1998) (“[A] make-whole remedy is appropriate only where there exists . . . some basis for supposing that the grievant suffered ‘damage’ from the [unlawful conduct] for which he or she should be made whole.”) (discussing *United Rubber Workers, Local 250*, 290 N.L.R.B. 817, 818–19 (1988)).

462. As under *Kraft*, the remedial approach suggested here would only result in the issuance of the Board’s “standard cease-and-desist order” in *Weingarten* cases in which the employer “learned nothing it did not already know from its unlawful interview.” *Radisson Muehlebach Hotel*, 273 N.L.R.B. 1464, 1481 (1985).

463. See *United States Dep’t of Justice, Bureau of Prisons*, 35 F.L.R.A. 431, 448 (1990) (“By making the right to representation ultimately inescapable, [the FLRA’s] remedy . . . provide[s] an additional incentive to [employers] to afford representation rights and diminish[es] any advantage to denying the right at the outset.”).

464. *Compare Wellman Indus., Inc.*, 222 N.L.R.B. 204, 207–08 (1976) (discussing the contention that “[a] cease and desist order is an insufficient remedy,” and that “[o]nly a make-whole order can . . . deter the employer from further unfair labor practices”) with *Montgomery Ward & Co.*, 273

better serve the policies underlying the NLRA.<sup>465</sup>

On the other hand, by creating a presumption *against* an award of make-whole relief,<sup>466</sup> the approach suggested here would preserve the employer's right to discipline an employee for misconduct<sup>467</sup> unless it is affirmatively shown to have done so on the basis of information it obtained by violating the employee's Section 7 right to union representation.<sup>468</sup> In accordance with the analysis in *Weingarten*<sup>469</sup> and the policies underlying the NLRA itself,<sup>470</sup> this approach thus attempts to address "the problem of accommodating the rights of employees under Section 7 to engage in concerted activities with the right clearly given an employer under Section 10(c) to protect [its] business by discharging an employee

N.L.R.B. 1226, 1227 (1984):

In *Taracorp*, . . . the Board established the appropriate remedial scheme for [unfair labor practices] arising out of unlawful *Weingarten* interviews. In that decision, the Board held that a make-whole remedy is inappropriate and that the proper remedy is [the cease-and-desist order] normally prescribed for violations of Section 8(a)(1).

465. See *Buddies Super Markets*, 223 N.L.R.B. 950, 956 (1976) ("The purposes of the Act are, of course, better advanced by deterring the commission of unfair labor practices than by remedying them once committed.").

466. In *Garrett R.R. Car & Equip., Inc. v. NLRB*, 683 F.2d 731 (3d Cir. 1982), the court observed that a Board decision placing the burden of proof on a particular party creates "a rebuttable presumption." *Id.* at 742; see also *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 855 (9th Cir. 2001) (noting that an "allocation of the burden of proof has the effect of creating a rebuttable presumption").

467. In this sense, the approach would retain that aspect of *Taracorp* holding that "an employee denied his *Weingarten* rights is not entitled to reinstatement and backpay if he has been discharged for misconduct." *Epilepsy Found. v. NLRB*, 331 N.L.R.B. 676, 680 n.14 (2000), *enforced in part and rev'd in part*, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002). See generally *Okla. Furniture Mfg. Co.*, 104 N.L.R.B. 771, 782 (1953) ("The Board has long recognized that . . . the Act does not circumscribe the right of an employer to select, discharge, or discipline [its] employees, or to otherwise alter their employment status, for reasons other than those forbidden by the Act.").

468. This result is consistent with the analysis in *Weingarten* itself, where the Court noted that an employer is "free to act on the basis of whatever information [it has] . . . without such additional facts as might [be] gleaned through [an unlawful] interview." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 259 (1975) (quoting *Quality Mfg. Co.*, 195 N.L.R.B. 197, 199 (1972)).

469. The Board has noted that "the construction of Section 7 affirmed by the Supreme Court in *Weingarten* represents a *balance* between employer 'prerogatives' in investigating and disciplining misconduct and the right of employees to band together when their terms and conditions of employment are threatened by those 'prerogatives.'" *Pac. Tel. & Tel. Co.*, 262 N.L.R.B. 1048, 1049 (1982) (emphasis added), *enforced in part and enforcement denied in part*, 711 F.2d 134 (9th Cir. 1983); see also *Millcraft Furniture Co.*, 282 N.L.R.B. 593, 596 n.6 (1987) ("[T]he Supreme Court in *Weingarten* intended to strike a balance between employee rights and legitimate employer prerogatives.").

470. See *Caterpillar Tractor Co.*, 276 N.L.R.B. 1323, 1331 (1985) ("The Act strives to achieve a balance between the right of employees to organize for mutual aid and protection and 'the equally undisputed right of employers to maintain order in their establishments.'" (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945))).

‘for cause.’”<sup>471</sup>

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471. *Vernon Livestock Trucking Co.*, 172 N.L.R.B. 1805, 1809–10 (1968); *cf.* *Ill. Bell Tel. Co.*, 251 N.L.R.B. 932, 935 n.20 (1980) (advocating a “procedure [that] remedies the unfair labor practice[s], while preserving [the employer’s] right to discipline and discharge its employees”), *enforced in part and enforcement denied in part*, 674 F.2d 618 (7th Cir. 1982). *See generally* *Consol. Casinos Corp.*, 266 N.L.R.B. 988, 1009 (1983) (“*Weingarten* and subsequent cases have attempted to balance the conflicting interests of the parties and have sought . . . a reasonable accommodation between those interests.”).