

Safeway Stores, Inc. and Frank Hawkins. Case 32–
CA–10109

July 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On June 7, 1989, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief and the counsel for the General Counsel filed an answer to the Respondent's exceptions and a brief in support of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

1. The Respondent excepts to the judge's finding that the suspension of Hawkins was unlawful on the same basis as the discharge. It argues that, according to the judge's factual findings, the Respondent made the decision to suspend Hawkins for failure to take the drug test before Hawkins ever requested the presence of a union representative and that therefore the suspension could have nothing to do with any *Weingarten* request (*NLRB v. J. Weingarten*, 420 U.S. 251 (1975)). We disagree.

The Respondent had launched an inquiry into Hawkins' record of absenteeism. As a first step in that inquiry, the Respondent determined to give Hawkins a drug test to see if his absences were related to his taking drugs. When Hawkins arrived at work on December 14, he was called to the office of Safety Driver Supervisor Latoures, who told Hawkins that he had been instructed to give Hawkins a drug test. Latoures explained that the Respondent wanted Hawkins tested for drugs because it thought that his absences were related to his using drugs again. Hawkins protested that his absences were related to a kidney problem and that he had submitted doctors' excuses for most of them. When Latoures reiterated that the Respondent wanted him to be tested, Hawkins sought union assistance. His requests were refused, and he was told that he would be suspended if he refused to take the drug test on the spot.

We do not pass on the administrative law judge's apparent conclusion that a drug test, standing alone,

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

would constitute an investigatory interview under *Weingarten*² As noted, however, the test here was part of an inquiry into Hawkins' absence record. Hence, when Latoures—carrying out his instructions to the letter—disregarded Hawkins' requests for union assistance and suspended him for not taking the drug test, Latoures was, in effect, penalizing Hawkins for claiming *Weingarten* rights with respect to the larger controversy. Further, the Respondent could reasonably have anticipated that Hawkins might seek union assistance out of fear of possible discipline for his absences. Yet, unlike its practice on past occasions involving disciplinary interviews with Hawkins, the Respondent had made no advance arrangements for a union representative to be present. Thus the Respondent's original suspension decision encompassed not only a simple refusal to take a drug test, but also Hawkins' reasonably foreseeable request for union representation at the meeting in which the test would be administered—a request that the Respondent was prepared to have its supervisor disregard. In these circumstances, the suspension cannot be divorced from Hawkins' assertion of *Weingarten* rights, and it is unlawful just as is the discharge.

2. The Respondent contends that, even assuming arguendo that the December 14 interview violated employee Hawkins' Section 7 rights as defined in *NLRB v. J. Weingarten*, supra, the reinstatement remedy is inappropriate. In support of this contention, the Respondent relies on *Taracorp, Inc.*, 273 NLRB 221 (1984), and its progeny. We find no merit in this contention.

In *Taracorp*, the administrative law judge had found that an employee had been discharged solely for misconduct unrelated to protected activity. Because that misconduct had been the subject of an investigatory interview conducted in violation of the employee's *Weingarten* rights, however, the judge ordered a reinstatement and backpay remedy. The Board reversed, finding that there was no sufficient nexus between the unfair labor practice (denial of representation at the interview) and the reason for the discharge (the employee's earlier misconduct). *Taracorp*, supra at 223. Accord: *System 99*, 289 NLRB 723 fn. 3 (1988). In this case, by contrast, we are adopting the judge's finding that the Respondent's claims concerning its reason for discharging Hawkins were pretextual and that its real reason was that Hawkins refused to participate in

² Member Raudabaugh sets forth the following rationale for the conclusion that the meeting of December 14 constituted an interview to which *Weingarten* rights attached. At that meeting, the Respondent was inquiring into employee Hawkins' record of absenteeism. Hawkins could reasonably fear that discipline would be imposed as a result of that inquiry. Further, during that inquiry, Respondent demanded that a drug test be taken, and Hawkins opposed that demand. Hawkins could reasonably fear that discipline would be imposed if he failed to comply with the Respondent's demand. In these circumstances, Member Raudabaugh concludes that Hawkins was entitled to union assistance at the meeting. This is not to say that Hawkins would have a right to union assistance at any drug test that may have been administered.

an investigatory interview (consisting essentially of a drug test administered by the Respondent's supervisors) without the assistance of a union steward. The nexus between the statutory right and the discharge is clear. The reinstatement and backpay order remedies the suspension and discharge, not an unlawful interview. (Indeed, as the judge pointed out (at fn. 18), the complaint did not even allege that the December 14 interview as conducted was unlawful, and he did not pass on any such allegation.) Accordingly, we find the remedy appropriate.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Safeway Stores, Inc., Richmond, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Gary M. Connaughton, for the General Counsel.
Lindbergh Porter, Jr. and *Brian Ashe (Littler, Mendelson, Fastiff & Tichy)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. The hearing in this case held on April 10, 1989, is based on an unfair labor practice charge filed January 12, 1989, by Frank Hawkins (Hawkins) and on a complaint and an amendment to the complaint issued February 15, 1989, and March 14, 1989, respectively, on behalf of the General Counsel of the National Labor Relations Board (Board), by the Regional Director of the Board, Region 32, alleging that Safeway Stores, Inc. (Respondent), on December 14, 1988, denied Hawkins' request to consult with a representative of the union which represented him prior to participating in an interview which he had reasonable cause to believe would result in disciplinary action being taken against him, and further alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act), when on December 19, 1988, it discharged Hawkins because Hawkins refused to participate in the aforesaid interview without prior consultation with a union representative. Respondent filed timely answers to the complaint and to the amendment to the complaint in which it denied the commission of the alleged unfair labor practice.¹

On the entire record, from my observation of the demeanor of the witnesses, and having considered the General Counsel's and Respondent's posthearing briefs, I make the following

¹ In its answer to the complaint Respondent admits it meets the Board's applicable discretionary jurisdictional standard and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Also Respondent admits in its answer that General Truck Drivers, Warehousemen, Helpers and Automotive Employees of Contra Costa County, Teamsters Local 315, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Union), is a labor organization within the meaning of Sec. 2(5) of the Act.

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Evidence*

Respondent, a corporation, owns and operates retail supermarkets in several of the States of the United States, including California. The facility involved in this case is Respondent's distribution center for Northern California located in Richmond, California. The Union and Respondent have been parties to a series of collective-bargaining agreements covering a unit of employees employed at this facility for the past several years. The most recent agreement is effective from May 1, 1988, through April 30, 1992. The parties stipulated that the agreement provides for a grievance-arbitration procedure which includes a bipartite panel comprised of an equal number of employer and union representatives and further stipulated that the agreement provides that a unanimous decision of the bipartite panel constitutes a final decision as to those issues which were presented to the panel.

Frank Hawkins, the Charging Party, was employed by Respondent at the Richmond distribution center since 1966 and during the time material was employed there as a truckdriver and, with Respondent's other truckdrivers, was represented by the Union and covered by the parties' collective-bargaining agreement. Since 1986 Hawkins has suffered from a chronic medical problem, kidney stones, which requires medical attention.

During 1987 Respondent discharged Hawkins because it believed he was using drugs. The Union, on Hawkins' behalf, filed a contractual grievance protesting the discharge. Subsequently, pursuant to an agreement between Respondent and the Union, Respondent reinstated Hawkins after he completed a drug/alcohol rehabilitation program. As a part of this agreement, Hawkins agreed to subject himself to random testing for drugs for 1 year. The year expired during the summer of 1988.

On June 29, 1988,² Hawkins was again discharged, this time for excessive absenteeism. Union Business Representative William Buccellato filed a contractual grievance against Respondent protesting the discharge and when the grievance was submitted to the employer-union bipartite panel the panel deadlocked, thus the grievance was then submitted to an impartial arbitrator pursuant to the terms of the contractual grievance-arbitration procedure. On October 27, the day of the scheduled arbitration hearing, Respondent and the Union, with Hawkins' approval, entered into a settlement agreement which, among other things, provided for the following: Rescinded Hawkins' discharge and provided for his reinstatement effective October 28; Hawkins' absence from work during the period of June 29 through September 1 was to be treated as a disability leave of absence for which he was entitled to all contractual disability benefits;³ Hawkins was to be issued a "Final Warning Letter" under the Re-

² All dates hereinafter, unless specified otherwise, refer to the year 1988.

³ In connection with this part of the settlement agreement Hawkins submitted to Respondent's representatives a letter from his doctor dated August 26 which detailed his history of physical problems caused by kidney stones and advised Respondent that the adverse effect on his body caused by the kidney stones "appears to be a chronic and on-going condition, which will require further treatment and medical evaluation in the future." However, when the parties entered into the aforesaid settlement agreement they entered into it with the understanding that "there is no current claim of the chronic condition."

spondent's "Attendance Control Program" which would remain in force and effect through December 31; Hawkins was to be reinstated "with two days sick leave accrual on the books"; and, on his reinstatement, Hawkins was required to complete a drug/alcohol rehabilitation program as detailed in the settlement.⁴ Present for the Union during the negotiation of the settlement agreement was its lawyer and Union Representative Buccellato. Present for Respondent, among others, was Industrial Relations Supervisor Susan Walls.

The employee attendance calendar maintained by Respondent at the distribution center for Hawkins shows that following his October 28 reinstatement, during October, November and December, he was absent from work as follows. In October he had an "unauthorized absence" on Monday, October 31.⁵ In November Hawkins had unauthorized absences on Saturday, November 5, and Friday, November 11, and was also absent on Wednesday, November 23, and Wednesday, November 30, but notified Respondent he was sick on the last 2 of those days and requested sick leave pay for his November 23rd absence. In December Hawkins had an unauthorized absence on Sunday, December 11, and also was absent on Friday, December 1, Wednesday, December 7, and Friday, December 9, but notified Respondent he was sick on the last 3 of those days and wanted to be paid sick leave for those absences.

Hawkins testified, without contradiction, that for all of his above-described absences, except possibly one, he had a written medical excuse from his physician which he submitted to whatever supervisor or dispatcher was on duty when he returned to work after his absence. However, as described *infra*, under Respondent's attendance control program an employee's absence is not regarded as an excused absence even though it is documented by a written excuse from the employee's physician.

Under Respondent's attendance control program none of Hawkins' above-described absences were excused, they were all unexcused absences. Respondent's attendance control program mandates that all unexcused absences must be recorded and that if an employee accumulates three unexcused absences within a 6-month period, the employee will be issued a final warning letter and if the employee accumulates a fourth unexcused absence during this 6-month period, the employee will be terminated.

As described *supra*, when Hawkins was discharged by Respondent in June for excessive absenteeism, he filed a grievance protesting the discharge, and pursuant to an agreement settling his grievance was reinstated on October 28 with a final warning letter concerning his absences and was given 2 days of accrued sick leave. Pursuant to Respondent's policy regarding accrued sick leave Hawkins would not accrue a third day of sick leave until December 6. Therefore, according to the attendance calendar maintained by Respondent for Hawkins at the distribution center, *supra*, he could have been discharged by Respondent for any one of his unauthorized absences in October and November or December, none

of which were treated by Respondent as sick leave. He also could have been discharged for his sick leave absence on November 2 because he had used up his 2 days of accrued sick leave by that date, and also could have been discharged on December 9 as he had used up his third day of accrued sick leave on December 7.

Susan Walls, a supervisor in Respondent's industrial relations department, testified that employees are regularly terminated for accumulating an unexcused absence within the same 6-month period after they receive a final warning letter. She further testified that even though each employee's case is reviewed she was not aware of any case where Respondent did not discharge an employee under those circumstances. The only evidence presented to explain why Hawkins was not, under Respondent's attendance control program, discharged in either October, or November or early December, when he incurred unexcused absences after having been issued a final warning letter, was Walls' testimony set forth below.

Walls testified she learned Hawkins was in trouble because of his absenteeism, when during the first week of December, prior to December 6, someone employed at Respondent's recordkeeping facility in Fremont, California, telephoned her to determine if Hawkins, as he claimed, was eligible to be paid for 2 days of accrued sick leave. Walls told this person about the October 27 grievance settlement which had awarded Hawkins 2 days of accrued sick leave. Walls further testified that in answering this inquiry she looked at the employee attendance calendar maintained at the distribution center for Hawkins and observed, as described *supra*, he had been absent several days since his October 28 reinstatement and probably should have been terminated because of those absences but observed Respondent had "missed" those absences and concluded that because of the "timeliness factor" under the governing collective-bargaining agreement, it was too late at that time to terminate Hawkins for his past absences.

Prior to testifying about reviewing Hawkins' absenteeism record during the first week of December, Walls had testified that on December 14 she reviewed Hawkins' absenteeism record under the following circumstances: on December 13 when she happened to be in the vicinity of the drivers' room, Hawkins handed her a doctor's note concerning his December 11 absence;⁶ Walls informed him it was not her responsibility to file such notes, but testified that she took the note in view of the fact she had been involved with his prior termination for excessive absenteeism; and, the next day she gave the doctor's note to the clerical employee who handled such matters and testified that at that time,

I was made aware that Hawkins had an absentee problem. I was aware that he could possibly be out of sick leave, and even though he had a doctor's note that he handed me, that would be considered an unexcused absence and that he would be subject to termination.

As I have noted *supra*, Walls later testified she had been made aware of Hawkins' absenteeism problem more than a week earlier.

Walls testified that when she discovered on December 14 that Hawkins could possibly be subject to termination for ex-

⁴It is undisputed that on October 27 Respondent's representatives proposed as a part of the settlement agreement that Hawkins be required to agree to random drug testing. It is also undisputed that the Union's representatives objected to this requirement which was dropped by Respondent.

⁵The term "unauthorized absence," as defined by Industrial Relations Department Supervisor Walls, is a day when the employee is scheduled to work and fails to show up for work.

⁶Hawkins did not deny that on December 13 he gave Walls a doctor's note.

cessive absenteeism, she immediately notified Truck Manager Will Rollins that Hawkins had been absent the prior Sunday, that he had given her a doctor's excuse for the absence, but was probably out of sick leave and that if this was true, they needed to review his situation because under the terms of the settlement of his discharge grievance, Hawkins had received a final warning letter for his absenteeism and one more unexcused absence would terminate him.

On December 14, shortly after her conversation with Rollins, Walls and John Flanigan, the manager of the distribution center, testified that, in Rollins' presence, Walls spoke to Flanigan about Hawkins. They testified that Walls informed Flanigan Respondent had a potential problem with Hawkins, that he probably had an unexcused absence, and if this was true that Walls and Rollins would recommend he be terminated, but they first needed to verify his attendance record with Respondent's recordkeeping center in Fremont, California, because, as Walls testified, she explained to Flanigan,

there had been a mix up on the sick leave, and that also when Rollins and [Walls] earlier that morning had looked at [the Richmond distribution center's] internal records that there had been a mistake on the Company's part [and t]hat Frank had, in fact been absent several times and [Walls and Rollins] wanted to make sure that we did not make another mistake.

Walls and Rollins advised Flanigan that Hawkins' attendance calendar showed he had been absent for 9 days during the approximately 6 weeks he had been employed since his reinstatement. Rollins stated that in view of Hawkins' past problem with drugs, Hawkins might be having a drug problem since one of the danger signs of drug abuse was absenteeism. Rollins suggested Hawkins be required to take a drug test, Flanigan agreed with this suggestion, and it was decided that if Hawkins came to work that day he was to be tested for drugs by Paul Latoures, the distribution center's safety driver supervisor. It was also decided, according to the testimony of Walls and Flanigan, that Walls would contact Respondent's recordkeeping center in Fremont to verify whether, as indicated by the attendance calendar maintained at the distribution center, Hawkins in fact had no more accrued sick leave available at the time of his December 11 absence.

Later, on December 14, Rollins spoke to Latoures and instructed him to give Hawkins a drug test when Hawkins reported for work that day at 4:30 p.m. Rollins explained that because of Hawkins' poor attendance record and because of Hawkins' past history of drug abuse, that Rollins wanted to make sure Hawkins was not driving under the influence of drugs. Latoures asked what Rollins wanted him to do if Hawkins refused to take the drug test. Rollins instructed Latoures to suspend Hawkins pending further investigation if he refused to take the test.

During the time material herein the parties' collective-bargaining agreement contained the following "substance abuse program" which covered Hawkins and which, with respect to drug testing, in pertinent part, provided:

In cases where the Company has probable cause to believe that an employee is under the influence of alcohol and/or drugs, it may require the employee to provide a urine specimen for laboratory testing. "Probable cause"

means a clear indication based on objective evidence and based on specific personal observations by a supervisor or other company management personnel that can be described concerning the appearance, behavior, speech or breath odor of the employee. The employee is requested to sign a consent form authoring a collection of a specimen and authorizing the release of the test results to the Company. A refusal to cooperate and/or to provide a timely specimen will constitute a presumption of intoxication and the employee will be subject to discharge.

On December 14 at 4:30 p.m., when Hawkins reported for work, he was called to the office of Safety Driver Supervisor Latoures and, in the presence of Truck Driver Supervisor Ron Sundrud, Latoures told Hawkins that Rollins had left instructions for Hawkins to take a drug test. Latoures explained to Hawkins that because of the excessive number of days Hawkins had been absent from work that Rollins thought he was using drugs again. Latoures, in this respect, showed Hawkins the attendance calendar maintained for him at the distribution center which showed he had been absent 9 days since his reinstatement. Hawkins replied he had been absent due to the physical problem he was having with his kidney, that Respondent knew about that problem, and that he had submitted doctor's excuses for most of his absences. Latoures replied that the doctor's excuses did not change things, that Rollins wanted him to take a drug test.

Hawkins at this point asked for representation by Union Business Representative Buccellato. Hawkins explained to the supervisors that his reason for requesting Buccellato's presence was that during the negotiation of the October 27 grievance settlement, which resulted in his reinstatement, Respondent's representatives had unsuccessfully sought to require random drug testing as a condition of his reinstatement and that Buccellato, who was present during the negotiations, was familiar with that aspect of the settlement. Latoures, however, refused to telephone Buccellato at the Union's office and gave Hawkins two reasons for his refusal: Buccellato probably would not be there so late in the day, 4:45 p.m.; and, even if he was there, Latoures and Sundrud, whose normal work shift ended at 4 p.m., did not intend to sit around and wait for Buccellato to travel the distance between the Union's office and Respondent's distribution center, a distance of approximately 27 miles. Hawkins stated he thought someone would be at the Union's office whom he could talk to about taking the drug test, but Latoures refused to telephone the Union's office. Latoures indicated that regardless of whom Hawkins spoke to at the Union's office, that Rollins intended to have him take a drug test.

Hawkins at this point asked that he be permitted to have a union steward present as his union representative. Sundrud responded by suggesting Hawkins take the drug test and grieve later. Hawkins replied he wanted some form of union representation. Sundrud answered that because of the time of day there was no union shop steward available. Hawkins again asked Latoures to telephone Buccellato. Latoures again refused to do this. Hawkins asked where the management people were who were familiar with the terms of the settlement which had resulted in his reinstatement. He was informed by Latoures they were not present at the facility. Hawkins reiterated his request for Buccellato and Latoures

reiterated his refusal to telephone Buccellato and also refused to provide Hawkins with representation by a union steward who might have been available at the facility.

The meeting concluded with Latoures informing Hawkins that Rollins had left instructions for Hawkins to take a drug test or be suspended. Hawkins stated that without union representation he would not agree to take the drug test. Latoures advised Hawkins that because of his refusal to take the drug test that he was suspended from work, pending a further investigation. The record reveals that Hawkins on December 14 was in fact suspended from work because of his refusal to take the drug test, pending further investigation (Tr. pp. 135–137; G.C. Exh. 4).

The aforesaid description of Hawkins' December 14 meeting with Latoures and Sundrud is based on Hawkins' testimony and the testimony of Latoures and Sundrud only insofar as Latoures' and Sundrud's testimony was consistent with Hawkins. I considered that Latoures' and Sundrud's testimony contradicted Hawkins' in these respects: Latoures, whose testimony was substantially corroborated by Sundrud in this respect, testified that Latoures began the interview by advising Hawkins they intended to ask him to do something that might require "representation" and asked if he wanted "representation" and Hawkins declined the offer; Latoures, whose testimony was not corroborated by Sundrud in this respect, testified Hawkins did not ask him to telephone the Union's office; and, Latoures and Sundrud testified that when they rejected Hawkins' request that Buccellato be present as his representative, that they offered Hawkins the option of being represented by any other person of his choice who was presently available at the distribution center,⁷ but Hawkins insisted on being represented only by Buccellato. I rejected Latoures' and Sundrud's aforesaid testimony and credited Hawkins' description of what occurred because Hawkins, whose testimonial demeanor was good, testified about this interview in a straightforward, sincere, and candid manner, whereas the testimonial demeanor of Latoures and Sundrud was poor.

In concluding Latoures and Sundrud refused Hawkins' request for a union steward, I considered Respondent's contention that it was implausible for them to have engaged in such conduct because it was contrary to Respondent's policy of providing union representation to employees during investigatory interviews. However, their deviation from company policy may have been the result of the unusual nature of Hawkins' investigatory interview,⁸ or their belief that a union

⁷Latoures and Sundrud testified in effect they did not word their offer of representation to Hawkins in terms of a union steward or a union representative, but worded it in terms of another available employee. Also, from their testimony, it is clear that neither Latoures nor Sundrud were thinking in terms of a union steward or a union representative when they offered Hawkins his choice of available persons as his representative, but were thinking in terms of simply another employee. Indeed, Latoures admitted that as far as he was concerned, "a driver would be a union representative, as [he] understood it" for the purpose of Respondent's policy of affording union representation for employees during investigatory interviews.

⁸Supervisors Latoures and Sundrud were not going to question Hawkins about alleged misconduct, as is usually the case during an investigatory interview, but were going to require him to take a drug test and supervise the taking of the drug test. I note that on the four occasions in the past when supervision conducted the usual type of investigatory interview with Hawkins, that each time, without Hawkins' request, supervision had already made arrangements for a union representative to be present in the room for the interview before Hawkins even entered the room. Respondent offered no evidence to explain its deviation from this practice, when on December 14 it summoned

steward was not available to act as Hawkins' representative,⁹ or for some other reason. In any event, whatever the reason for Latoures' and Sundrud's deviation from Respondent's usual policy, for the reasons set forth supra, I am persuaded that Hawkins testified truthfully when he testified that after refusing to telephone Union Representative Buccellato for him that Latoures and Sundrud then refused his further request for a union steward to act as his representative.

I have also considered and rejected Respondent's contention that Hawkins' testimony that the supervisors refused his request for a union steward was not believable because of Hawkins' failure to mention this to Union Representative Buccellato later that evening and because of Buccellato's failure to present this evidence to the bipartite panel which considered the grievance protesting Hawkins' discharge. It is not surprising that when Hawkins spoke to Buccellato on December 14 about what had occurred earlier that day, that Hawkins only mentioned the refusal of the supervisors to contact Buccellato and made no mention of their refusal to provide him with a union steward. Thus, as described in detail supra, Hawkins felt that in order to be intelligently represented during the December 14 drug testing interview he needed to consult with Buccellato because of Buccellato's knowledge of Hawkins' particular situation and, in view of this belief, Hawkins repeatedly during the December 14 interview asked that the supervisors telephone Buccellato at the Union's office. It was only after his request for Buccellato was turned down that as a last resort he asked for union representation in the form of a union steward. Under the circumstances it was not surprising that when Hawkins spoke to Buccellato about what went on during the interview that he failed to mention his request for a union steward. And, with respect to the failure of Hawkins and Buccellato to present evidence to the bipartite panel about Hawkins' request for a union steward to represent him during the December 14 interview, it was not relevant to the issues being considered by the panel; indeed, there is no evidence that the panel was even advised that Hawkins had unsuccessfully sought the representation of Union Representative Buccellato.

On December 19 Truck Manager Rollins, by letter, informed Hawkins he was terminated. The termination letter, in pertinent part, read as follows: "Because of your unexcused absence on Sunday, December 11, 1988, your employment with [Respondent] has been terminated in accordance with Attendance Control Policy and the Arbitrator Return to Work Agreement."

On either December 21 or 22 Union Representative Buccellato spoke separately to Truck Manager Rollins and

Hawkins to Safety Supervisor Latoures' office to take the drug test. Under the circumstances, it is not unreasonable to infer that Respondent's supervisors on December 14 believed that due to the unusual nature of the December 14 interview, which did not require that they personally interrogate Hawkins, that Hawkins was not entitled to union representation.

⁹Sundrud testified that on December 14, during the time material, there was no truckdriver union steward available at the distribution center. Latoures and Sundrud further testified in effect that neither one had any idea whether any of the union stewards employed at the distribution center in other departments, i.e., warehouses, were available at that time. The record reveals that Respondent, in its statement of position submitted to the Board's Regional Director during the investigation of this case, stated that on December 14, during the time material, Union Steward Parsons was available to act as Hawkins' representative. However, Sundrud testified Parsons was employed on the first shift and because of this it was doubtful he was available on December 14 at 4:45 p.m.

Distribution Center Manager Flanigan about Hawkins' termination. Rollins and Flanigan each told Buccellato that Hawkins had been terminated on account of his absenteeism. Buccellato then questioned them about Respondent's reason for having Hawkins take the drug test. They each responded that because of Hawkins' poor attendance record the Respondent suspected he was once again using drugs.

Regarding the drug test, Rollins told Buccellato: "I like Frank he's a good worker, and if he had tested clean, we probably would not have to fire him." Buccellato replied he felt Rollins was not telling the truth when he claimed Hawkins was fired for absenteeism.

Regarding the drug test, Flanigan told Buccellato: "If he tested clean we would not have had a problem [referring to Hawkins' absenteeism]." Buccellato replied by asking "If that's the case let's send him down for a drug test right now and if he's clean put him back to work." Flanigan thought about it for a minute, then replied, "No I don't think we can do that."

The aforesaid description of Buccellato's conversations with Rollins and Flanigan are based on Buccellato's testimony. Rollins and Flanigan denied they indicated to Buccellato that if Hawkins had taken and passed his drug test, he would not have been terminated for absenteeism. I credited Buccellato's testimony, rather than Rollins' and Flanigan's, because Buccellato's testimonial demeanor, which was good, was better than Rollins' and Flanigan's which was not so good.

Soon after Hawkins' December 19 discharge, Union Representative Buccellato filed a grievance under the governing collective-bargaining contract grievance-arbitration machinery protesting the discharge. Subsequently, the grievance was considered by the bipartite panel which, as described supra, is part of the contractual grievance-arbitration machinery. The panel unanimously denied the grievance. In doing so the panel did not consider the unfair labor practice issue presented in the instant proceeding. Respondent's position before the panel was that Hawkins had been discharged for his absenteeism. The Union's position was that this reason was not the real reason for his discharge, that the real reason was Hawkins' refusal to take the drug test, that when Respondent realized it did not have grounds under the governing contract to discharge Hawkins for refusing to take the drug test, and realized that the settlement agreement under which Hawkins had been reinstated did not provide for random drug testing, Respondent seized on Hawkins' record of absenteeism to justify his discharge.

In support of its case-in-chief regarding its reason for discharging Hawkins' and its conduct following Hawkins' December 14 refusal to take the drug test, Respondent called as witnesses Distribution Center Manager Flanigan, Trucking Department Manager Rollins, and Industrial Relations Supervisor Walls. Their testimony, when considered in its entirety, if credible, establishes the following. On December 15 Rollins told Flanigan that Hawkins had been suspended, pending an investigation, for his refusal to take the drug test. In response to Flanigan's inquiry, Rollins advised Flanigan they had not received verification from the record center in Fremont about Hawkins' absenteeism record. Flanigan instructed Rollins to check that information out so they could decide "which way they were going to go." Later the same day, Walls was notified by the record center that Hawkins had

been out of accrued sick leave on Sunday, December 11, which meant that his absence that day was unexcused, thus pursuant to Respondent's attendance control program he was subject to termination. Walls relayed this information to Flanigan with a recommendation that Hawkins be discharged for violating Respondent's attendance control program. After considering the matter and having Walls recheck Hawkins' attendance record to be sure there had been no mistake, on December 16 Flanigan decided to discharge Hawkins and made this decision solely because of Hawkins' absence on December 11 which mandated his discharge under the Respondent's attendance control program.

B. *The Questions Presented and the Applicable Legal Principles*¹⁰

The complaint alleges Respondent violated Section 8(a)(1) of the Act by discharging the Charging Party, Frank Hawkins, on December 19 because he refused to participate on December 14 in an interview with supervision prior to consulting with a union representative, when he reasonably believed the interview would result in disciplinary action being taken against him.¹¹ Thus, the essential questions for decision are as follows: During his December 14 interview with Supervisors Latoures and Sundrud, when Hawkins asked for union representation, was he exercising a right protected by Section 7 of the Act and, if so, was he discharged on December 19 because he exercised that statutory right. See *Gar-*

¹⁰In its answer to the complaint, as set forth in its fifth affirmative defense, Respondent alleged that the "Charging Party is estopped by the doctrine of res judicata and collateral estoppel from bringing or maintaining this action, having filed a grievance, presented his case and received a binding result on January 26, 1989, which result is now final." This affirmative defense refers to the grievance filed on Hawkins' behalf by the Union protesting his discharge under the parties' contractual grievance-arbitration machinery, which was considered by the bipartite panel established by said machinery to resolve such disputes, and which panel unanimously denied the grievance. In support of its fifth affirmative defense, Respondent argues that under the doctrine of res judicata and collateral estoppel the bipartite panel's determination that Hawkins was discharged for cause, excessive absences from work, precludes the Board in this proceeding from finding he was discharged for refusing to participate in an investigatory interview conducted in derogation of his Sec. 7 right to a union representative at said interview. Respondent cites no legal authority for the novel proposition that under the doctrine of either collateral estoppel or res judicata the Board is precluded in an unfair labor practice proceeding from making findings of fact or conclusions of law contrary to those made by an arbitration panel pursuant to the parties' contractual grievance-arbitration machinery. The lack of authority is not surprising because the law is settled that the Board will defer to an arbitration award only if that award complies with the standards set forth by the Board in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and its progeny. Counsel for Respondent at the start of the hearing in this case specifically stated that by virtue of its fifth affirmative defense Respondent was *not* asking the Board to invoke its *Spielberg* doctrine and defer to the arbitration panel's award pursuant to that doctrine. In view of this representation, the question of whether deferral to the arbitration panel's award would be appropriate under the Board's *Spielberg* doctrine was not an issue in this proceeding and was not litigated. It is for these reasons that Respondent's fifth affirmative defense lacks merit.

¹¹The complaint does not, as contended in the General Counsel's posthearing brief, further allege that Respondent violated Sec. 8(a)(1) "by denying Hawkins' request to consult with a union representative prior to participating in an investigating interview which he reasonably believed would result in disciplinary action . . ." Nor, as contended in Respondent's posthearing brief, does the complaint allege Respondent "violated Sec. 8(a)(1) and (5) of the [Act] by denying [Hawkins'] request for a union representative at a discussion in which Respondent directed [Hawkins'] to submit to a drug screen." Rather, as stated above, the complaint in substance alleges only that Respondent violated Sec. 8(a)(1) by discharging Hawkins for refusing to participate in an interview conducted in derogation of his Sec. 7 right to consult with a union representative.

ment Workers v. Quality Mfg. Co., 420 U.S. 276 (1975); *Salt River Valley Water Users' Assn.*, 262 NLRB 970 (1982); *Spartan Stores*, 235 NLRB 522 (1978).

In *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Supreme Court affirmed, as a permissible construction of the Act, the Board's finding that Section 7 of the Act embodies a statutory right for an employee to refuse to submit without union representation to an interview by employer representatives that the employee reasonably fears may result in discipline. In *Salt River Valley Water Users' Assn.* and *Spartan Stores*, the Board held that employers violated Section 8(a)(1) of the Act for discharging employees because the employees exercised their *Weingarten* rights.

In determining whether the discharge of an employee is motivated by an employees' exercise of his or her *Weingarten* rights, the test for assessing the employer's motivation is the test articulated by the Board in *Wright Line*, 251 NLRB 1083 (1980), which in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), was approved by the Supreme Court. Under this test when it is shown, initially, that the employee's activity protected by the Act was a motivating factor in the employer's discharge decision, the discharge is an unfair labor practice unless the employer demonstrates, as an affirmative defense, that it would have taken the same action for legitimate reasons, absent the employee's protected conduct. *NLRB v. Transportation Management Corp.*, supra at 402-403 (1983). See also *Communications Workers Local 5008 (Illinois Bell) v. NLRB*, 784 F.2d 847 (7th Cir. 1986) ("if the employer fires the employee in part because he requested the assistance of his union . . . the Board will use its *Transportation Management* policy. The employee wins reinstatement with backpay unless the employer persuades the Board that it would have fired the employee even without the improper motive.'").

C. Discussion and Conclusions

On December 14 Hawkins was called into Safety Supervisor Latoures' office for the purpose of being given a drug test by Latoures, with Supervisor Sundrud acting as a witness. Hawkins, on being informed of the purpose of the meeting, asked for the presence of Union Representative Buccellato or that he at least be allowed to consult with Buccellato, or whomever was at the Union's office, over the telephone. Latoures and Sundrud denied these requests. Hawkins then asked to be allowed to have a union steward present as his representative during the interview. This request was also denied, with Supervisor Sundrud explaining to Hawkins that at that time of the day a union steward was not available. Later during the meeting Safety Supervisor Latoures refused to provide Hawkins with representation by any of the union stewards who might have been available at the facility.

It is clear that on December 14 when Hawkins was informed that the purpose of his interview with Supervisors Latoures and Sundrud was to have them administer a drug test, Hawkins had every reason to fear that the interview, the drug test, could result in disciplinary action. In 1987 Hawkins had been discharged because Respondent believed he had been taking drugs. More recently, under the terms of the settlement agreement which resulted in his reinstatement to work in October, he had been enrolled in a drug/alcoholic rehabilitation program and under the terms of Respondent's

"Substance Abuse Program," if, in taking the drug test he had tested positive, he was subject to discipline.

Respondent at the hearing in this case conceded that when Hawkins on December 14 requested union representation that at that point in time he had reason to believe he might be subject to discipline as the result of the interview (Tr. pp. 190-191). However, in its posthearing brief Respondent argues:

Although Respondent concedes that Charging Party reasonably could have believed that at some point discipline would have been imposed, Respondent does not concede that the *Weingarten* right attached at the time of the discussion between Charging Party and Respondent's supervisors. The sole purpose of the discussion was to instruct Charging Party to submit to the drug screen. There was no interrogation, factual or discretionary determination to be made during the discussion Here, no representative was needed for Charging Party to receive an instruction regarding the drug screen.

Respondent appears to take the position that because supervision did not personally intend to interrogate Hawkins about his drug use but were going to secure his consent to take a drug test, instruct him on how to take the test, and supervise the test, that Hawkins had no right to union representation under Section 7 of the Act. This argument lacks merit. Respondent has not cited a single Board or Court case which supports this novel argument. The lack of authority is not surprising inasmuch as the purpose of an employer's investigatory interview concerning the use of drugs and the possible adverse effects of such an interview on an employee's employment are the same regardless of whether the employer's interrogation of the employee during the interview is done personally by supervision or by means of a drug test.

Also without merit is Respondent's further contention, set forth in its answer to the complaint as its third affirmative defense, that "'*Weingarten* rights' are not applicable, and this complaint may not be based on such alleged rights" because the "Charging Party is acting as an individual and that Charging Party's Union is not a party." There is no authority to support this novel proposition which squarely conflicts with the Supreme Court's holding in *Weingarten* that the Section 7 right to have a union representative present during an investigatory interview is vested in the individual employee being interviewed, as distinguished from his union representative (402 U.S. at 256-260).

Having found that on December 14 when Hawkins during his interview asked supervision for union representation, he had reason to fear the interview could result in disciplinary action, I further find that when Hawkins made his request for union representation to supervision that he was exercising a right protected by Section 7 of the Act. In so concluding I have considered that initially Hawkins insisted on a particular union representative, Buccellato, who was not available at the distribution center at the time of the interview. However, when supervision refused this request Hawkins then requested the presence of a union steward. Assuming that under the circumstances of this case that Hawkins' request

for Buccellato was not a valid one,¹² his further request for a union steward to represent him was a valid one encompassed by Section 7 of the Act. For, in the absence of a union steward at the distribution center at the time of the December 14 interview, Respondent was obligated to respect Hawkins' request for assistance, even if it meant delaying the interview (*Super Valu Stores*, 236 NLRB 1581 (1978)), or, if there was a union steward available Respondent was obligated to provide Hawkins with that steward prior to proceeding with the interview.¹³

Having found that when Hawkins during his December 14 interview with supervision asked to be represented by a union steward, he was exercising a right protected by Section 7 of the Act, the remaining question is whether he was discharged on December 19 because he exercised that statutory right. For the reasons below, I am persuaded the General Counsel made a prima facie showing that this was what occurred and that Respondent failed to establish it would have discharged Hawkins for legitimate reasons even absent his protected conduct.

That a motivating factor for Respondent's decision to discharge Hawkins was Hawkins' exercise of his statutory right during the December 14 interview to refuse to participate in that interview without a union representative, is established by the following considerations. As I have found supra, on December 14 when Hawkins refused to participate in the interview, to take the drug test, without representation by a union steward, he was abruptly suspended from work because of his refusal to participate in the interview, to take the drug test without union representation. It is clear, therefore, that Hawkins was suspended from work on December 14 for refusing to participate in an investigative interview conducted in derogation of his Section 7 right to refuse to participate in that interview without union representation. *Spartan Stores*, supra; *Salt River Valley Water Users' Assn.*, supra. Accordingly his suspension violated Section 8(a)(1).¹⁴ Hawkins' discharge came hard on the heels of his unlawful suspension and, as I have found infra, the reason advanced by Respondent to justify his discharge was not the real reason for the discharge. It for these reasons that I am persuaded the General Counsel has established that a motivating factor in Respondent's decision to discharge Hawkins was Hawkins' exercise of his *Weingarten* rights during the December 14 investigatory interview. The burden, therefore, shifted to the Respondent to establish it would have discharged Hawkins even if Hawkins had not exercise his *Weingarten* rights during the December 14 investigatory interview.

¹² See generally *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977); *Roadway Express*, 246 NLRB 1127 (1979); *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981); and *Montgomery Ward & Co.*, 273 NLRB 1226 (1984).

¹³ As I have noted supra, at the time there were no truckdriver stewards available at the distribution center to represent Hawkins, but there may have been other union stewards, employed in other sections of the distribution center, available to represent Hawkins.

¹⁴ I have considered that the complaint does not allege Hawkins' December 14 suspension violated the Act, but only alleges that his December 19 discharge violated the Act. However, ruling on the legality of Hawkins' suspension does not violate any principles of due process because the legality of his suspension is inextricably intertwined with the legality of his discharge, thus affording Respondent ample notice that the legality of Hawkins' suspension would be an essential issue in this proceeding. Moreover, the matter was fully litigated.

As described in detail supra, Respondent defends its discharge of Hawkins on the ground that under its attendance control program he had been issued a final warning letter and on December 11 had an unexcused absence from work which, in view of the final warning letter, subjected him to discharge under the attendance control program.¹⁵ In this regard, as described in detail supra, the record shows Hawkins was previously discharged by Respondent in June for excessive absenteeism and after filing a contractual grievance with the Union protesting his discharge was reinstated by Respondent on October 28 and, as part of the settlement of the grievance which resulted in his reinstatement, was reinstated with a final warning letter concerning his absenteeism and, in view of this final warning letter, was subject to discharge under the Company's attendance control program when, on December 11, he incurred an unexcused absence. However, as is also described in detail supra, between his October 28 reinstatement and December 11 absence, Hawkins was absent during October, November, and December on 8 different workdays, most of which were unexcused absences, and because of this and the final warning letter which had been issued to him on October 28, Hawkins was subject to discharge under the Company's attendance control program for several of those absences, yet was not discharged.

The only evidence presented by Respondent to explain why Hawkins was not discharged in October, November, or December when he incurred the other unexcused absences, prior to his December 11 absence, was the testimony of Susan Walls, one of Respondent's industrial relations department's supervisors. Walls, as described in detail supra, testified the reason Hawkins was not discharged because of his previous unexcused absences in October, November, and December was that Respondent "missed" those absences and that when early in December Walls became aware Hawkins had incurred several unexcused absences in October, November and December, that by then it was too late for Respondent to terminate him for any one of those absences because of the "timeliness factor" under the governing collective-bargaining agreement. For the reasons below, I reject Walls' testimony in its entirety.

Walls' testimonial demeanor was poor; she did not impress me as an honest or reliable witness.

Walls' testimony was not corroborated even though corroboration should have been readily available. The supervisor or supervisors responsible for monitoring Hawkins' attendance record were not called to corroborate Hawkins' testimony. Nor did Respondent produce the governing collective-bargaining agreement or that section of the agreement which supposedly made it untimely for Respondent to discharge Hawkins early in December when it supposedly first became aware of his unexcused absences.

Walls' testimony that Respondent "missed" Hawkins' unexcused absences in October, November, and December was inherently incredible. It is inconceivable that after agreeing to reinstate Hawkins on October 27 after having discharged him earlier for excessive absenteeism and conditioning his

¹⁵ I note Respondent has never contended that it discharged Hawkins because it believed he was under the influence of drugs. Rather, as expressed to Hawkins and as expressed in this proceeding, Respondent's position is that its sole reason for discharging Hawkins was that his unexcused absence on December 11 constituted a dischargeable offense under the Company's attendance control program.

reinstatement on his being issued a final warning letter concerning his absenteeism, that Respondent's supervisors would have "missed" the fact that on his reinstatement Hawkins incurred several unexcused absences which under the terms of the reinstatement agreement would have subjected him to discharge. In this respect it is highly significant that Walls did not explain how it was that Respondent "missed" those unexcused absences.

The inference that during October, November, and December Respondent did not "miss" Hawkins' unexcused absences from work, but was aware of them and consciously decided not to exercise its right to discharge him under its attendance control program, is warranted by the fact that shortly after Hawkins' discharge Respondent's representatives admitted to Union Representative Buccellato that if Hawkins had taken the drug test on December 14 and tested negative, he would not have been discharged for his absenteeism. More specifically, as described in detail, supra, Truck Department Manager Rollins told Buccellato he liked Hawkins and considered him to be a good worker and stated that if Hawkins had passed the drug test Respondent "probably" would not have discharged him. Likewise, Distribution Center Manager Flanigan informed Buccellato that if Hawkins had passed the drug test, Respondent "would not have had a problem" with his absenteeism.¹⁶

For all of the above reasons I reject Walls' testimony that Respondent "missed" the several unexcused absences incurred by Hawkins after his reinstatement and that by the time Respondent became aware of them in early December it was too late for Respondent to terminate him for any one of those absences.

Considering that for several weeks prior to Hawkins' refusal on December 14 to take a drug test without union representation, Respondent had excused his absences which under the Company's attendance control program subjected him to termination; and, considering the admissions of Respondent's distribution center manager and trucking department manager that if Hawkins had taken the December 14 drug test and tested negative that he would not have been discharged on account of his December 11 absence from work; I am persuaded Respondent failed to establish by a preponderance of the evidence that it would have discharged Hawkins for his December 11 absence even if Hawkins had not exercised his statutory right to refuse to participate in the December 14 investigatory interview without union representation.¹⁷

¹⁶I am persuaded the reason Respondent overlooked the several unexcused absences incurred by Hawkins following his reinstatement on October 28 and the reason its representatives indicated to Union Representative Buccellato that Respondent would have overlooked Hawkins' December 11 unexcused absence if he had taken and passed the December 14 drug test, was Respondent's knowledge that Hawkins was suffering from a serious and chronic kidney ailment and that for all but perhaps one of his unexcused absences Hawkins had submitted to supervision an excuse from his doctor.

¹⁷In rejecting Respondent's defense, I considered Walls' and Flanigan's testimony that on December 14, prior to Hawkins' refusal to take the drug test, Walls recommended to Flanigan that Hawkins be terminated for his December 11 absence, if the Company's recordkeeping center verified he lacked accrued sick leave to cover that absence. I also considered the testimony of Walls, Flanigan, and Rollins that subsequent to December 14 Respondent received verification from the recordkeeping center that Hawkins had no accrued sick leave, that Walls relayed this information to Flanigan with the recommendation Hawkins be discharged for violating the Company's attendance control program by virtue of his December 11 absence, and that Flanigan subsequently decided to discharge Hawkins solely for this reason. I did not credit their testi-

Having found the General Counsel established that a motivating factor for Respondent's decision to discharge employee Frank Hawkins on December 14 was Hawkins' exercise of his *Weingarten* rights during the December 14 investigatory interview and having further found that Respondent failed to establish it would have discharged Hawkins for legitimate reasons even if he had not exercised his *Weingarten* rights during the December 14 interview, I conclude Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act by discharging Hawkins for refusing to participate in an interview conducted in derogation of his Section 7 right to a representative at said interview.¹⁸

THE REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent suspended and then discharged its employee Frank Hawkins in violation of Section 8(a)(1) of the Act, I shall order Respondent to offer Hawkins immediate and full reinstatement to his former position of employment or, if that position is no longer available, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of pay he may have suffered by reason of Respondent's discrimination against him, with interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

The Respondent, Safeway Stores, Inc., Richmond, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or suspending any employee for refusing to participate in an interview in derogation of the employee's Section 7 right to a representative at the interview.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Offer Frank Hawkins immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously en-

mony because when Walls, Flanigan, and Rollins testified, their testimonial demeanor was poor and because when viewed in the context of the whole record, described supra, their testimony does not ring true.

¹⁸I have not decided whether the December 14 interview was a *Weingarten*-violative interview inasmuch as the complaint did not allege that as a violation of the Act and it was not necessary for me to decide that issue in order to decide whether, as alleged in the complaint, Respondent violated Sec. 8(a)(1) of the Act by discharging Hawkins for refusing to participate in an interview conducted in derogation of his Sec. 7 right to consult with a union representative. See *Salt River Valley Water Users' Assn.*, 262 NLRB 970 (1982).

¹⁹If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

joyed, and make him whole, with interest, for any loss of earnings he may have suffered in accordance with the provisions set forth in the remedy section of the decision.

(b) Remove from its files any reference to the suspension and discharge of Frank Hawkins on December 14 and 19, 1988, respectively, and notify him in writing that this has been done and that evidence of his unlawful suspension and discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Richmond, California, copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²⁰If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or suspend any employee for refusing to participate in an interview conducted in derogation of the employee's right to a representative at said interview.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Frank Hawkins immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered by reason of our discrimination against him, plus interest.

WE WILL remove from our files any references to the suspension of Frank Hawkins on December 14, 1988, and to his discharge on December 19, 1988, and WE WILL notify him in writing that this has been done and that evidence of his unlawful suspension and discharge will not be used as a basis for future personnel actions against him.

SAFEWAY STORES, INC.