

New Jersey Bell Telephone Company and Local 827, International Brotherhood of Electrical Workers, AFL-CIO. Cases 22-CA-15099 and 22-CA-15119

August 18, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On March 27, 1989, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed cross-exceptions and supporting briefs. The Respondent filed answering briefs in opposition to the cross-exceptions.

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, cross-exceptions, and briefs and has decided to affirm the judge's rulings,¹ findings, and conclusions only to the extent consistent with this Decision and Order.²

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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The fourth sentence in sec. II.C, par. 18 of the judge's decision should read "Ehlers then asked for union representation and requested that Huber serve as his representative.

² The Charging Party has moved to expand the record to include the arbitration award and opinion of Arbitrator Lawrence T. Holden Jr. and to modify the Order of the administrative law judge. We deny the motion because it does not meet the requirements of Sec. 102.48(d)(1) of the Board's Rules and Regulations. Under that section, the Board may grant a motion to reopen the record if the evidence adduced "would require a different result" in the proceedings. As fully set forth below, we are adopting the judge's finding that the Respondent unlawfully terminated William Huber, and the evidence sought to be entered by the Charging Party would not require a different result. Accordingly, the motion is denied.

We also deny the Respondent's February 13, 1990 motion to defer to the arbitration award. The Board will not defer to an arbitration award unless the party urging deferral has raised the issue in a timely manner. *Combustion Engineering*, 272 NLRB 215 (1984). Here, arbitration was requested on October 14, 1987. The hearing before the administrative law judge was closed on March 18, 1988. The arbitration hearing was held on November 8, 1988. The parties agreed to delay the issuance of the arbitral award until after the judge's decision in the instant case. The judge's decision issued on March 27, 1989, and the arbitral award issued on December 27, 1989. The Respondent did not raise the issue of deferral before the judge or in its exceptions of May 12, 1989. Concededly, the arbitral award was not issued until after these events. However, the Respondent could have raised, at these times, deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971), or at least the prospect of potential deferral under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). Respondent did not do so. It did not move

I. FACTUAL BACKGROUND

A. *The Ehlers Interview*

The facts are fully set forth in the judge's decision and are summarized as follows. In June 1987,³ a dispute arose at the Respondent's Bergenfield, New Jersey facility regarding whether a particular job assignment could be performed safely. Immediately following this dispute, an incident occurred at the facility in which a ladder, apparently rigged to do so, fell on one of the Respondent's supervisors. In addition, that supervisor's office was ransacked. The Respondent's security department thereafter commenced an investigation into the matter. The investigation included interviews of many employees of the Bergenfield facility.

The initial interviews conducted by Respondent's security department were of Bergenfield employees Mike Woods and Daniel Ehlers on June 22. Prior statements taken from management personnel placed Woods and Ehlers, along with other employees, near the supervisor's office shortly before it was ransacked. The statements additionally alleged that Woods remarked to management personnel after the incident, "you're playing with a man's safety."

At the commencement of the interview of Woods on June 22, the Respondent complied with Woods' request that William Huber serve as his union representative during the interview. Woods and Huber were permitted to confer privately before the start of the interview. Huber is the Union's general delegate whose jurisdiction includes the Bergenfield location. Although Huber spends all of his time functioning in his capacity as general delegate, he retains his employee status and company identification card.⁴ Pursuant to the parties' collective-bargaining agreement, Huber spends over half of his time on so-called joint time, such as grievance meetings, for which he is paid by the Respondent.⁵

The security representatives asked Woods a series of questions, to which he frequently responded "I don't know," "I don't recall," or "I don't remember." The questions were then repeated two or three times. Although Woods answered the questions twice, on the third query Woods stated that he had already responded and would not answer the same questions again. When the security representatives persisted, Huber also objected to the repetitious questioning, and

for deferral until February 13, 1990. In these circumstances, we find the Respondent's motion to be untimely and deferral to be inappropriate. Accordingly, we deny the motion.

³ All dates hereafter refer to 1987.

⁴ The record indicates that Huber had spent 1 day over the past several years performing "production" work for the Respondent.

⁵ The Respondent has excepted to the judge's finding that the pay Huber receives for joint time is contractually required. The Respondent has failed to present any evidence in support of its exception, however.

requested that new questions follow.⁶ The interview continued with the questions being asked repeatedly and Woods and Huber vehemently objecting to such questions. The interview lasted approximately 1 hour, including a restroom break for Huber and Woods.

Thereafter, also on June 22, the security representatives brought in Daniel Ehlers for an investigatory interview. Ehlers requested that Huber serve as his union representative, and the security officials agreed. Ehlers and Huber were permitted to confer privately prior to the interview.

Ehlers was then asked a series of questions regarding the Bergenfield incident. Each question was asked only once. In answering the questions posed to him, many of Ehlers' responses were vague and inconclusive. The security representatives warned Ehlers that they had information that Ehlers had direct knowledge of the events, and that it was his duty to cooperate. On repetition for a second time of some of the prior questions, Huber objected that the questions had already been asked. The security representatives attempted to repeat their questions, but Huber and Ehlers continued to interrupt the questions on the basis that they had been previously asked. Ehlers was warned that if Huber continued to interrupt, Ehlers would be subject to discipline. Huber was also informed that he could be disciplined if his behavior continued. After an additional interruption by Huber, he was informed by the security representatives that he was disruptive, that he should leave, and that the interview would continue in the presence of another union official. Huber refused to leave. The Respondent summoned the police, caused Huber to be arrested, and filed criminal trespass charges against him. The interview thereafter continued without incident with another union official serving as Ehlers' representative.

B. *The Bergenfield Arrest on June 23*

The following day, June 23, Huber arranged a meeting outside the Bergenfield facility before the start of the workday to discuss with employees the procedures to follow in the event additional interviews were scheduled. Shortly after Huber had finished addressing the employees and the workday had commenced, Huber was informed that an employee had become upset on learning of his scheduled interview. Without seeking permission from the Respondent, Huber entered the Bergenfield facility to speak with that employee. While doing so, several employees engaged Huber with further questions regarding the interview process.

Supervisory personnel observed Huber's presence and asked him what he was doing. Huber replied that

⁶The Union had recently distributed guidelines to its officials recommending that they advise interviewees, inter alia, not to answer the same question twice.

he was advising employees regarding their *Weingarten*⁷ rights. The supervisors then inquired whether he had permission to be in the facility. On Huber's negative response, he was directed to leave the facility. Huber refused to do so. The Respondent thereafter summoned the police. When the police arrived, Huber was already outside the Bergenfield facility. Huber approached the police, displayed his company and union identification, stated that this was a labor problem not involving the police, and added that he had already left the building. The police responded that the Respondent intended to file charges against him. Huber was arrested, and the Respondent filed criminal trespass charges against him.

C. *The Neithardt Interview*

On Huber's release from the police station, he proceeded to the Respondent's River Edge, New Jersey facility where an interview of Bergenfield employee Timothy Neithardt was to take place. Huber arrived at the entrance to the River Edge facility at the same time as the acting shop steward at Respondent's Emerson, New Jersey location, Bob David. David had been designated by the Respondent to serve as *Weingarten* representative for interviews to be conducted at River Edge. Huber informed the Respondent that due to his having greater experience than David as well as for reasons of economy,⁸ he would replace David as the union representative for employee Neithardt. The Respondent insisted, however, that David serve as union representative and requested that Huber leave the premises. Huber refused to depart. The Respondent again summoned the police, Huber was again arrested, and the Respondent filed criminal trespass charges against him.

Approximately 1 week later, the Respondent discharged Huber. The discharge was based on Huber's insubordination for refusing to leave the Respondent's premises when directed to do so by management, and for his failure to observe the Respondent's rule requiring that a union representative obtain permission from management before conducting union business on the Respondent's premises during company time.

II. DISCUSSION

A. *Huber's Ejection from the Ehlers Interview*

This case presents an issue of first impression before the Board: whether a *Weingarten* representative may permissibly direct that questions by management may

⁷*NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

⁸The Union is required to pay the wages of union representatives in attendance at investigatory interviews. Huber was at this time already being paid by the Union. He indicated his concern that the Union need not incur the additional expense of paying for David's time at the investigatory interview.

only be asked once (in the case of Ehlers), and prevent management from repeating its questions.

The judge initially observed, and we agree, that the “[p]ermissible extent of participation of [Weingarten] representatives in interviews is seen to lie somewhere between mandatory silence and adversarial confrontation.”⁹ The judge further observed that a *Weingarten* representative may advise against answering questions that are reasonably perceived by the representative as abusive, misleading, badgering, confusing, or harassing. The judge found that Huber reasonably believed that the repetitious questioning of Ehlers constituted harassment or intimidation. The judge accordingly found that Huber’s conduct in advising Ehlers to answer questions only once, and the Union’s policy to that effect, was a reasonable exercise of the Union’s representative function, and did not unduly interfere with the Respondent’s right to conduct the interview nor transform the interview into an adversarial confrontation. The judge thus concluded that the Respondent violated Section 8(a)(1) of the Act by ejecting Huber from Ehlers’ investigatory interview, directing him to leave its premises, causing his arrest, and filing trespass charges against him.¹⁰

The Respondent contends in its exceptions that it lawfully removed Huber from the Ehlers interview because his conduct in advising Ehlers to answer questions only once exceeded the permissible role of a union representative as set forth in *Weingarten*, and interfered with the Respondent’s ability to effectively conduct the investigatory interview. We find merit in the Respondent’s exceptions.

The Board has long recognized the Supreme Court’s intention in the *Weingarten* decision to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role to be played by the union representative present at such an interview. *Southwestern Bell Telephone Co.*, 251 NLRB 612, 613 (1980), enf. denied 667 F.2d 470 (5th Cir. 1980); *Texaco, Inc.*, 251 NLRB 633, 636 (1980), enf. 659 F.2d 124 (9th Cir. 1981).

⁹*Postal Service*, 288 NLRB 864, 867 (1988).

¹⁰The judge also found, and we agree, that the Respondent violated Sec. 8(a)(1) of the Act by threatening Ehlers with disciplinary action based on Huber’s conduct. Concededly, as set forth below, Huber engaged in unprotected conduct. However, in our view, this did not privilege a threat to Ehlers. To countenance such a threat would mean that employees would be subject to retaliatory action based on the conduct of their *Weingarten* representative. In our view, this would needlessly deter employees from exercising their Sec. 7 right to choose such a representative. We do not adopt, however, the judge’s discussion regarding the unlawful nature of the Respondent’s threat to discipline Huber for his conduct as *Weingarten* representative, absent any such allegation in the complaint.

Member Devaney agrees that the Respondent violated Sec. 8(a)(1) by threatening Ehlers based on the conduct of Huber. As indicated in his separate opinion, Member Devaney does not agree that Huber engaged in unprotected conduct.

It is clear from the Court’s decision in *Weingarten* that the role of the union representative is to provide assistance and counsel to the employee being interrogated. *Weingarten*, supra, 420 U.S. at 262–263. The Court specifically declared, however, that the presence of the representative should not transform the interview into an adversary contest or a collective-bargaining confrontation, and that the exercise of the *Weingarten* right must not interfere with legitimate employer prerogatives. *Id.* at 258–259, 263.

In light of these well-established principles, we cannot find that *Weingarten* grants to a union representative the right to preclude an employer from repeating a question to an employee at an investigatory interview. The Supreme Court directly cautioned against the transformation of an investigatory interview into an adversarial contest by virtue of the presence of a union representative. Incorporation of such a rigid limitation on questioning would only serve to turn an investigatory interview into a formalized adversarial forum. This is clearly contrary to *Weingarten*.

Furthermore, it is within an employer’s legitimate prerogative to investigate employee misconduct in its facilities without interference from union officials. *Manville Forest Products*, 269 NLRB 390 (1984); *Cook Paint & Varnish Co.*, 246 NLRB 646 (1979), enf. denied 648 F.2d 712 (D.C. Cir. 1981). Indeed, an employer may, without violating the Act, seek to compel its employees to submit to questioning concerning employee misconduct when the employer’s inquiry is still in the investigatory stage and no final disciplinary action has been taken. *Manville Forest Products*, supra. The limitation on questioning that the Union seeks to impose under the aegis of *Weingarten* would severely circumscribe an employer’s legitimate prerogative to investigate employee misconduct. Such a limitation in effect vests in a union representative the authority to terminate an investigatory interview following a single series of questions by the employer. We cannot reconcile such a restriction with the Court’s explicit intention to preserve legitimate employer prerogatives, and our duty to maintain the careful balance of the rights of employer and employee articulated by the Court.

Our conclusion does not detract from the right—acknowledged by the judge—of a *Weingarten* representative to object to questions that may reasonably be construed as harassing. See *Postal Service*, supra, 288 NLRB at 868. Contrary to the judge, however, we conclude that the conduct of the Respondent’s security representatives in the Ehlers interview did not rise to the level of harassment.

The Respondent in this case readily agreed to Ehlers’ request for a union representative, and did not dispute his selection of Huber. The Respondent further permitted Ehlers and Huber to confer privately before

the commencement of the interview. In addition, the security officials specifically apprised Ehlers that they had reason to believe he had knowledge of the Bergenfield incident, and then attempted to repeat their questions to him when some of his initial responses were vague and inconclusive.¹¹ Under these circumstances, we cannot conclude that the Respondent's effort to raise questions more than once constituted harassment or intimidation.

Contrary to the views expressed by our dissenting colleague, we do not diminish the role of a *Weingarten* representative to that of a "passive observer." The representative is free to counsel the employee. As noted above, however, the union cannot obstruct the employer in exercising its legitimate prerogative of investigating employee misconduct. The repetition of a question, or the phrasing of it in alternative ways, is a common and legitimate investigatory technique, which, in our view, cannot fairly or reasonably be described as harassment. Consequently, the representative cannot act to preclude the employer from using this technique. If he does so, as Huber did in this case, he loses whatever protection the Act affords a *Weingarten* representative.

We find, therefore, that Huber, by advising Ehlers to answer questions only once, and by preventing the Respondent by his persistent objections and interruptions from asking questions more than once at Ehlers' investigatory interview, exceeded the permissible role of a *Weingarten* representative.¹² Having exceeded that role, Huber forfeited his protected right to remain on the Respondent's premises as Ehlers' representative. Accordingly, the Respondent acted lawfully in ejecting Huber from the interview, directing him to leave the

¹¹ In light of the nature of Ehlers' responses, the Respondent's questioning Ehlers about relevant matters more than once was all the more justified. According to the Respondent's security officials, Ehler answered virtually all questions the first time through with "I don't know" or "I don't remember." Indeed, it is questionable that Ehlers, as our dissenting colleague suggests, really "responded to" the questions when first asked.

Given Ehlers' unresponsive answers, we find it entirely understandable and reasonable that the Respondent would want to probe Ehlers' memory and candor without constant interference from Huber, the *Weingarten* representative. Contrary to the judge and our dissenting colleague, the Respondent's questioning, in these circumstances, cannot fairly be deemed to be harassment.

¹² In concluding that Huber acted within permissible bounds, our dissenting colleague relies in part on his finding that the Union had determined, before the events at issue, that the Respondent had instituted a practice of harassing and intimidating employees in investigatory interviews. Though the Union may have determined, the record does not support that the Respondent had in fact harassed or intimidated employees or even that the Union's determination was reasonably based. Indeed, Huber's testimony on the subject was merely that the Union had issued guidelines regarding investigatory interviews because of "an ongoing problem" with the Respondent's security department.

premises and, on Huber's refusal to do so, causing his arrest and filing trespass charges against him.

B. *The Denial of Access at Bergenfield on June 23*

The Respondent ordered Huber to leave the Bergenfield facility due to his failure to comply with its rule that a union representative obtain permission from management before conducting union business on the Respondent's premises during company time.¹³ The judge found that this rule was unlawful under *Tri-County Medical Center*, 222 NLRB 1089 (1976). Accordingly, the judge concluded that the Respondent violated Section 8(a)(1) by, pursuant to its unlawful rule, ordering Huber to leave the facility, causing his arrest, and filing trespass charges against him. We agree with the judge that the Respondent's conduct was violative of the Act, but only for the following reasons.

In *Tri-County*, the Board articulated the analytical framework for assessing the propriety of an employer's rule limiting the access of off-duty employees to its facilities.¹⁴ The Board's expressed intent in doing so was to prevent undue interference with the rights of employees under Section 7 of the Act to freely communicate their interest in union activity to those who work on different shifts.

The judge based the application of *Tri-County* to this case on his threshold determination that Huber is an off-duty employee. In so concluding, the judge relied on Huber's retention of employee status and company identification card, as well as the Respondent's payment for his joint time. We find, contrary to the judge, that *Tri-County* is inapposite because (1) the Respondent's rule is not directed towards its employees, whether on or off duty, and (2) Huber cannot be considered an off-duty employee.

The Respondent's rule is clearly directed exclusively toward officials of the Union, rather than employees of the Respondent. Initially, therefore, we find that *Tri-County* does not apply to the rule in issue in this case. Moreover, although Huber retains his status as an employee of the Respondent, we cannot conclude that the analysis of *Tri-County* is applicable to the instant situation in which Huber was clearly performing his duties as a full-time union general delegate. To characterize Huber's conduct at the Bergenfield facility on June 23

¹³ We agree with the judge's recommended dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally promulgating the aforementioned rule on June 23.

¹⁴ Such a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. The judge found that the Respondent's rule violated the latter two requirements of the *Tri-County* test.

as that of an off-duty employee attempting to express his interest in union activity to employees on different shifts—as *Tri-County* was designed to protect—ignores that Huber was clearly acting in his role as a full-time union official and was perceived as such by the Bergenfield employees and supervisory personnel.

The term “off-duty” necessarily implies concomitant on-duty status, which Huber clearly does not possess at any time. Huber has not performed regular production work for the Respondent for several years and, on the record before us, had no expectation of doing so. To deem Huber an off-duty employee is irreconcilable with his de facto status as a full-time union official with approximately 1000 employees under his jurisdiction. For these reasons, we conclude that the judge’s *Tri-County* analysis is inapplicable to the instant situation.

It has long been established, however, that a denial of access for Section 7 activity may constitute unlawful disparate treatment when a property owner permits similar activity in similar, relevant circumstances. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *Providence Hospital*, 285 NLRB 320, 322–323 (1987). Although the Supreme Court in *Lechmere v. NLRB*, 112 S.Ct. 841 (1992), recently rejected the Board’s holding in *Jean Country*, 291 NLRB 11 (1988), the *Lechmere* decision does not disturb the Court’s statement in *Babcock & Wilcox* that an employer acts unlawfully when it discriminates by denying a union access while permitting access to other organizations. See also *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978). In this case, the Respondent’s rule on its face discriminates against union activity because it only requires permission by union officials for the conduct of union activity on company property.¹⁵ The judge found that the rule as applied by the Respondent’s supervisors did not require permission for the discussion of nonunion issues by union officials.¹⁶ In this regard, we note, as did the judge, that on Huber’s entrance into the Bergenfield garage, the supervisors initially inquired as to his purpose rather than whether he had obtained permission. Only after his response that he was discussing union matters did the Respondent question whether he had permission to do so, and thereafter order him to leave the premises. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by denying Huber access to its Ber-

¹⁵ In *Lechmere*, by contrast, the Court observed that the respondent had established and consistently enforced a policy several years prior to the union’s organizing efforts prohibiting solicitation or handbill distribution of any kind on its property.

¹⁶ For example, Supervisor Hoffman testified that if a union official were to speak to an employee who is on the job about a non-union-related matter such as baseball or just to say hello, permission would not be required.

genfield facility pursuant to its unlawfully discriminatory access rule.

C. The State Court Criminal Proceedings Concerning Conduct at the Bergenfield Garage

The complaint further alleges that the Respondent violated Section 8(a)(1) by summoning the police and filing criminal trespass charges against Huber for his conduct at the Bergenfield garage.¹⁷ In *Johnson & Hardin Co.*, 305 NLRB 690 (1991), as here, the employer filed criminal trespass charges before the General counsel had issued a complaint regarding the employer’s expulsion of the union representatives. We held there that the filing of the criminal charges could be enjoined as an unfair labor practice if it was shown that the criminal charges were filed for a retaliatory purpose and lacked a reasonable basis in fact or law. We find these two requirements to be satisfied regarding Huber’s arrest outside the Bergenfield garage on June 23.

The judge found that Huber remained in the Bergenfield garage for only 3 or 4 minutes after being advised by Respondent’s supervisor Hoffman to leave. Indeed, Huber was already outside the garage when the police arrived. Hoffman nevertheless advised the police that the Respondent intended to file trespass charges¹⁸ against Huber. We find that the Respondent’s filing criminal charges, given the short duration of the incident and Huber’s voluntary departure from the garage before the police arrived, demonstrates that the Respondent had a retaliatory purpose in causing Huber’s arrest. Certainly, it was not necessary to arrest Huber to remove him from the Bergenfield garage, as Huber had already left the garage when the police arrived. Nor was there any evidence that Huber intended to return to the garage unless he was restrained from doing so.¹⁹

We additionally find that the Respondent’s filing of “defiant trespass” charges against Huber lacked a reasonable basis. The New Jersey statute requires that for there to be a trespass the defendant must “know” that he is not privileged to be on the premises. The Respondent was well aware that Huber believed that he

¹⁷ As indicated in his separate opinion, Member Raudabaugh does not agree that the Respondent violated the Act by summoning the police and instituting criminal proceedings.

¹⁸ New Jersey statute 2C:18-3.(b) provides, in pertinent part:

b. Defiant trespasser. A person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice of trespass is given.

¹⁹ If the Respondent was concerned that Huber might later have returned to the garage, it could have filed a civil injunction action, which would have accomplished its goal and have been less coercive than seeking Huber’s arrest and conviction on criminal charges. To go beyond what it needed to protect its property lends force to the view that the Respondent’s filing of a criminal trespass complaint was for a retaliatory purpose.

had a right to be on the premises as a *Weingarten* representative. Thus, Huber's remarks to Supervisor Hoffman when Hoffman advised him to leave the garage indicated that Huber believed he was privileged to enter the premises to advise employees regarding their *Weingarten* rights. The New Jersey statute also stipulates that, as a prerequisite to a "defiant trespass," a person must "remain" on the premises after notice of trespass is given. We do not believe that any reasonable person would have considered Huber's staying in the garage just 3 or 4 minutes after being advised to leave to be "remaining" on the premises such that a criminal trespass action against Huber would be at all justified. The Respondent has offered no precedent to the contrary. We note furthermore that even if it could be contended that staying 3 minutes constituted "remaining" on the premises, the Respondent was not justified in considering Huber a trespasser in the first place, since the only basis for excluding Huber was the rule which required prior permission for the conduct of union business, a rule that we have found to be unlawful under Section 8(a)(1).

Accordingly, under the principles set forth in *Johnson & Hardin*, supra, we conclude that the Respondent violated Section 8(a)(1) of the Act by causing Huber's arrest outside the Bergenfield garage on June 23, and filing criminal trespass charges against him.

D. The Neithardt Interview

The judge found that the Respondent violated Section 8(a)(1) of the Act by refusing to permit Huber to serve as the *Weingarten* representative for Timothy Neithardt. The judge concluded, and we agree, that when two union officials are equally available to serve as a *Weingarten* representative, as with Huber and David for employee Neithardt, the decision as to who will serve is properly decided by the union officials, unless the employer can establish special circumstances that would warrant precluding one of the two officials from serving as representative. We find, contrary to the judge, that the Respondent carried its burden in this regard.

The Respondent argues that Huber's prior refusals to depart the Respondent's premises, and its desire to avoid a similar confrontation, justified its selection of David to serve as *Weingarten* representative for employee Neithardt. The judge rejected this justification based on his finding that the Respondent's earlier directives to Huber to depart its premises were unlawful and, accordingly, Huber's failure to heed those directives could not justify his exclusion from the Neithardt interview.

We have found above, however, contrary to the judge, that Huber exceeded the permissible role of a *Weingarten* representative during the Ehlers interview, and that the Respondent acted lawfully in ejecting

Huber from that interview. We find that the Respondent's concern in preventing a repetition of such an incident the following day at River Edge constituted a legitimate basis for excluding Huber and selecting David to serve as Neithardt's representative. In so concluding, we are particularly persuaded by the closeness in time of the incidents.

We find, therefore, that the Respondent lawfully selected David to serve as Neithardt's representative. Accordingly, we conclude that Huber did not have a protected right to remain at the Respondent's River Edge facility when ordered to leave and, on his refusal to do so, the Respondent acted lawfully in causing him to be arrested and filing trespass charges against him.

E. The Discharge of Huber

The judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Huber based on his failure to observe its rule requiring permission before conducting union business on the Respondent's premises during company time, and his insubordination in thrice refusing to depart the Respondent's premises when ordered to do so. The judge, having determined the Respondent's rule to be unlawful, reasoned that any disciplinary action based on a violation of that rule was accordingly unlawful. The judge further found that in each of the three incidents set forth above, Huber's presence on the Respondent's premises was protected under the Act. The judge concluded, therefore, that the Respondent's directives to leave were unlawful, and that Huber could not be considered insubordinate due to his refusal to heed those orders. Accordingly, the judge concluded that there was no lawful basis for Huber's discharge.

In light of the judge's finding that the Respondent's entire basis for the discharge of Huber was unlawful, it was unnecessary for the judge to determine under *Wright Line*²⁰ whether the Respondent had demonstrated that the discharge would have taken place for legitimate nondiscriminatory reasons, regardless of Huber's protected activity. Contrary to the judge, we have found above that the Respondent acted lawfully in ordering Huber to leave its premises during the Ehlers and Neithardt interviews. In light of the latter findings, we must determine, under a *Wright Line* analysis, whether the Respondent has carried its burden of demonstrating that the discharge would have taken place based on Huber's failure to heed the Respondent's lawful directives to leave the premises during the Ehlers and Neithardt interviews, and regardless of Huber's protected activity at the Bergenfield garage on June 23.

Initially, we find that the General Counsel established a strong prima facie case that Huber's protected

²⁰251 NLRB 1083 (1981), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

conduct at the Bergenfield garage on June 23 was a motivating factor in the Respondent's decision to discharge Huber. Indeed, the Respondent specifically contended that the discharge was based, in part, on Huber's failure to abide by its rule on June 23—a rule that we have found to be discriminatory and unlawful. We further find that the Respondent has not met its burden of demonstrating that the discharge would have occurred regardless of the Bergenfield incident. The Respondent has not shown that its normal practice is to discharge employees who refuse to leave company premises when lawfully directed to do so or who engage in similar insubordinate conduct. "Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *Hicks Oil & Hicksgas*, 293 NLRB 84, 85 (1989). For these reasons, we agree with the judge that Huber was unlawfully discharged by the Respondent.

AMENDED CONCLUSIONS OF LAW

1. Delete paragraph 3(b), (c), (d).
2. Add the following after paragraph 3(a).

"b. Ordering Huber to leave its premises, causing his arrest, and filing trespass charges against him, pursuant to its unlawfully discriminatory access rule, thereby preventing Huber from advising other employees regarding their rights with respect to union representation at investigatory interviews."

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act by, pursuant to its unlawfully discriminatory access rule, ordering William Huber to leave its Bergenfield facility on June 23, causing his arrest, and filing trespass charges against him, we shall order the Respondent to rescind its rule and to cease giving effect thereto. We shall further order that the Respondent petition the police department of the town of Bergenfield and the Bergenfield municipal court to request the withdrawal of all proceedings against William Huber stemming from his arrest at the Respondent's Bergenfield facility on June 23, and further to request that any reference to such proceedings be expunged from his record, and that the Respondent pay any expenses involved in the expunction proceedings. *Clark Manor Nursing Home Corp.*, 254 NLRB 455 (1981), *enfd.* in relevant part 671 F.2d 657 (1st Cir. 1982).²¹ We shall further order that the Respondent pay to William Huber any legal expenses, plus interest

²¹ The remedy for the Respondent's unlawful discharge of Huber is set forth in the remedy section of the judge's decision.

as computed in *New Horizons for the Retarded*,²² he incurred in defense of the charges filed by the Respondent stemming from Huber's presence at the Bergenfield facility on June 23.

ORDER

The National Labor Relations Board orders that the Respondent, New Jersey Bell Telephone Company, Bergenfield, Oradell, and River Edge, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with disciplinary action because of the conduct of their union representatives at investigatory interviews.

(b) Ordering union officials to leave its premises, causing their arrest, and filing criminal trespass charges against them, pursuant to an unlawfully discriminatory access rule.

(c) Discharging employees based on their failure to comply with an unlawfully discriminatory access rule.

(d) 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 William Huber immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits resulting from his discharge, in the manner set forth in the remedy section of the judge's decision.

(b) Remove from its files any reference to the unlawful discharge and notify William Huber in writing that this has been done and that the discharge will not be used against him in any way.

(c) Rescind and cease giving effect to its unlawfully discriminatory access rule requiring that union officials obtain permission from management before conducting union business on Respondent's premises during company time.

(d) Petition the police department of the town of Bergenfield and the Bergenfield municipal court to request the withdrawal of all proceedings against William Huber stemming from his arrest at the Respondent's Bergenfield facility on June 23, 1987, notify him in writing that this has been done, and further request that any reference to such proceedings be expunged from his record, and pay any expenses involved in the expunction proceedings.

(e) Pay to William Huber any legal expenses he incurred in defense of the charges filed by the Respondent stemming from Huber's presence at the Bergen-

²² 283 NLRB 1173 (1987). See also *Summitville Tiles*, 300 NLRB 64 (1990).

field facility on June 23, 1987, with interest computed in the manner set forth in the amended remedy section.

(f) Post at its Bergenfield, Oradell, and River Edge, New Jersey facilities copies of the attached notice marked "Appendix."²³ Copies of the notice, on forms provided by the Regional Director for Region 22, 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.

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

MEMBER DEVANEY, concurring in part, dissenting in part.

I concur in finding that the Respondent violated Section 8(a)(1) of the Act by denying Union Delegate Huber access to its Bergenfield facility; causing his arrest outside that facility; and filing criminal trespass charges against him.¹ I also concur in finding that the Respondent's discharge of Huber violated Section 8(a)(3) of the Act. Unlike my colleagues, I would additionally find that the Respondent violated Section 8(a)(1) by ejecting Huber from employee Ehlers' investigatory interview; causing Huber's arrest; and filing criminal trespass charges against Huber, as well as by barring Huber from employee Neithardt's investigatory interview; again causing Huber's arrest; and filing criminal trespass charges against him.

It is important to consider the background to Respondent's ejection of Huber from Ehlers' interview. Respondent conducted an investigatory interview of employee Woods immediately preceding the Ehlers interview. Woods was employed by the Respondent as a splicer. When Woods reported for work at the Respondent's Bergenfield garage about a week after the incident in which a ladder fell on Supervisor Siegel, he was not given a work assignment but instead was told that he would be going to a meeting with Supervisor Hoffman. Woods asked to make a telephone call to Union Delegate Huber, but Hoffman denied his request. Woods managed to apprise Union Delegate

²³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ I agree with the judge that the Respondent's denying Huber access to the Bergenfield facility was unlawful both because the Respondent's rule was discriminatory and because the denial of access violated the test set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976). Contrary to my colleagues, I agree with the judge that *Tri-County* is applicable here, as Huber was an off-duty employee.

Agresta of what was happening, and Agresta notified Huber that Woods was being taken to the Respondent's Oradell office but that no one knew the reason for the action.

Huber was able to arrive at the Oradell office only a few minutes after Hoffman and Woods and was permitted to talk to Woods. Woods told Huber that he did not know why the Respondent's security representatives wanted to interview him.

Two of the Respondent's security representatives, Schadewald and Esposito, conducted Woods' interview. After Schadewald completed asking Woods a series of questions, Schadewald began asking the same questions again. Woods answered each question at least twice, but when certain questions were asked a third time, Woods responded that he had already answered and would not answer the same question again. Woods felt that the security representatives were "trying to twist everything around."² The Respondent's security representatives persisted in asking repetitious questions. As Woods' *Weingarten*³ representative, Huber remarked that Woods already had answered each question and that they should move on to a new area. Security Representative Esposito then lectured Huber on the Respondent's guidelines for the conduct of union representatives in investigatory interviews. When Huber responded that he was guided by the parties' contract and the Union's guidelines, not the Respondent's guidelines, Esposito began pacing around the room.

The Respondent's security representatives continued asking Woods repetitious questions, and Huber and Woods continued to reply in progressively louder tones that the questions had been asked and answered. Schadewald began the "written" portion of the interview, which consisted of asking the same questions again and writing down the answers, to be presented to the employee to sign. Woods again refused to answer redundant questions and Huber continued to point out that the questions had been asked before. Esposito warned Huber that he could be subject to disciplinary action because of his interruptions. Esposito's written summary of the interview, which Woods was asked to read, included warnings that Woods was impeding the investigation and could be subject to discipline. At the end of the interview, Woods was suspended indefinitely on suspicion of withholding information.

Ehlers, who also worked for the Respondent as a splicer at the Bergenfield garage, was then brought

² About a month before the conduct at issue here, the Union had concluded that the Respondent's security representatives were harassing and intimidating employees during investigatory interviews and twisting information provided by employees. The Union's vice president had advised union delegates to suggest to employees subject to such interviews that they not answer the same question a second time.

³ *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

into the room for an investigatory interview. He requested Huber to serve as his *Weingarten* representative. Schadewald began the interview, asking a number of questions which Ehlers answered. When Schadewald began to repeat some of the questions, Huber interjected that Ehlers had already answered them. Esposito told Huber that he had no right to interrupt and that Ehlers must answer the questions. Schadewald continued to ask repetitive questions. Huber and Ehlers responded that the questions had already been answered and suggested that new questions be asked. Huber accused the security representatives of conducting a "fishing expedition." Esposito warned Huber that he could be disciplined for disruptive behavior.

After similar exchanges continued, Schadewald warned that Ehlers would be discharged if Huber continued to interrupt. Huber replied that he hoped that Schadewald's statement had been picked up on the tape recorder, because it could be a serious unfair labor practice. Schadewald and Esposito dropped their pencils, threw up their hands, and Esposito jumped out of his seat, upset at the implication that the Respondent was secretly recording the interview. Esposito stated that Huber had made a serious accusation and suggested summoning the police to check if the room was "bugged." Huber replied that the interview should continue, but Schadewald and Esposito called in a local management representative, who confirmed that the room was not "bugged."

Schadewald then resumed the interview, asking another repetitive question, and Huber again interjected that the question already had been asked. Schadewald ordered Huber to leave the room, stating that his services were no longer needed. Huber refused. Schadewald stated that Huber had "disrupted and frustrated the interview to the point that we were getting nowhere." The Respondent had Huber escorted from the building by the police, had him arrested, and filed a criminal trespass complaint against him. At the end of the interview, Ehlers was told that he was being suspended for withholding evidence and not cooperating. Ehlers responded, "You're wrong, this is wrong, this whole thing is wrong."

Because I find that Huber's conduct was within the scope of that permitted a *Weingarten* representative, I agree with the judge that the Respondent's expulsion of Huber from Ehlers' investigatory interview violated Section 8(a)(1). In my view, Huber's objection to the security representative's persistent repetition of questions did not turn Woods' and Ehlers' interviews into adversarial forums. Rather, Huber's objections constituted a legitimate exercise of the Union's proper role in assisting employees undergoing investigatory questioning. In affirming that an employee has a right to the assistance of a union representative in an investiga-

tory interview, the Supreme Court in *Weingarten* declared:

A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. [*Weingarten*, above, 420 U.S. at 262-263.]

The Court further noted:

There has been a recent growth in the use of sophisticated [investigative] techniques . . . [that] increase not only the employees' feelings of apprehension, but also their need for experienced assistance in dealing with them. Thus, often . . . an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques. [*Weingarten*, above, 420 U.S. at 265 fn. 10.]

The concerns expressed by the Court in *Weingarten* are directly implicated in the present case. Here, Woods and Ehlers, both telephone company splicers, reported to work one morning and were abruptly taken to investigatory interviews without prior notice and without being informed of the subject matter of the interviews. After being told that he was to be taken to a "meeting," Woods was denied permission to telephone Union Delegate Huber. The interviews themselves were not conducted in the familiar surrounding of Woods' and Ehlers' workplace. Instead, Woods and Ehlers were transported to the Respondent's district office for questioning. Rather than being questioned by supervisors known to them, Woods and Ehlers were interrogated by specially trained security representatives. Shortly before Woods' and Ehlers' questioning, the Union had determined that the Respondent had instituted a practice of harassing and intimidating employees in investigatory interviews and twisting information they provided.

Additionally, the Respondent's security representatives told Woods and Ehlers in their interviews that the Respondent had reason to believe that they had knowledge of the incident concerning Supervisor Siegel. Thus, Woods and Ehlers likely feared that the Respondent would be dissatisfied unless they supplied information about the incident, regardless of whether they actually knew such information, as the Respondent would likely not believe denials of such knowledge. They also knew that they could be disciplined or discharged based on what occurred in their interviews. Indeed, Ehlers was told during his interview that he could be discharged based on Huber's conduct in the interview, and Woods and Ehlers both were suspended immediately following their interviews.

Under these circumstances, Woods and Ehlers no doubt felt apprehensive when suddenly taken before the Respondent's security representatives for questioning. The circumstances and surroundings they faced—being abruptly subjected to questioning by unfamiliar security specialists away from the employees' normal workplace—were intimidating. Moreover, they no doubt feared discipline in any event: if they declined to make incriminating statements, they would be disciplined for withholding information, but if they did give incriminating statements, they would be disciplined for participating in or failing to report the incident in question.⁴

In my view, Huber fulfilled the proper role of a *Weingarten* representative under these circumstances by aggressively objecting to the security representatives' tactics which the judge found could reasonably be viewed as harassing. As the union representative responsible for protecting Woods' and Ehlers' rights in the interviews, Huber could not be compelled to remain mute. In light of the high-pressure situation in which the employees were placed, Huber was justified in aggressively objecting to the security representatives' repetitive questions. To do less might have allowed the employees to be pressured into unwarranted admissions. It is well established that a *Weingarten* representative may not be required to remain silent during an investigatory interview⁵ and has a right to interrupt to voice objections.⁶ In finding Huber's conduct unprotected, my colleagues truncate the proper role of a union representative in an investigatory interview, requiring him to be a passive observer in what is often a highly charged situation with the most severe potential employment ramifications. I decline to join in eviscerating this important employee right.

Having concluded that Huber's conduct as a *Weingarten* representative was permissible, I agree with the judge that the Respondent violated Section 8(a)(1) by expelling Huber from Ehlers' investigatory interview, causing Huber's arrest, and filing criminal trespass charges against Huber. In finding the latter two actions violative, I find that the test set forth in *Johnson & Hardin Co.*, 305 NLRB 690 (1991), has been met. In light of the protected nature of Huber's conduct as a *Weingarten* representative, Respondent lacked a reasonable basis for causing his arrest and filing criminal trespass charges against him.

⁴Under these circumstances, Ehlers' responding to many questions by stating that he did not know or did not remember did not, in my view, diminish the right of Ehlers or his *Weingarten* representative to object to the Respondent's security representatives' highly repetitious questioning.

⁵See *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980); *Texaco, Inc.*, 251 NLRB 633 (1980).

⁶See *Postal Service*, 288 NLRB 864 (1988).

I also reject Respondent's argument that Huber's conduct during Ehlers' interview and in subsequently entering the Bergenfield garage justified the Respondent's subsequent refusal to permit Huber to serve as Neithardt's *Weingarten* representative. Therefore, I would affirm the judge's finding that the Respondent violated Section 8(a)(1) by refusing to permit Huber to serve as Neithardt's *Weingarten* representative, directing Huber to leave the premises, causing Huber's arrest, and filing criminal trespass charges against him.⁷

MEMBER RAUDABAUGH, dissenting in part.

I do not agree that the Respondent violated the Act by summoning the police and instituting criminal proceedings. More particularly, I do not believe that the General Counsel has established that such conduct was motivated by an intention to retaliate against a Section 7 exercise. The judge found that Huber, after being asked to leave the Respondent's premises, refused to do so and told the Respondent to "go call the police and go shit in your hat." Further, Huber said that he would leave only when he finished his union business. Consistent with that defiant attitude, Huber stayed on the premises until he had finished his union business. In these circumstances, I would conclude that the Respondent did not have a retaliatory motive for calling the police and following up by filing the appropriate complaint. The Respondent engaged in this conduct because that was the only alternative left open to it by Huber's defiant conduct.

Concededly, Huber had a right to be free from disparate treatment in his effort to engage in Section 7 activity on the Respondent's premises. However, as recognized in *Johnson & Hardin Co.*,¹ and in *Bill Johnson's Restaurants v. NLRB*,² the mere fact that an individual is engaged in Section 7 activity does not mean that a lawsuit in response is unlawful. Because of the importance of safeguarding access to the courts, such conduct is lawful unless it is for a retaliatory motive and has no reasonable basis.³ For the reasons set forth above, I do not believe that the General Counsel has established a retaliatory motive.⁴ Accordingly, the Respondent was privileged to seek the protection of the law enforcement authorities of the State of New Jersey.

⁷Regarding the latter two actions, I find the test set out in *Johnson & Hardin Co.* to have been met.

¹305 NLRB 690 (1991).

²461 U.S. 731 (1983).

³This case does not involve a contention that the criminal proceeding was preempted or that it had an unlawful objective. See *Bill Johnson's Restaurants*, supra at fn. 5.

⁴I do not reach the issue of whether the criminal proceeding had a reasonable basis.

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 threaten employees with disciplinary action because of the conduct of their union representatives at investigatory interviews.

WE WILL NOT order union officials to leave our premises, cause their arrest, and file criminal trespass charges against them, pursuant to our unlawfully discriminatory access rule.

WE WILL NOT discharge employees based on their failure to comply with an unlawfully discriminatory access rule.

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

WE WILL offer immediate and full reinstatement to William Huber to his former position or, if that job no longer exists, to substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, plus interest.

WE WILL notify William Huber that we have removed from our files and reference to his discharge and that the discharge will not be used against him in any way.

WE WILL rescind and cease giving effect to our unlawfully discriminatory rule requiring that union officials obtain permission from management before conducting union business on our premises during company time.

WE WILL petition the police department of the town of Bergenfield and the Bergenfield municipal court to request the withdrawal of all proceedings against William Huber stemming from his arrest at our Bergenfield facility on June 23, 1987, notify him in writing that this has been done, and further to request that any reference to such proceedings be expunged from his record, and WE WILL pay any expenses involved in the expunction proceedings.

WE WILL pay to William Huber any expenses he incurred in defense of the charges we filed against him stemming from his presence at our Bergenfield facility on June 23, 1987, with interest.

NEW JERSEY BELL TELEPHONE CO.

Gary Carlson, Esq., for the General Counsel.

James Brady, Esq., of Newark, New Jersey, for the Respondent.

Paul Levinson, Esq. (Mayer, Weiner & Levinson, Esqs.), of Demarest, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges and amended charges filed in Cases 22-CA-15099 and 22-CA-15119 by Local 827, International Brotherhood of Electrical Workers, AFL-CIO (the Union or Local 827), the Acting Regional Director for Region 22, issued an order consolidating cases, consolidating complaint and notice of hearing on August 24, 1987.¹ Said complaint alleges that New Jersey Bell Telephone Company (Respondent) engaged in various actions in violations of Section 8(a)(1) of the Act, in substance, by denying the request of an employee to be represented at a "Weingarten" interview by ejecting Union representative William Huber from such interview, and causing his arrest when he refused to leave the premises; by threatening an employee with discharge if Huber did not refrain from acting as said employees' union representative; by directing Huber to leave the premises, summoning police and having Huber arrested, because Huber was advising employees of their "Weingarten" rights; by denying the request of another employee to be represented by the Union during a "Weingarten" interview, by refusing to permit Huber to be present at said interview, by directing Huber to leave the premises, summoning the police to escort him out and filing trespassing charges against him because he sought to continue to represent said employee; Section 8(a)(5) of the Act by promulgating a requirement that union representatives must obtain permission in order to enter one of Respondent's buildings; and Section 8(a)(1) and (3) of the Act by discharging Huber because of his union and protected activities. The trial with respect to the above allegation was heard before me on March 7, 8, 9, 10, 11, and 16, 1988, and was closed by Order on March 18, 1988.

Briefs have been received from all parties and have been carefully considered.

Based on the entire record, including my observation of the demeanor of the witnesses along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a corporation with an office and place of business in Newark, New Jersey, and in various other locations in New Jersey, where it is engaged in the furnishing of telephone communication services. Annually, Respondent derives gross revenues in excess of \$100,000, and purchases and causes to be delivered to its New Jersey locations, goods and materials in excess of \$50,000 directly from States other than the State of New Jersey.

It is admitted and I so find that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹ All dates hereinafter are in 1987 unless otherwise indicated.

It is also admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. *Background*

The Union has represented for many years employees employed by Respondent in various locations throughout the State of New Jersey.

At the time of the hearing the Union represented approximately 12,000 employees in two bargaining units, one comprised of employees who work in the plant engineering department,² and one consisting of employees who perform accounting tasks, which includes billing and processing of the telephone bills. The Union hierarchy includes, from top to bottom, the president-business manager, vice president, secretary-treasurer, executive board members, general delegates, delegates, and alternate delegates.

Respondent maintains a garage at 30 McDermott Place, Bergenfield, New Jersey (the Bergenfield garage or the garage). At this facility, Respondent employs approximately 50 employees in the classifications of splicer and special service technician, who are represented by the Union. Bob Voss, Richard Hoffman, and William Siegel are Respondent's supervisors of these employees at the Bergenfield garage. These supervisors report to Larry Houghtalin manager of Respondent's Pascat Valley and Hackensack sectors, whose office is in Oradell, New Jersey. Houghtalin in turn reports to Robert Scairpon, Respondent's director of installation and maintenance.

Splicers are responsible for maintaining Respondent's telephone cables. They generally report to the garage by 8 a.m. They obtain their work assignments, receive instructions from their supervisors, stock their trucks, and usually leave the garage to perform their assignments by about 8:30 to 8:45 a.m.

William Huber is the Union's general delegate with approximately 1000 employees under his jurisdiction, including the 50 employed at the Bergenfield garage. Mike Woods, a splicer, assigned to that garage was the delegate representing the splicers, who is responsible for conducting craft meetings and processing grievances. Daniel Ehlers, another splicer assigned to that garage, is an alternate delegate, who assists and fills in for Woods as delegate when Woods is absent or unavailable.

B. *Respondent's Security Representatives*

Respondent employs a staff of security representatives, who are responsible for investigating breaches of security and conducting investigatory interviews. Respondent furnishes training to these representatives regarding techniques to be used in interrogations. Some of the representatives also receive training from police departments and Federal investigative agencies.

Investigatory interviews are generally conducted by two security representatives, one who primarily asks the questions, and the other who writes down the answers and or other pertinent portions of the interview. Employees are informed about the purpose of the interview, given union representa-

²These employees install and maintain telephones at homes or places of business.

tion if requested and are allowed to consult with such representative prior to and during the interview. A request is made by the security representatives to tape the interview, and if the employee refuses permission, the interview is not taped. After questions are asked and answers recorded during what Respondent terms the "oral" portion of the interview, the security representatives sum up the previous responses to make sure all pertinent points are covered. At that point the representatives seek to document the interview in a more formalized written portion. The questions are asked and answers are recorded in more detail in the written portion of the interview. The employee is then asked to read it, insure its accuracy, make corrections and to sign the statement taken by the security representatives.

Representatives of Local 827 came to believe that Security Representatives of Respondent were harassing and intimidating employees, and "twisting" information that employees provided during the course of these interviews. Accordingly on May 27, Union Vice President John Amadeo issued "suggested guidelines" to general delegates and delegates, setting forth advice that it believed union representatives should give to employees who are subject to investigatory interviews. These guidelines include advising employees that no tape recording should be permitted, the member has the right to caucus, know the exact subject of the interview, and the right not to answer a question if the answer may lead to discipline. The guidelines also provide examples of unfair tactics which the Union believes that Security has no right to use during the interview. These "unfair tactics," include asking irrelevant questions, putting words in member's mouth, asking leading questions, interrupting answers and asking double barreled questions. Other recommendations made in the "guidelines" include, advising employees not to listen to Security read back their answers, advising them not to sign or initial the Security interview statement and advising the employees not to answer the same questions a second time.

The concluding portion of the "guidelines" reads, "the final decision on all advice and recommendations rests with the Union member, not the Delegate. The advice and recommendations is only for guidance and need not be mandatorily [sic] followed by the member."

C. *The Investigatory Interviews on June 22*

On June 15, a dispute arose between Siegel and Brendan Leen a splicing technician, as to whether a maintenance job at Nussbaum's Auto Wreckers could be done safely. Immediately following this dispute, Siegel returned to his office at the garage. As he entered, a ladder which had apparently been rigged to do so, fell on him. Additionally, his office had been ransacked.

This incident resulted in a decision by Respondent to conduct an investigation to determine who was responsible. Security Representative Robert Schadewald was designated as the representative in charge of the investigation. Initially, statements were taken from management representatives. Voss' statement revealed that he was in Siegel's office at 4:17 p.m. on June 22 and the office was not ransacked. He also noticed at that time that employees Mike Woods, Ron Agresta, Dennis Collins, Lou Argenio, and Rudy Mikowski were in Siegel's office. After the incident Voss claimed in his statement that he expressed his criticism to Woods.

Woods allegedly responded, "You're playing with a man's safety."

Siegel's statement revealed that as he entered the garage he saw employee Daniel Ehlers standing outside his office and a member of unidentified employees leaving his office and laughing. Immediately thereafter he entered the office, and as set forth above, was hit with the ladder and observed that his office had been ransacked.

Schadewald in connection with the investigation, formed six teams of two investigators each to conduct interviews, at three locations. The locations were Respondent's district office at 514 Kinderkamack Road in Oradell, a central office in River Edge, and a central office in Little Ferry. Schadewald prepared a booklet for each of the security representatives for use during the interviews. This booklet consisted of the questions to be asked, objectives of the investigation, guidelines regarding responsibilities of the security representatives and union representatives at investigatory interviews, "local management contact," "local union representative," floor plan of the Bergenfield garage, statements taken from management officials regarding the incident, a copy of a New Jersey statute defining assault, and a copy of general work rules or guidelines.

Since it was likely that union representation would be requested, Houghtalin made efforts to make union representatives available for this purpose. For the interviews scheduled to be held at Kinderkamack Road, he selected Carol Baumuller to be made available. Baumuller was a Local 827 delegate representing clerical employees who work at that location. For the River Edge interviews, Houghtalin chose Bob David, who was a recently appointed shop steward at Respondent's Emerson garage. Houghtalin instructed Al Draper, David's foreman not to assign David any work, and keep him available at the Emerson garage, in case he was needed to serve as a union representative. As for the Little Ferry interviews, Houghtalin chose Kaufman who worked in Respondent's Hackensack location. Houghtalin instructed Kaufman's foreman to keep him on "standby" so he could be available to serve as a union representative, if necessary. Finally on Friday, June 19, Houghtalin told two of Respondent's managers that he might need to "borrow" some Local 827 delegates who were under their supervision to serve as union representatives at these interviews on June 22.

On June 18, at a meeting of Respondent's representatives and officials, the question came up of what action should be taken if union representatives became "disruptive" at the interviews. It seems that in a prior investigatory interview conducted by Schadewald and security representative Esposito, of employee Cilli, it was necessary to terminate the interview because of conduct by Huber that the security representatives considered "disruptive." It was decided that the police would be called if a problem developed and a "disruptive delegate" would not leave. The local police were contacted in advance to notify them that their assistance might be required. The police informed Respondent's officials that the police would not assist Respondent unless it agreed to file criminal charges.

On June 22, Woods was not given an assignment and told by Hoffman to "hang around." Five other employees were similarly instructed. At 8:15 a.m. Hoffman informed Woods that he would be going with Hoffman to a meeting. Woods asked Hoffman if he could make a phone call to Billy Huber,

but Hoffman refused permission for him to do so. As Woods went to get his lunch, he told Ron Agresta, another union delegate, to contact Huber and let him know what was happening. Agresta contacted Huber and told him that Woods was being taken to the Oradell district office and no one knew why.

Huber who was scheduled to be at Oradell location that day for a grievance meeting, told Agresta that he would look into the matter. Agresta relayed that information to Woods as he was about to get into Hoffman's car.

Hoffman drove Woods to the Oradell office, and escorted him into a conference room at 8:52 a.m. where Schadewald and Esposito were present. Woods requested that Huber serve as his union representative, mentioning that Huber was going to be at the Oradell office on that day. The Security representatives replied that they would wait until 9 a.m. and if Huber didn't arrive by then, they would proceed with the interview, using the nearest delegate. Huber arrived at Oradell at 8:55 a.m., rescheduled his grievance meeting, and arrived at the conference room at 9:06 a.m. The security representatives introduced themselves, and informed Huber and Woods that they were investigating incidents that had occurred at the Bergenfield garage on June 15. Huber and Woods were then permitted to confer in the hallway. In the hallway, Huber asked why the security representatives wanted to interview Woods. Woods replied that he didn't know. Huber explained that Woods should answer the questions of the security representatives, and cooperate with them.

After asking some preliminary questions such as his name, and where he was employed, Schadewald focused in on the events of June 15. He asked whether Woods was in the Bergenfield garage on June 15 after 2:30 p.m.? Woods replied that he did not recall, but he didn't think so. Many of Woods' responses to the questions asked were either, "I don't know, I don't recall or I don't remember. Woods did provide more specific answers to a few questions, such what time he arrived at the Bergenfield garage after completing your days work on June 15? Woods responded to this question, around 4 p.m. Woods was also asked and answered questions such as who else was in the garage that evening?, to which he answered, that he couldn't say off hand, but employee Bernie Baudish was with him. To the question, did he go into Siegel's office, Woods replied that he went in with Voss at 4:05 p.m. Woods was also asked about the remark that he allegedly made to Voss, i.e., "they are playing with a man's life and safety." Woods denied making such a statement, and further denied saying anything like that to Voss. The responses that Woods made to these questions were recorded by the security representatives.

Schadewald then began to ask Woods the same questions two or three times. Some of these repetitious questions were the time that he arrived at the Bergenfield garage, and whether he knew Siegel. Woods answered each of these repetitious questions at least twice. Finally when certain questions were asked a third time, Woods responded that he had already answered that question, and would not answer the same question again. Woods testified that he felt that security representatives were setting him up, and "trying to twist everything around."

When the security representatives continued to ask questions that Woods had already answered, Huber became involved and remarked that Woods already had answered that

question, and to move on to a new area. Huber testified that in his view the representatives were “badgering” Woods by repetitious questioning, and that they were trying to “entrap” Woods and put words into Woods’ mouth.

Esposito then interjected, and asked Huber if he was familiar with Respondent’s “personnel practices” and guidelines for “union representation at meetings between an employee and management.” Huber replied that he was not. Esposito read portions of the “guidelines” to him. These guidelines include the fact “that an investigatory interview is not a bargaining session nor an adversary proceeding.” It adds that a union representative is “present to assist the employee and may attempt to clarify facts or suggest other employees who may have knowledge of them. Management, however is free to insist that it is interested in, at that time in hearing the employee’s own account of the matter under investigation.”

The role of the union representative was further discussed, and Huber was instructed that he does not have a “protected right to engage in conduct that frustrates the Company’s right to hear the employee’s own account of the matter under investigation. If you engage in such disruptive conduct, you may be subject to discipline and the interview will be discontinued and another union representative will be provided to the employee.” Esposito asked Huber if he understood these guidelines. Huber replied that he did not. Esposito read the document a second and then a third time to Huber. Huber again asserted that he did not understand these guidelines, but in any event added that he was guided by the collective bargaining agreement and Local 827’s guidelines, not Respondent’s personnel practices. Esposito began getting upset and started pacing around the room. Repetitious questions continued to be asked, and both Huber and Woods would reply in progressively louder tones that the particular question was already asked and answered and that the security representatives should ask new questions.³

At about 9:40 a.m. Schadewald began to take the “written” statement, pursuant to Respondent’s normal practice. He so informed Huber and Woods, and began to ask preliminary questions such as name and age, and Huber interjected that Respondent already had that information in its records. After at first refusing to answer, Woods responded to these questions. Schadewald began inquiring about the incident of June 15 by asking again what time Woods had returned to the garage? Woods again refused to answer stating that the question had already been answered. Schadewald asked if Woods would answer any questions about the June 15 incident? Huber replied that Woods already had answered the questions, and that Respondent had already written down his responses during the so called “oral” portion. Huber suggested that the security representatives merely transfer that information to the written part. The security representatives did not take Huber’s suggestion, and continued to ask questions that they had already asked in the prior portion of the interview. Both Woods and Huber either together or alternatively responded that the question was already asked and answered, and that Woods would answer only new ques-

³Esposito also began speaking in progressively louder tones. Schadewald on the other hand did not raise his voice during the interview.

tions.⁴ Esposito informed Huber in a loud voice that because of his interruptions, he could be subject to disciplinary action. Huber yelled back to Esposito, “put up or shut up.”

At 10:07 a.m. Huber and Woods left the room to go to the bathroom. They returned at 10:10 a.m. Woods was again asked if he would answer questions and reference was again made to Respondent’s personnel practice and code of conduct. Woods was reminded that he was leaving himself open to disciplinary action if he did not answer the questions. Woods responded that he has responded to all questions asked of him. Huber leaned over the table, pointed his finger at Schadewald and said “you already asked that question. Ask a new question.” Huber was warned by Esposito once again that he was being disruptive and subject to discipline. Huber replied, “put up or shut up.” Schadewald then wrote up a statement consisting of 5 pages, which essentially consists of his asking questions such as what time Woods arrived at the garage after work, and if he would answer any questions at all. The statement indicates that Woods replied that he already answered the question. Additionally the statement includes warnings to Woods that he was impeding the investigation and he could be subject to discipline. Schadewald then gave Woods the opportunity to read the statement, make deletions or corrections and was asked to sign the document. Woods refused to comply with any of these requests, and the statement so reflects.

The security representatives then left the room. Shortly thereafter, Houghtalin entered, asked Woods for his company I.D. card, and informed him that he was being suspended indefinitely for suspicion of withholding information pertinent to the alleged sabotage and assault on a supervisor, suspicion of sabotaging company property and suspicion of assault.

As Huber was leaving the conference room, Ehlers was brought in. Huber sat down. Schadewald asked Huber to leave, since his presence had not been requested. Ehlers then asked for union representation and requested that Ehlers serve as his representative. The security representatives agreed, and permitted Ehlers and Huber to confer in the hallway.

When they returned, Schadewald commenced the interview. After the usual preliminary questions, Schadewald asked about the events of June 15. Some of his questions included what time Ehlers returned to the garage, did he know anything about the incident in the garage, who else was in that day; what he did between 4 and 4:30 p.m.; did he ever use the ladder; and where was he when Siegel came into the garage. Ehlers answered all of the questions posed to him, but some of the responses were I don’t know or I don’t recall or I am not sure. The security representatives believed that these responses of Ehlers were not sufficiently forthcoming, since their information indicated that Ehlers should have been able to answer these questions with more precise information. Schadewald advised Ehlers that they (the representatives) had information that Ehlers had direct knowledge of certain events and it was in his best interest to cooperate.

Schadewald then began to repeat some of the previous questions that he had asked. Huber interjected that Ehlers had already answered these questions. Esposito reminded

⁴At times when it became clear that a question was repetitive, Huber would interrupt the question before the representative was finished asking the question.

Huber that he had no right to interrupt and answer for Ehlers, and that Ehlers must answer the questions.

Schadewald continued to ask questions that had already been asked and answered, sometimes twice or three times. At that point both Huber and Ehlers would respond that the questions were already answered, and suggested that new questions be asked. Huber also accused the security representatives of conducting a "fishing expedition," and added that they should conduct themselves in a more professional manner. When Huber would interject his views, Esposito would remind him of his responsibilities as a union representative, and added that he could be discipline if he engaged in "disruptive" behavior. A similar scenario continued for several other questions, with the voices of Huber and Esposito continuing to get progressively louder.

Finally after another repetitious question, once again Huber asserted that the question had already been answered, mentioned his "fishing expedition" charge and again suggested that the security representatives conduct themselves in a professional manner. On this occasion, Schadewald informed Ehlers that if Huber continued to interrupt, that Ehlers would be discharged. Huber replied that he hoped that Schadewald's remarks had been picked up on the tape recorder, because it could be the subject of a serious unfair labor practice charge. At that point both Schadewald and Esposito dropped their pencils and put their hands up in the air. Esposito jumped out of his seat, became visibly upset at the accusation that the interview was recorded. Esposito stated in a loud voice that Huber had made a serious accusation and suggested calling in the police to see if the room was bugged. Huber replied that the interview should continue. The security representatives then called in Paul Livilli local management representative to confirm that the room was not bugged.

After Livilli left, Schadewald asked one more question which had already been asked and answered. Huber again interjected, "you've already asked that question, ask a new question." Schadewald then told Huber that his services were no longer required and to leave the room. He added that Huber was being "disruptive" and that the interview will be continued with Ehlers being represented by a new union delegate. Huber refused to leave and insisted that he had a right to be there. Schadewald repeated that Huber had disrupted the interview and his services were in longer required. He assured Huber that the interview would not continue until Respondent found another union representative to represent Ehlers. Huber continued to refuse to leave, so Schadewald summoned Houghtalin. Schadewald informed Houghtalin that Huber had "disrupted and frustrated the interview to the point that we were getting nowhere." He added that Huber had refused Schadewald's request to leave. Houghtalin informed Huber that since Schadewald had no need for his services, his union business was completed, and he should therefore leave the premises. Huber insisted that he had a right to be there, would not leave, and suggested that Respondent call the police.

Houghtalin then left the room and called the police to remove Huber. Shortly thereafter the police arrived. Huber again refused to leave, claiming this was a labor dispute, and the police should not be involved. The police escorted Huber from the building and took him to the police station. An hour

or so later Paul Livilli came to the police station and signed a complaint against Huber alleging "criminal trespass."

About 10 minutes after Huber was escorted out of the building, Carol Baumuller arrived at the conference room. The security agents advised her that they were investigating incidents at the Bergenfield garage, and permitted her to confer with Ehlers. During this conference Ehlers informed Baumuller that Huber had been arrested, but did not tell her why. After Baumuller and Ehlers reentered the conference room, Schadewald resumed questioning Ehlers. At first Schadewald asked Ehlers questions such as whether or not he had ever seen a picture of a fish that was shown to him, and whether he had ever made a phone call to some unmentioned person and threatened his kids. Ehlers replied no to both of these questions. Ehlers was then asked to give a handwriting sample. He refused, stating that he would have to get George Cookson's approval first.

At that point Schadewald then returned to the events of June 15, and began to ask Ehlers about the ladder, when he returned to the garage, did he use the back door, and other questions that Ehlers had already answered during the interview when Huber was present. Ehlers stated that he had already answered these questions and would not answer them again. Baumuller also interjected on several occasions that these questions had been asked and answered. After one of Baumuller's objections, Esposito read to her Respondent's guidelines for the role of the union representative, as it had previously done with Huber. Baumuller then asked "is this why Billy Huber was asked to leave"? Ehlers replied, "Yes, it was."

At that point Schadewald informed Ehlers that they were proceeding to the second part of the interview, which is a written part, where he would be asked questions and the answers would be recorded.

Ehlers and apparently Baumuller as well, believing that this was a "separate" part of the interview, did not object to the fact that Schadewald asked questions that had been asked and answered previously. This portion of the interview commenced at 12:21 p.m. and concluded at 1:28 p.m.

Questions were asked and answered about Ehlers movements on June 15, when he arrived back at work, when he left the garage, what he did when he got to the garage, who else was in the garage, did he see anyone ransack the garage, and other questions pertaining to the incident. A number of Ehlers' answers were still "I don't know" or "I don't recall," but he answered all questions that were asked. No questions were repeated during this portion of the interview. At the end Ehlers read the statement, and made one correction. The statement originally read that Ehlers was "allowed to confer with your union delegate." This was changed at Ehlers request to "confer with a union delegate." Ehlers refused to sign the statement.

The security representatives left the room. A few minutes later Houghtalin came in and notified Ehlers that he was being suspended for withholding evidence and not cooperating. Ehlers responded, "You're wrong, this is wrong, this whole thing is wrong."

Schadewald made the decision to terminate Ehlers' interview, order Huber to leave, and resume with another union representative. Schadewald testified that he made such a decision because Huber was being "disruptive" during the previous interview of Woods as well as during the interview of

Ehlers. Schadewald admitted that Respondent had published no guidelines as to what conduct of a union representative is considered "disruptive," so as to justify his removal from the interview.

Schadewald further testified as to what conduct of Huber was in his view sufficiently disruptive to warrant the decision to terminate the interview and ask Huber to leave. The first item mentioned by Schadewald was the fact that Respondent had developed information that both Ehlers and Woods were in a position to have had knowledge of who was involved in the incident of June 15. However these employees were continually responding to questions with such answers as they don't know or didn't remember. Schadewald testified that he felt Huber was responsible for the employees' lack of forthcoming answers, because he continually made remarks throughout these interviews that questions had already been asked and to ask a new question. This resulted in the employees giving similar responses to questions, thereby impeding Respondent's efforts to obtain the facts. Schadewald admitted further that in his view, it is disruptive conduct for a union representative to advise an employee not to answer a question that has been asked once before.

Schadewald also testified as to other conduct engaged in by Huber, which he considered "disruptive." The second item mentioned was that Huber was speaking loudly during the interviews. In this connection, Schadewald admitted that Esposito was speaking loudly as well during the interviews, but asserts that this was necessary in order to respond to Huber's loud talking. Thus Schadewald's problem was that Huber was "being loud first." Additionally Schadewald asserts that he relied upon Huber's actions of leaning over the table, coming between himself and the interviewee, and Huber's propensity for interrupting before he could finish asking a question. Schadewald also pointed to what in his view was "just about the final thing," when Huber accused Respondent of bugging the room, and again made that accusation in a loud manner.

Interviews were also conducted at Little Ferry by security representatives Lance Nelson and Carmine Inteso. The first employee interviewed was Ron Agresta. The union representative present was Bruce Kelly. The representatives informed Kelly that he was "here as an observer." Kelly replied that he was there as Agresta's representative, and some discussion ensued on that subject. The interview then commenced, and the security representatives began asking the same or similar questions that they had asked before. Both Kelly and Agresta protested and told the security representatives to "move on" and ask new questions. After these confrontations, Agresta was made aware of his obligations to cooperate, and the code of conduct was read to him. Agresta's responses were recorded.

The security representatives then proposed going on to the so called "written portion" of the interview. Kelly responded that this would be redundant since all the questions and answers were already recorded. Kelly and Agresta stated that Agresta would only answer new questions. The representatives then called in Dan Fangaro, who informed Agresta that he was being suspended for suspicion of withholding information during a security investigation, and suspicion of assaulting a supervisor.

The next employee interviewed was Warren McRea with Kelly again serving as union representative. This time the se-

curity representatives did not use the format of two distinct portions of the interviews, probably expecting Kelly to take the same position that he had taken in Agresta's interview, that such a procedure would be redundant.

Questions were asked and answered, and a five-page "Voluntary Statement" was written by the security representative. At the end McRea was asked to read over and sign the document. He refused, as Kelly stated "we don't sign that, you have your notes, we have our notes." Fangaro entered shortly thereafter, and suspended McRea for "suspicion of withholding information during a security investigation."

A report prepared by Nelson and Inteso on these two interviews for Respondent's files described Kelly's behavior therein as follows: (1) interruptive, (2) acted as counsel, (3) numerous times answered for employee or told employee not to answer, (4) stated employee would not answer any question more than once, (5) treated interviews as adversarial in nature, (6) Argumentative, loud and sarcastic, (7) attempted to disrupt entire interview process, and (8) refused to allow a recap of questions and answers for a written record.

Employees Lou Argenio and Dennis Collins were interviewed by security representatives Lorraine Vasilik and Bill Minick at the Oradell Central office. Bob David served as the union representative. Argenio was asked questions about the incident of June 15 and he gave answers, which were written down. The security representatives then sought to move on to the "written portion" of the interview. David advised Argenio not to give a written statement. David indicated that all of the questions had already been answered and that signed statements are not given. Thus no written statement was taken.

When Collins was interviewed, the security representatives started right in by taking a "so called" voluntary statement. A five page statement was written out by the representatives, based upon the questions asked and responses given by Collins. Collins refused to sign the statement. There is no evidence that any repetitious questions were asked at the interviews of either Collins or Argenio. The security representatives report of David's conduct indicates that he "acted in an orderly manner . . . took notes and clarified some points. He was not disruptive, and did not counsel or answer for the subject." Both Collins and Argenio were also suspended at the close of their interviews.

My findings with respect to the various interviews conduct on June 22 as set forth above is based on a synthesis of the credible portions of the testimony of Huber, Ehlers, Kelly, Esposito, and Schadewald, supplemented by documents and statements prepared by security representatives which comprise Respondent's "Security Report" of the investigation.

D. *The Arrest of Huber on June 23*

Since six splicers had been interviewed and suspended on June 22, Woods and Huber decided to call a meeting of the remaining splicers to explain what had happened, and to discuss with these employees what they should do in the event that additional interviews were to be scheduled. Woods called employees at home during the evening of June 22, and notified them that a meeting would be held on June 23, outside the garage, at 7:45 a.m. Most of the splicers who were not suspended, plus some of the technicians were present, along with Woods, Ehlers, and Huber. Huber explained that

six splicers had been interviewed by security representatives and suspended on June 22. He urged the employees to stay calm, be careful, and to contact Huber if there were any problems. Huber also explained that there was a possibility that the security representatives would interview additional employees. In that event he urged them to request union representation, cooperate in the investigation, but not to sign anything.

The meeting ended about 7:55 a.m. when the employees went into the garage to report for work. In the garage, supervisors directed employees Thomas Pfeiffer, Timothy Neithardt, Robert Testa, Brian Kaye, Dennis Spirito, Kenneth Haberman and Glenn Berg to wait in the breakroom while assignments were distributed to the other employees. Pfeiffer and Neithardt approached Siegel outside the breakroom and asked him where they were going that day. Siegel responded, "just wait here, you're going for a ride." Pfeiffer walked away and became very upset. He began to rant and rave and started throwing his pencil and notebook around.

About 8:10 a.m., John Dwyer, a splicer, left the garage and informed Huber, Woods, and Ehlers that some employees were to be taken to some unknown destination, and that Pfeiffer had become upset about the situation, was throwing a notebook around the garage, and someone should try to calm Pfeiffer. It was decided that Huber would enter the garage in order to calm down Pfeiffer. Huber walked in, picked up Pfeiffer's notebook from the top of the truck, and approached Pfeiffer. Pfeiffer told Huber that he was "pissed off" because he was not involved in the situation, but he was apparently going to be questioned. Huber replied that it looks like Pfeiffer was going to be involved in interviews like everyone else. Pfeiffer was very upset, but Huber calmed him down and told him that Respondent is looking for him to react, but that he should not get upset and provoke disciplinary action. He further told Pfeiffer that if he was interviewed, to ask for union representation, answer questions honestly but only once, do not sign anything and do not permit the security representatives to tape record the interview.

Huber started to walk with Pfeiffer near the break room, when he encountered Neithardt, Berg, Kaye, Spirito, and Testa. Berg and Neithardt told Huber that they had been told to remain on standby, and were waiting to be taken to an undisclosed location, apparently for an interview, and asked what they should do? Additionally a few other splicers such as Bernard Baudish, who had not been scheduled for an interview that day were also standing in this group of employees.

Huber began to give a more detailed explanation of the Weingarten process. He told them that he wasn't certain, but it looked like they were going to be interrogated by security. He informed them to be sure to request union representation, not to sign anything, to make sure nothing was recorded, and not to answer any question more than once. He also explained the procedure that would be followed, i.e., a two-part series of questions, and added that the union objected to the second part of the interview.

Meanwhile, Siegel observed Huber speaking to employees, but he did not know who Huber was at the time. Siegel went into Hoffman's office and asked who was it that was addressing the employees. Hoffman informed Siegel that it was

Billy Huber the General Delegate.⁵ Hoffman then said to Siegel, "Let's go find out why he's here."

Hoffman and Siegel then approached Huber while he was in the process of explaining to the employees their "Weingarten" rights. Hoffman asked Huber what he was doing. He replied he was instructing members about their Weingarten rights. Hoffman asked Huber if he had permission to be in the garage. Huber responded that he had been in the garage many times before, and had never needed permission. He asked why did he suddenly need permission then. Hoffman answered that he was just doing what he was told. Huber replied that he did not have permission, did not need permission, and would leave the garage when he was finished. Hoffman then told Huber that if he did not leave, the police would be called. Huber told Hoffman that he can "go call the police and go shit in your hat," when he was finished he would leave the garage. Three or four minutes later Huber concluded his remarks, and left the garage.

Meanwhile at 8:19 a.m. after Hoffman was finished speaking with Huber, he called the police. He told them that there was a union official on the premises without prior management approval and he wanted a squad car to come down to "keep the peace and ask the person to please vacate the premises." Hoffman then called Houghtalin and informed him that he had called the police to remove Huber and that he intended to press charges.

The police arrived immediately, while Huber was already outside the garage. Hoffman told the police officer that he intended to press charges against Huber for trespassing. Huber approached the police officers, showed his company I.D. and union card, and said this was a labor problem not involved with the police. Huber added that he had already left the building. The police officer replied that Hoffman would be going to the station to sign criminal trespassing charges, and asked Huber if he would go willingly. Huber said that he would and was driven in the police car to the station. At the station Huber was there for an hour, as the police took his fingerprints, and a "mug shot." Hoffman arrived and filed a complaint charging Huber with "defiant trespassing."

My findings as detailed above with respect to the events of June 23, is based on a synthesis of the credible testimony of Huber, Woods, Ehlers, Neithardt, Hoffman and Siegel. In fact the only significant credibility issue with respect to this incident, is whether Siegel and Hoffman were told about or aware of what Huber was discussing with employees when they asked him to leave. I reject the testimony of Siegel and Hoffman that they were unaware that Huber was advising the employees of their "Weingarten" rights, and credit Huber as indicated above that he so advised them. I note in this connection that Hoffman admitted that before he spoke to Huber, he told Siegel that he intended to find out "why he [Huber] is here." Thus I find it logical that since Hoffman intended to ask Huber why he was at the garage, that he in fact did so as testified to by Huber, and that Hoffman was fully aware of what Huber was discussing with employees when he ordered Huber to leave the premises.

⁵ Hoffman had received a call from Houghtalin in the late afternoon on June 22, and was told that Huber had been disruptive during some security interviews at Oradell, and had been removed from the building and arrested by police.

Extensive testimony was adduced with respect to past practice at Respondent's facilities, vis-a-vis the alleged requirement for union representatives to obtain permission to enter such facilities, and or to conduct union business while there. General Counsel produced various present and current union officials, such as Arthur Perry, George Cookson, Robert Johnson, Bruce Kelly, and Huber to testify on this subject. These witnesses contend that Respondent never had a rule or policy which required union officials to obtain advance permission from Respondent's officials before entering one of its facilities. Indeed many of the officials of the Union, including Huber were and are still employees of Respondent while serving as union representatives, and still retain their company I.D. cards.

Huber had worked for Respondent for 16 years, when he became a general delegate for the Union in 1983. After becoming a delegate Huber performed some installation and repair work for Respondent in 1983. From 1984, until his termination in 1987, he performed production work for Respondent only for 1 day, in September 1986. However pursuant to the terms of the collective-bargaining agreement, Huber is paid by Respondent when he is engaged in "joint time," which refers to meetings held or on telephone conversations with officials of Respondent. Since Huber became a general delegate, approximately 65 percent of his time has been paid by Respondent pursuant to the above collective-bargaining provision.

The union officials also deny the existence of any rule or policy of Respondent that requires union representatives to obtain permission from Respondent's supervisors before speaking to employees on the premises regardless of the subject matter of the discussion or the time of day. However, the union officials essentially concede, that as a matter of "common sense," or "common courtesy," when a union representative wishes to speak to an employee about union business, while that employee was working, they generally obtain permission from a supervisor, if the discussion was likely to exceed a "reasonable" amount of time. The amount of time spent with an employee before requesting permission would vary according to the situation, with some union officials using a guideline of 6 minutes. Some of these witnesses and most particularly Huber contend that there were some occasions when they would not obtain permission for any such discussions, such as an emergency, and that some supervisors were stricter than others with respect to requiring permission to speak with employees in general.

Respondent furnished testimony from Siegel, Hoffman, Houghtalin, Kenneth Teneza, Anton Kurelja, Alfred Murphy, John Donnelly, and Robert Voss. These officials testified essentially that Respondent had no rule requiring that union officials obtain permission to conduct union business prior to entering Respondent's facilities. However they assert that Respondent has consistently maintained and enforced a policy that union officials must obtain permission from supervisors in order to conduct union business, where such union business involves speaking to employees who were "on the job," or "working" or "on the clock." In clarification of this "rule or policy," they contend that such permission is not required where the officials wishes to conduct union business during breaks, or lunch hour or before work. Similarly if the union officials merely intends to place union literature on the bulletin board, permission is not required,

since employees at work would not be impacted. Thus the key factor in Respondent's view, is whether the union officials conduct "disrupts" the work of employees, since "work time is for work."

Another aspect of Respondent's "rule" or "policy," produced conflicting testimony from its witnesses. While on its face the rule concededly prohibits the conducting of "union business," Houghtalin testified that the rule does not apply only to the conduct of "union business," but to the conducting of any "personal" business, which takes employees "off the job." However a number of the other of Respondent's supervisors, who testified had a different view of the rule. Thus Hoffman who I would note was one of the supervisors directly involved with Huber on June 23, testified that the rule only applies to "union business." Thus he asserts that if an union official were to speak to an employee who is on the job about a nonunion related matter such as baseball or just to say hello, permission would not be required. However, if the union official in addition to saying hello, informs him about a union meeting, even though the time spent away from work is the same as the discussion about baseball or just saying hello, then he must get permission to speak to the employee.

Kurelja testified similarly, when he was asked about a situation where a union official approached an employee on the job, and spending the same amount of time, says to the employee "Hi" or "come to the union meeting tonight." According to Kurelja the union official would require permission from a supervisor if he were going to make the latter comment to the employee, but not the former.

Additionally, Voss was asked if he ever had occasion to mention Respondent's alleged "rule" to a union delegate. His response was "I might have challenged him if I thought he was talking union business."

Finally, the conduct of Hoffman and Siegel on June 23 supports this interpretation of the rule. Thus when they noticed that Huber was speaking to employees after 8 a.m., Hoffman said to Siegel, "Let's go find out why he's here." They then approached Huber and asked him what he was doing? This conduct suggests that it was significant whether or not Huber was talking to employees about union business, since otherwise it would not have been necessary or essential to ask him why he was there or what he was doing.

Finally, it is not disputed that Respondent has not published in writing any rule or policy with respect to the need to obtain permission by union officials to either enter its facilities to discuss union business, or to speak to employees about union business or any other matters. Moreover, the collective-bargaining agreement between the parties contains no provisions dealing with these matters.

E. Interviews Conducted on June 23

After Huber was released from the police station, he and Cookson discussed the situation that employees were being interviewed at Oradell and River Edge. They decided that Cookson would go to Oradell and Huber to River Edge. Cookson suggested that Huber go to River Edge, because the representative sitting in on the interview was an inexperienced appointed steward, and that he should sit in on the interview.

Cookson arrived at Oradell, and entered the conference room where two security representatives were interviewing

employee Testa with Baumuller serving as union representative. After identifying himself, Cookson asked if he could speak to Baumuller. The representatives (Lance Nelson and Carmine Intesa) agreed and Cookson conferred with Baumuller and Testa. Cookson spoke to Baumuller and Testa to make sure that Baumuller and Testa were comfortable with the situation. If he was not satisfied that this was so, it was Cookson's intention to replace Baumuller as the union representative. However Cookson concluded that Baumuller seemed "sure of the situation," and Testa was comfortable with her representing him, so Cookson did not attempt to replace her.

The interview proceeded without incident, with the security representatives preparing a six-page "Voluntary Statement," which Testa would not sign. The report prepared by the security representatives of this interview, indicated that Baumuller "displayed a business like attitude," acted as counsel on a number of occasions, refused to allow interviewee to answer questions more than once, interrupted and counseled interviewee before interviewee answered most questions," and was "argumentative but in a civil manner."

About 9:30 a.m. security representatives Minick and Vasilik began to interview Neithardt at River Edge. They informed him that they wished to talk with him about an incident at the Bergenfield garage. Neithardt then asked for union representation. According to Neithardt he would have referred to have Huber as his representative, since Huber was the general delegate and an experienced union official. However Neithardt testified that he did not ask for Huber because he had seen Huber being arrested about an hour earlier, and he didn't believe that Huber would be available. He didn't ask for a delay in the interview, because he claims that he didn't believe that Respondent would hold up the interview until Huber arrived.

Minick then advised Siegel that Neithardt had requested union representation. Siegel notified Houghtalin, who in turn arranged for David to be transported by his Supervisor Al Draper from Emerson to River Edge.

About 9:45 a.m. Huber arrived at the River Edge office at the same time that David and Draper pulled into the parking lot. Siegel observed them both arriving together, and suspecting that Huber was going to ask to be the union representative, immediately called Houghtalin for advice.

Houghtalin after being informed of the situation, asked if Neithardt had specifically requested Huber's presence. Siegel replied no, that Neithardt had merely requested union representation. Houghtalin informed Siegel that David had been summoned to handle the investigation and Huber would not be allowed to intervene.

Meanwhile, Huber encountered Draper and David as they were entering the facility, and told Draper that he would replace David as the union representative. Huber explained to Draper that he was already being paid by the Union, so it would be more productive to send David back to work, and to avoid the Union incurring the expense of paying for David's time.⁶ Huber added that he was more experienced than David in these matters. Draper could not make a decision on Huber's request, so he went to speak with Siegel. Siegel informed both Draper and the security representatives that

⁶The Union must pay for the wages of union representatives when they attend investigatory interviews.

David, and not Huber would be the union representative at the investigatory interview.

Siegel and Draper then went downstairs to the lobby where Huber and David were standing. Siegel asked Huber what he was doing in the building, since he did not have permission to be there. Huber replied that he did not need permission to be there, and that he was present because security representatives were about to interview one of his members, and he intended to serve as the representative. Siegel responded that Huber's presence at the investigation was not required, since Respondent was supplying David who was already there as the union representative. Huber argued that David was on "his payroll," and he Huber had the right to choose who the union representative would be. Huber added that he was more experienced than David, and he did not believe that Respondent had the right to pick who the union representative would be. Siegel insisted that David would be the union representative, and since Huber therefore had no right to be there, asked Huber to leave. Huber continued to insist on his right to replace David as union representative, and Siegel threatened to call the police to remove Huber if he did not leave. Huber refused to leave, the police were called and arrived shortly thereafter. Huber was escorted from the premises by the police and taken to the River Edge police station. There Draper signed a complaint accusing Huber of "defiant trespass."⁷

Houghtalin testified that he made the decision to exclude Huber from serving as union representative on that day. He contends that his decision was based upon the fact that Huber was not asked for specifically by the employee, and more importantly because of the "volatility" of the situation.⁸ More specifically Houghtalin asserts that since Huber had refused to leave the investigatory interview on June 22, and refused to leave the garage on June 23, after being told to do so by company officials, he did not want to risk another such confrontation by allowing him to serve as union representative for Neithardt.

At 10:05 a.m. the interview with Neithardt continued, in the presence of David. David was reminded of the rules governing the behavior of union representatives, and Neithardt of his obligation to cooperate. Questions were asked about the Bergenfield incident and Neithardt responded. David interrupted a number of times, in a normal tone of voice to state that the same questions should be asked only once and that Neithardt had already answered the question.

Neithardt refused to sign the written statement taken by the security representatives and the interview was completed by 10:45 a.m. Cookson arrived at River Edge at about the time Neithardt's interview was concluding. He identified himself and asked the security representatives for permission to speak to his "two people" (Neithardt and Pfeiffer). The security representatives agreed. Cookson met with Neithardt, Pfeiffer as well as David in the breakroom. Pfeiffer was nervous and upset, and didn't want to be there. Cookson calmed him down, and convinced him that he should go in

⁷All three trespassing charges filed against Huber were subsequently consolidated into one case, which the prosecutor has agreed to hold in abeyance pending the resolution of the unfair labor practice charges herein.

⁸In this connection, Houghtalin candidly conceded that he would have excluded Huber from serving as union representative even if Neithardt had made a specific request for Huber's presence.

and participate in the interview. Cookson also spoke to David and assured himself that David was comfortable and capable of handling the situation. According to Cookson, if he was not so convinced, he would have insisted that he replace David in the interview. Cookson then left and the interview with Pfeiffer proceeded.

During the interview, which began at 11 a.m., David interrupted a line of questioning on several occasions stating that Pfeiffer had already answered a particular question and was not required to do so a second time. The interview was concluded at 11:55 a.m. Pfeiffer did not sign any statement.

Employees Glen Berg and Dennis Spirito were interviewed by Schadewald and Esposito on June 23, with Charles Kaufman union delegate acting as union representative. Kaufman began the Berg interview by stating that due to the fact that everyone who cooperated by answering questions the day before, were suspended indefinitely, "we feel we will not answer any more questions." Schadewald and Esposito then explained Berg's obligation to cooperate, leaving himself open to discipline if he does not.

After a caucus between Kaufman and Berg, and some additional discussion, Berg answered questions about the incident of June 15 at Bergenfield. A "Voluntary Statement," of five pages was taken by the security representatives. Berg and Kaufman read the statement, but Berg refused to sign.

Spirito was asked by the security representatives if he had been instructed by anyone that morning on how to answer any questions during the interviews. Spirito replied that he was not, and added that Huber at a meeting of employees had mentioned to employees to "be careful because security is around."

The interview proceeded and Spirito answered the questions asked of him. An eight-page "Voluntary Statement" was taken. Spirito was asked to read it over, and he gave it to Kaufman to read as well. The statement was not signed.

Schadewald's report of Kaufman's conduct in Respondent's security report, concluded that Kaufman during both interviews (Berg and Spirito) observed, witnessed, did not take notes, advised his constituents, interrupted to clarify facts and aided in the investigation, at times.

The record does not reflect whether the security representatives asked any "repetitious" questions during these interviews, nor whether Kaufman made any objections to questions being asked more than once.

Employee Kenneth Haberman was also interviewed by Schadewald and Esposito on June 23, with David serving as union representative.⁹ During this interview, Haberman initially began answering that he did not remember to many questions, including the names of the employees in the garage. In fact at one point Esposito asked Haberman if he had amnesia. After a recess, Haberman's memory improved slightly with respect to the above question, and the interview continued. A six-page written statement was taken, which Haberman refused to sign.

The final interview conducted on June 23 was employee Brian Kaye by security representatives William Minick and Lorraine Vasilik, with Baumuller serving as union represent-

ative. A six-page statement was taken from Kaye which was not signed.

Once again the record does not disclose whether during these interviews (Kaye and Haberman) the security representatives asked any repetitious questions, or whether the union representatives involved (David or Baumuller) objected to questions being asked a second time.

F. Subsequent Interviews

On June 24 employees Donald Cielsa, Bernard Baudish, and James Grant were interviewed at Oradell. Cielsa was interviewed by Vasilik and Minick, with Baumuller acting as union representative. A voluntary unsigned statement was taken with respect to Cielsa's responses. There is no indication in the record that any "repetitious" questions were asked or objected to during the interview.

Baudish was interviewed by Schadewald and Esposito with Gerald Heytink a delegate serving as union representative. A four page "voluntary statement" was taken from Baudish, but was not signed. During the interview Baudish was asked if he had been coached on how to answer questions. The record discloses that Heytink interrupted a number of questions, but does not disclose what types of questions they were or whether they were repetitious. According to Schadewald's report of the interview, Heytink "became disruptive because of too many interruptions and was advised of his role on one occasion."

Grant's interview was conducted by Inteso and Nelson, with Phill Toss Union delegate as union representative. An unsigned written statement was taken from Grant. Toss' conduct as described in the security report indicates that he refused to allow Grant to answer questions more than once, was argumentative but in a civil manner, and interrupted and counseled Grant before Grant answered certain questions.

On June 25 security representatives Schadewald and Kathy Wood interviewed employees James McGuire, Bruce Johnsen, and Robert Richardson with Baumuller serving as union representative at each interview. During the interview with Richardson Baumuller asked that Schadewald slow down his questioning, since she was having difficulty writing everything down. Schadewald replied that Baumuller would have to keep up as best she could. Schadewald suggested that the interview be tape recorded, and she would be provided a transcript. Baumuller responded that was not acceptable, and requested a recess to call Huber. Schadewald agreed. When Baumuller returned, Schadewald read Respondent's policy dealing with the role of the union representative. All three interviews resulted in a written statement which was reviewed by Baumuller and the employee, but not signed. The record once more does not disclose whether any "repetitious" questions were asked by the security representatives during these interviews, nor whether Baumuller objected to any such questions.

Employee Brendan Leen was interviewed by security representatives Schadewald and Minick with Baumuller acting as union representative. The security representatives started to question Leen about a dispute that he had on June 15 at a jobsite, prior to returning to the garage. There was a dispute about whether such questioning was permissible because a grievance may have been already filed about that incident. After a number of recesses and telephone calls, the security representatives agreed not to ask about such matters. They

⁹The record does not disclose why David rather than union delegate Kaufman was selected to serve as union representative for Haberman.

then proceeded to ask questions about the events at the Bergenfield garage on June 15. The questions became repetitious, with both Leen and Baumuller objecting to questions being asked more than once. At times when Baumuller objected to a question being asked more than once, the security representatives would become "very very annoyed," with Schadewald on one occasion raising his voice to Baumuller. Leen answered the questions that the security representatives asked once, and those answers were recorded.

Schadewald then attempted to summarize and to commence the written, "voluntary statement." Schadewald asked what time Leen had arrived back at the garage. Leen based upon Baumuller's advice refused to answer that question, and stated that he would not answer any question that had already been asked. Schadewald persisted, explaining Leen's obligation to cooperate, and possible consequences if he did not, and again asked what time Leen arrived back at the garage. Leen once more responded that he had already answered that question. Schadewald then accused Leen of impeding the investigation by not answering questions that had been answered during the oral portion of the interview, and asserted that Respondent has a right to formalize the oral interview into a written statement. Schadewald again asked what time Leen arrived back at the garage, and received a similar reply that Leen had answered that question once. After reminding Leen of the N.J. Bell Code of Conduct, Schadewald asked him to read a five-page "Voluntary Statement," which consisted essentially of Schadewald asking him three times what time he arrived back at the garage and Leen's refusal to answer because he already done so, plus Schadewald's attempts to persuade him to respond. Leen refused to read or sign this document. The interview was terminated, and Leen was informed that he would receive a letter of discipline for his "non cooperative behavior" during the interview.

On June 29, Huber and Woods met with some of the employees who had not been suspended, including some who had just returned from vacation, outside of the Bergenfield garage before work began. They explained to the employees that it appeared that the security representatives were going to interview all of the splicers and perhaps even some of the technicians. They reminded the employees that if they were interviewed to request union representation, and ask for either Huber or Woods to serve as their representative.

After the meeting ended, the employees went into work. A splicer came out a few minutes later, and related that Respondent was taking employees Rudy Miller and Rudy Mikowski to an undisclosed location. Huber and Woods decided to follow the car driven by Steve Mohey, assistant manager, which contained the two employees, to the district office in Oradell. Huber and Woods entered the parking lot, got out of the car and walked toward the back door. Mohey informed them that they did not have permission to be in the building. They responded that they were here to represent these people. Mohey instructed them to wait in the vestibule while he checks things out. Houghtalin arrived and told Mohey that Woods and Huber did in fact have permission to be on the premises.¹⁰

¹⁰This statement surprised both Woods and Huber since neither of them had in fact asked for permission to enter the premises. They

As Huber and Woods walked towards the conference room where they assumed that the interviews of the two splicers were to be conducted, Houghtalin informed them that Woods was now back on the payroll and Respondent wished to re-interview Woods. Woods requested Huber to serve as his union representative, and Houghtalin agreed. Houghtalin testified that he permitted Huber to act as the union representative for Woods, because the situation had somewhat "defused" from June 22 and 23, and he did not anticipate any problems with Huber at that point.

Schadewald and Minick conducted the reinterview of Woods. After Huber and Woods conferred, Huber asserted that he is advising Woods not to answer any questions more than once. The security representatives indicated that they were not going to conduct the oral portion and would go right to a written statement. The first few questions dealt with Woods' alleged conversation with Voss on June 15, which had been asked and answered in his prior interview. Woods, supported by Huber refused to answer these questions, stating that he had "answered that question at the last interview." Schadewald replied that Woods was still obliged to cooperate and questioning continued.

Schadewald then asked Woods about a conversation with Voss on June 16 in which he allegedly apologized for what was done to Siegel's office. Since this was a new area of inquiry, Woods responded and furnished his version of the "apology" to Voss, and his reasons for doing so.

A three-page "Voluntary Statement" covering these matters was taken. Woods refused to either read or sign the statement. After the interview, Houghtalin entered and informed Woods that he was again suspended indefinitely.

Later on throughout the day of June 29, Schadewald and Minick interviewed employees Miller and Mikowski and re-interviewed Richardson with Woods serving as union representative. During all three interviews Woods advised employees not to answer questions that had been answered before. Mikowski and Richardson followed Woods' advice but Miller did not, and answered all questions even though a number of them had already been answered.

At one point in Mikowski's interview he was asked who specifically had told him not to answer questions a second time. After a recess, Mikowski replied that Woods had so instructed him on the advice of union counsel.

The final interview was conducted on July 7 with employee Robert McGrath being questioned by Schadewald and Mury, a supervisor, with Baumuller serving as union representative. A five page unsigned statement was taken. The record does not disclose whether any "repetitious" questions were either asked or objected to by Baumuller.

A grand total of 23 employees were interviewed during the course of the investigation. Respondent suspended eleven of these employees for 10 days for refusing to cooperate in the investigation.¹¹

_____ surmised that Respondent had reconsidered Woods' suspension and were putting him back on the payroll.

¹¹The employees suspended were Woods, Argenio, Agresto, Ehlers, Collins, McRae, Spirito, Grant McGuire, Mikowski, and Richardson.

G. *The Discharge of Huber*

On June 29, Huber accompanied by Woods was summoned into the office of Robert Scairpon. Houghtalin was also present. Scairpon stated, "Mr. Huber, I would like to discuss you entering company premises last week. As you know, you must obtain permission prior to entering company premises. Do you have anything to say about this?"

Huber after clarifying what Scairpon was referring to (the Oradell, Bergenfield, and River Edge incidents), Huber responded that he "was at those locations in my capacity as a union official. I have been advised by counsel concerning this."

Scairpon then read a statement indicating that Huber was being terminated for "repeatedly being on company premises without permission, which is a violation of a requirement with which you are familiar, and insubordination for refusal to leave company premises when directed to do so by management."

There was some discussion of Huber's past disciplinary record, and Huber turned in his I.D. card and left. The past disciplinary record referred to above, consists of a number of prior incidents involving Huber and various company officials.

On Saturday, November 5, 1983, Huber and another delegate entered Respondent's facility at 1500 Teaneck Road in Teaneck. Huber had a grievance meeting scheduled the following Monday concerning complaints about asbestos, dust and other hazardous conditions at that site. Thus he entered the facility on November 5,¹² with a camera in order to take pictures in connection with the grievance. Huber took some pictures on the first floor and walked to the second floor. Supervisor Ken Teneza approached the union officials and observed the camera around Huber's neck. After seeing their I.D. cards, Teneza asked Huber what he was doing. Huber replied that he was there to take pictures. Teneza ordered Huber to leave, asserting that he was not wearing protective gear. Huber refused to leave, and challenged Teneza to call the police or throw him out bodily. Teneza then called his superior, who told Teneza to order Huber out of the building and threaten him with discipline for insubordination. Teneza followed these instructions, as Huber was leaving anyway.

After reviewing Teneza's report of the incident District Manager Dan McMullen and J. Backman of labor relations concluded that no disciplinary action was appropriate at the time. However, McMullen decided that he would review with Union President McLaughlin and Huber the proper procedures for entering a company location. McMullen on November 18 spoke to McLaughlin, and informed him that Huber had been insubordinate and gained unauthorized entrance into the Teaneck Road facility. He suggested that McLaughlin review proper procedures with Huber.

On December 5, McMullen spoke to Huber. McMullen told Huber that he needed prior permission to enter company premises. Huber claimed that he did not agree that he needed such permission. McMullen advised Huber that this was Respondent's rule and although he personally had no problem with Huber's actions, that Huber would probably suffer some disciplinary action if any future such incidents occur.

On April 11, 1984, a joint management union discussion was held. Present were Huber, McLaughlin, George Via, Re-

spondent's division manager, and Murphy. During the course of this discussion, various problems were mentioned including a reiteration of Respondent's position that union officials must obtain prior approval from management in order to conduct union business on Respondent's property. Both Huber and McLaughlin expressed disagreement with this position and no agreement was reached.

On April 16, 1984, Huber entered Respondent's facility at Teaneck Road to distribute some union literature to employees who were working at the time. On the first floor, he informed Supervisor Joe Dwyer that he intended to distribute the literature to the employees in the building. Dwyer made no objection. However when Huber went upstairs to the second floor to distribute the literature, he was confronted by supervisor Anton Kurelja, who was in charge of the second floor. He refused to permit Huber to distribute the literature to the employees under his Supervision and asked Huber to leave, since he did not have permission. Huber insisted that he had received permission from Dwyer. Kurelja responded that he didn't care, that he was in charge of this floor and he didn't want Huber disrupting the work force. Huber refused to leave and continued to distribute the literature to the employees until he finished. Kurelja reported the incident to his superior, and by the time he completed the call, Huber had left the premises.

On April 20, 1984, a written reprimand was issued to Huber. The letter refers to his "insubordinate conduct" on April 16 at Teaneck Road, wherein Huber "entered the . . . building . . . without arranging prior approval from Management." The letter goes on to conclude that "these insubordinate actions of entering without approval and distributing contrary to Management direction are very serious infractions."

The letter also made reference to the prior instances described above; i.e., the April 1984 discussion with Via and McLaughlin wherein Huber was told "it was unacceptable for you to visit or walk around company buildings at will"; and the discussion with McMullen in December 1983 where Huber was informed he would be disciplined if he "attempted to visit company buildings without prior approval." Finally, the letter stated that Huber was reprimanded and threatened more serious discipline if such conduct continues.

This reprimand was grieved, with the Union taking the position that the reprimand was not proper. The Union did not file for arbitration of this action, since arbitration is not available to protest a letter of reprimand under the parties collective-bargaining agreement.

On September 30, 1985, Huber entered Respondent's facility in Emerson, in order to pick up his paycheck. After picking up his check, he began talking with a group of employees about an overtime problem. John Donnelly, assistant manager of that facility, approached the group and asked if they were talking about union business? Huber replied, "Does it matter?" Donnelly responded, "Yes it does." Huber then said that the group would break up and he would walk with them as they were getting ready.

Donnelly, feeling that he had dispersed the group, went back to his office. Five or six minutes later Donnelly observed Huber talking to three employees. At this time Donnelly directed his remarks to the employees, telling them to get to work or they would be on "union time." Huber interjected, "fine, then they are on union time." Donnelly, realiz-

¹²No employees were working at the facility on that day.

ing that Huber had no prior approval, rescinded his prior remarks about the men being on union time and told them to get on with their workload. Huber speaking in a loud voice said to Donnelly, "You can take that rescind and shove it up your ass. The men are on union time now. Get the fuck out of here."

Subsequently, as a result of this incident Huber was suspended for 10 days. The reasons given by Respondent for the suspension were conducting union business on Respondent's property without prior approval, abusive language, disrupting the work force, undermining supervisory authority, and insubordination. This suspension was grieved by the Union. An arbitration hearing was held on the matter and a decision is pending.

On December 6, 1985, the Union filed a charge with the Region in Case 22-CA-14164, alleging that Huber's suspension was violative of Section 8(a)(1) and (3) of the Act. On January 23, 1986, the Region issued a "Collyer" letter deferring further processing of the charge to the grievance arbitration procedure in the parties collective-bargaining agreement.

In 1976, D. Cifrodelli, an employee and delegate was given a letter of reprimand for conducting union business on company premises without prior approval. In the minutes of a grievance meeting held with respect to this issue, A. Trenkamp, on behalf of Respondent set forth its position on the subject. He asserted "When the delegate . . . wants to conduct union business on company premises, the Company should be made aware of this. He does not have any right to conduct union business on company premises . . . This is not to say that he cannot be on union business on company premises, but he should have prior approval by Management." Trenkamp pointed out that Cifrodelli had been warned four previous times by the District Manager that his presence on company premises without arrangement would not be tolerated. He again appeared at this location without advance authorization in time, and the letter of reprimand ensued.

Perry on behalf of the Union objected to Trenkamp's position. He disputed that this was a company policy and argued that it had never been discussed before with the Union. Perry added that the contract contains no such requirement, and asked Trenkamp to show what rule is violated when a union representative appears on company premises without prior approval. Perry's position was that the union representative must have access to the people he represents.

Subsequently, after a phone call between Trenkamp and Perry, the grievance was settled as follows:

Mr. Trenkamp advised Mr. Perry that he would agree to remove this letter with the understanding that in the future the Delegate, as a matter of common courtesy will arrange with Management in advance each time the Delegate finds it necessary to conduct union business on company premises. Mr. Perry said he had no problem with this understanding either and indicated that what the Company was asking was a common sense request.

Perry testified on behalf of General Counsel, and asserted that prior to the Cifrodelli grievance, Respondent had never asserted a requirement that union representatives obtain per-

mission prior to entering a company building. Since there only appeared to be a problem with Cifrodelli in this area, Perry contends that he agreed to the settlement, which in his view applied only to Cifrodelli, and not to other union officials.¹³

Robert Johnson, was the union president from 1985-1986, and vice president from 1975 to 1985. He testified that his understanding of the Cifrodelli grievance settlement was that in the future if a union official goes to a company location to conduct union business, as a matter of common courtesy he would inform the supervisor, although such notification need not be prior to his entering the premises. While Johnson also insisted that the settlement applied only to Cifrodelli, he agreed that there was an understanding between the parties, and that all "delegates from that point on had to operate under that same understanding."

Houghtalin also testified about his understanding of the Cifrodelli grievance. He contends that he was informed about it by his superiors at the time. Houghtalin asserts that he was told that the agreement between the parties reflected that "delegates . . . could enter company premises for various reasons with permission from management" and that the delegates "would just call local management and ask permission to enter the premises."

In connection with the Cifrodelli grievance, Charging Party refers to Section 7 of the collective-bargaining agreement which sets forth inter alia that "settlements of grievances shall not constitute a precedent for settlement of other grievances. A settlement arrived at in the course of the grievance procedure shall be limited to the specific occurrence out of which the grievance arose and to the particular employee or employees for whom the grievance is presented."

According to Huber, he was unaware of any company rule about obtaining permission until the 1983 asbestos incident. He admits however that his own policy had been "as a matter of common courtesy," when he enters a building to speak to employees, to tell a supervisor what he intends to do. However he further asserts that on numerous other occasions he would enter a building and speak to employees without obtaining permission, and no one would bother him. His only notification about the rule came according to Huber, was when he was so informed by the various officials of Respondent during the incidents described above relating to his prior disciplinary proceedings. After his suspension, Huber further contends that from time to time certain supervisors, but not all, would see him speaking to employees on the job. He asserts that these supervisors would ask Huber if he had permission to speak to employees. He would respond no, and the supervisors would then remind him that he was supposed to have permission since there was a pending suspension in arbitration about this issue. However Huber further claims that the supervisors took no further action and allowed him to continue his discussions with employees.

The decision to terminate Huber was made by Scairpon, in consultation with Houghtalin and Livelli. According to Houghtalin, Huber was discharged based upon his past record of prior disciplinary actions, plus his actions in not leaving the premises when requested to do so on June 22 and

¹³Perry did testify, however, that when he would enter Respondent's premises to speak to an employee on the job, he would ask permission from a supervisor to do so.

23. Houghtalin was insistent that Huber's conduct at Woods' and Ehlers' interview on June 22 had no bearing on Respondent's decision to terminate him. Houghtalin conceded however that Huber's conduct at these interviews did come up during the discussion between Respondent's officials of whether to discharge him, but he didn't recall what specifically was said about it.

Houghtalin admitted that on June 22, he had a conversation with Schadewald, during which Schadewald explained to Houghtalin what conduct Huber had engaged in during the interviews that led Schadewald to conclude that Huber was being "disruptive." Schadewald informed Houghtalin that Huber was constantly interrupting the questions, stating that the question already had been answered. Schadewald also told Houghtalin that he felt the employees were being evasive, while Huber was present and noted that after Baumuller replaced Huber, Ehlers became more responsive. Schadewald attributed this change to the fact that Baumuller was not like Huber "confrontational." Houghtalin a day or so later, reported to Scairpon what the security representatives had informed him about Huber's conduct during the interviews on June 22.

III. ANALYSIS

A. *The Threat to Discharge Ehlers*

As I have detailed above, Huber acted as the union representative for employees Woods and Ehlers, during the course of their investigatory interviews on June 22. It is clear that the security representatives became dissatisfied with Huber's conduct during the course of these interviews, believing that he was "frustrating" the security representatives in their efforts to ascertain information from the employees. There were several confrontations during these interviews between Huber and the security representatives about Huber's conduct and his proper role as construed by Respondent. On a number of occasions Huber was told by the security representatives that if he continued to "frustrate" their efforts by his conduct, that he could be subject to discipline.

Finally, towards the close of Ehlers' interview, after Huber once again objected to a "repetitious" question, a security representative told Ehlers that if Huber continued to interrupt, that he would be discharged.

It is alleged in the complaint, and contended by the General Counsel and the Charging Party that this remark by Respondent's security representative constitutes a threat in violation of Section 8(a)(1) of the Act.

Respondent argues that since Ehlers was being uncooperative at the interview, by failing to answer questions that he should have been able to respond to, it was within its right to threaten to discipline him for such conduct. *Service Technology Corp.*, 196 NLRB 845, 847 (1972). Cf. *Cook Paint & Varnish Co.*, 246 NLRB 646 (1979). Similarly, it contends that it is not unlawful to threaten to discipline a union representative who engages in "disruptive" conduct at such an interview, and that Huber was so engaged herein.¹⁴ Accordingly Respondent argues that Huber's "disruptive" conduct during the course of the interview, forfeits whatever protec-

¹⁴I note that the complaint does not allege nor does General Counsel contend that Respondent's threat directly to Huber that he would be disciplined for his conduct at the interviews was unlawful.

tion that the Act imposes based upon *Weingarten*.¹⁵ Thus its threat to Ehlers is therefore not unlawful. I cannot agree with Respondent's analysis.

It was recognized in *Weingarten*, supra, by the Supreme Court that the action of an employee in seeking and insisting upon the presence of a union representative at an investigatory interview constitutes protected concerted activity. Here Ehlers selected Huber to act as his union representative in such an interview, and was engaged in protected concerted activity by so doing. While Respondent did not initially deny Ehlers the right to representation by Huber, its action in threatening Ehlers that Huber's continued participation on his behalf would lead to discipline for Ehlers, "is no less interference and restraint than an outright denial of his right." *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977).

Thus whatever may be said about the right of Respondent to threaten to discipline Ehlers for his failure to cooperate or his failure to answer questions, this does not translate into a right to threaten him because of the conduct of his union representative, which would inhibit Ehlers' exercise of his protected rights to select a union representative in investigatory interviews.

I also do not agree with Respondent's unsupported assertion that it could lawfully threaten to discipline Huber because of his allegedly "disruptive" behavior at the interviews. Huber is an employee of Respondent, in addition to being a union official. Thus his actions in representing Ehlers at the investigatory interview also constitutes protected concerted activity, and Respondent's threat to discipline Huber for his exercise of such activity, also would constitute a violation of Section 8(a)(1) of the Act.¹⁶ *Good Hope Refineries*, 245 NLRB 380, 384 (1979), enf. 620 F.2d 57, 59 (5th Cir. 1980).

Respondent's claim that the necessary implications of *Weingarten* is that "a disruptive delegate loses the protection of the Act," is unsubstantiated by any precedent, or by any language in such decision. While *Weingarten* might provide support for Respondent's assertion that a "disruptive" delegate transforms the interview into an "adversary contest" or a collective-bargaining confrontation, thereby sanctioning the removal of the such delegate,¹⁷ such a finding does not in my view render the delegate-employee's conduct unprotected, warranting Respondent disciplining or threatening to discipline such employee.

Moreover, it is clear that an Employer may not during the course of a *Weingarten* interview silence or attempt to silence a union representative present at such interview. *Southwestern Bell Telephone Co.*, 251 NLRB 612, 613 (1980), enf. denied 667 F.2d 470, 474 (5th Cir. 1982); *Texaco Inc.*, 251 NLRB 633, 636 (1980), enf. 659 F.2d 124, 126-125 (9th Cir. 1981); *NLRB v. Southwestern Bell Telephone*, 730 F.2d 166, 172 (5th Cir. 1984); *San Antonio Portland Cement Co.*, 277 NLRB 338, 339 (1985); *Greyhound Lines Inc.*, 273 NLRB 1443, 1448 (1985); *United Technologies Inc.*, 260 NLRB 1430 (1982); *Postal Service*, 288 NLRB 864, 868 (1988).

¹⁵*NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975).

¹⁶Since the complaint does not allege such a violation, and the General Counsel made no such contention at the hearing, I do not deem it appropriate to make such a finding herein.

¹⁷Whether Huber's conduct can be so construed herein will be discussed more full below.

I agree with General Counsel's contention that the above cases provide support for a finding that the threats to discipline Ehlers for the conduct of his union representative at an investigatory interview is a violation of the Act. Thus such a threat is a clear attempt to silence Huber and prevent his participation in the interview, which deprives Ehlers of his protected right to union representation at such an interview. Accordingly, Respondent's threat to Huber is violative of Section 8(a)(1) of the Act, and I so find.

B. Respondent's Ejection of Huber from the Interview and Huber's Subsequent Arrest

There is no dispute that in the midst of the Ehlers interview, Schadewald told Huber that his services were no longer required as a union representative because of his alleged "disruptive" conduct. Schadewald ordered Huber to leave, and advised that the interview would continue with another union representative present.

The General Counsel and the Charging Party contend and the complaint alleges that this action of Respondent deprived and interfered with Ehlers protected rights under *Weingarten*. Relying on the above cited cases, which prohibit the silencing of a union representative during a *Weingarten* interview, it is argued that the ejection of Ehlers' choice as a union representative, is equally if not more violative of Ehlers' Section 7 rights.

Respondent argues, on the other hand, that it was within its rights to remove Huber from serving as a union representative because of his "disruptive" conduct during the Woods and Ehlers interviews. Respondent points to various portions of the Supreme Court's decision in *Weingarten*, which provide that "[t]he employer has no duty to bargain with the union representative [who may be permitted to attend the] investigatory interview. . . . The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation. . . . Certainly his presence need not transform the interview into an adversary [proceeding]." 420 U.S. at 260, 263. It is Respondent's contention that Huber's "disruptive" conduct at these two interviews, prevented Respondent from hearing the employee's own version, and transformed the interview into an "adversary contest." In these circumstances, Respondent believes that *Weingarten* permits it to eject Huber and continue the interview with another representative present.

While Respondent's quotations from *Weingarten* are accurate, it is also important to consider other language from that decision, which has received considerable emphasis in subsequent Board and court cases.

Thus the Court observed that

A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. . . . [420 U. S. at 262-263. Cited approvingly in *NLRB v. Texaco Inc.*, 659 F.2d at 126; *Climax Molybdenum Co.*, 227 NLRB 1189, 1190 (1977), enf. denied 584 F.2d 360 (10th Cir. 1978); *Southwestern Bell*, supra, 227 NLRB at 1223.]

The Supreme Court also noted in *Weingarten*,

There has been a recent growth in the use of sophisticated techniques . . . to monitor and investigate the employees' conduct at their place of work. . . . These techniques increase not only the employees' feeling of apprehension, but also their need for experienced assistance in dealing with them. Thus, often . . . an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques. [420 U.S. at 265 fn. 10. Cited approvingly in *Pacific Telephone Co.*, 262 NLRB 1048, 1049 (1982), enf. 711 F.2d 134 (9th Cir. 1983); *Southwestern Bell*, supra, 251 NLRB at 613.]

Finally, the Court emphasized that a major purpose of affording employees the right to union representation is "to eliminate the inequality of bargaining power between employees . . . and employers." 420 U.S. at 966. "Put simply, the union representative is there to help the employee in his effort to vindicate himself." *NLRB v. Southwestern Bell*, supra, 730 F.2d at 172, citing *Weingarten*, 420 U.S. at 263-264.

The Board has recognized these somewhat contradictory portions of the Supreme Court's opinion on *Weingarten* rights vis-a-vis the role of the union representative, and concluded that the Court "intended to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview and the role to be played by a statutory representative who is present at such an interview." *Texaco*, supra, 251 NLRB at 636, citing *Southwestern Bell*, 251 NLRB at 613. Thus in striking the balance between the union representatives right to provide assistance to the employee and the employer's right to conduct interviews which are not transformed into an adversary contest or collective-bargaining confrontation, the right of the employer to regulate the role of the representative is limited. Such regulations "cannot exceed that which is necessary to ensure the reasonable prevention of such a collective bargaining or adversary confrontation with the statutory representative." *Texaco*, supra; *Southwestern Bell*, supra. Here Respondent's regulation of Huber's role as representative consisted of terminating that role. The issue to be decided is whether that action exceeded Respondent's rights to limit Huber's role under *Texaco*, supra. Indeed *Texaco* and *Southwestern Bell* found that Respondent's action is silencing the union representative, went beyond the bounds of regulation reasonably necessary to avoid such a confrontation with the union representative. Without more, it follows that the termination of Huber's participation in the interview is clearly more of a denial of Ehlers' rights, than merely insisting on his silence.

However, Respondent does assert that Huber (unlike the union representative in *Texaco*, supra and *Southwestern Bell*, supra, in fact engaged in conduct which transformed the interview into an adversarial contest. Thus it becomes necessary to examine Huber's conduct, keeping in mind that the "permissible extent of participation of representatives in interviews is seen to lie somewhere between mandatory silence and adversarial confrontation." *Postal Service*, supra 288 NLRB at 867.

Schadewald made the decision on behalf of Respondent to exclude Huber from further participation in Ehlers' interview,

so his testimony must be examined to evaluate the lawfulness of such conduct. Schadewald admitted that he considered Huber's conduct in both the Woods and the Ehlers interview, in deciding that Huber was being "disruptive." The first item mentioned by Schadewald in his testimony that led to his decision, related to his view that Huber was responsible for the employees' failure to provide forthcoming answers. Thus Schadewald contends that the employees, based on Respondent's investigation, were in a position to supply information about the events under investigation. However, most of their responses to such questions were "I don't know" or "I don't remember." When Schadewald sought to ask some of these questions again, Huber began to interrupt and assert that the question had been asked and answered before. Accordingly, Schadewald asserts that he concluded that Huber's conduct in this regard interfered with Respondent's efforts to obtain the facts, and was therefore "disruptive" and "adversarial" in nature.

In my view, Schadewald's testimony in this area, mischaracterizes the facts, and misperceives the appropriate role of the union representative at an investigatory interview. Schadewald's assertion that the employee's failure to respond to questions was caused by Huber's conduct is simply not supported by the record. Indeed the employee's lack of responsiveness began and continued before Huber said anything in both interviews. Moreover both Ehlers and Woods, along with Huber, made the same assertions, pursuant to the Union's policy that questions should be answered only once. Thus I find no basis in the record to support Schadewald's purported conclusion that Ehlers or Woods would have been more forthcoming in their responses, absent Huber's conduct. In fact, an examination of the continuation of the Ehlers' interview when Baumuller took over as representative reveals that Ehlers' answers were not significantly more responsive than they had been during the portion of interview where Huber was representing him. Indeed Respondent suspended Ehlers at the close of the interview with Baumuller present, just as it did with Woods, after his interview with Huber as his representative, for the same alleged "withholding of evidence and failure to cooperate" in the investigation.

Moreover, it appears that Schadewald believes mistakenly that Huber's role at the interview was to assist Respondent in obtaining admissions from the employees. I note in this connection, Schadewald's remarks to Houghtalin after he decided to remove Huber, that Huber had "frustrated the interview to the point that we were getting nowhere." It is clear that the employees are entitled under *Weingarten* to the active assistance of a union representative during the interview. *Texaco*, supra. Moreover the union representative is there to help the employee in his effort to vindicate himself. *Southwestern Bell*, supra 730 F.2d at 572. While the Supreme Court's decision delineates certain examples of the assistance that union representatives can render to employees, including clarifying facts or suggesting other employees who may have knowledge of them, I do not believe that this list was meant to be all inclusive. In my view, the union representative's role in actively assisting an employee also includes the right to protect the employee from making unwarranted admissions of improper conduct, which might lead to the discipline of that employee. When security representatives ask questions that can reasonably be perceived by the union representative as abusive, misleading, badgering, confusing, or

harassing, I believe that it is permissible for the representative to so indicate and advise against answering such questions. I would construe Huber's objections to repetitious questions, pursuant to union policy, as falling within the above described parameters.¹⁸ I note particularly in this connection the Supreme Court's recognition of the "recent growth of investigative techniques," and rise of specially trained "security specialists" conducting the interviews, rather than a supervisor familiar to the employee. Thus I consider that the security representatives practice herein of asking the same question a number of times, when the previous answers are deemed unsatisfactory to the representative, to be an example of an investigative technique, that undoubtedly would not be utilized by a mere supervisor conducting an interview. Thus the Court recognized that it is appropriate for the union representative to protect an employee against the use of these kinds of investigatory techniques utilized by the security representatives.

While I make no finding that the security representatives actions in continuing to ask repetitious questions of employees, was necessarily confusing, harassing, badgering, or intimidating to the employees herein, I do believe that Huber acted reasonably in so concluding.¹⁹ I do not agree with the assertion of Respondent that the repeated insistence by Huber that questions be asked only once is "no more than a directive not to answer questions . . . and a subterfuge to circumvent the obligation on an employee to answer questions." In fact Respondent received an answer to every question that it asked of both Ehlers and Woods, in many cases two or three times. The fact that Respondent was not satisfied with these answers, even if it had reason to believe that these answers were not truthful, does not warrant the condemnation of Huber's conduct of urging that these questions not be asked again. Therefore I conclude that Huber's conduct in advising employees to answer questions only once, as well as the Union's policy supporting such a position, is a reasonable exercise of the Union's representative function, and does not and did not herein, unduly interfere with Respondent's right to conduct its interviews, nor transform the interview into an "adversarial confrontation."

While Huber may have at times interrupted security representatives questions, these interruptions were solely restricted to questions which had been asked and answered, and were consistent with similar statements made by the employees involved with respect to these or similar questions. Moreover, interruptions of questioning by union representatives is not in and of itself, sufficient, to establish "adversarial" or "obstructionist" conduct by a union representative. *Postal Service*, supra at 867-868.

Schadewald also testified that in making his decision that Huber was "disruptive," he relied on the fact that Huber was speaking loudly and leaned over the table coming be-

¹⁸Huber testified that he believed that the security representatives were "badgering" Woods by repetitious questions and were trying to "entrap" Woods by putting words in his mouth. Huber further felt that the security representatives were "belligerent, harassing, and intimidating" the employees.

¹⁹I note in this connection the Supreme Court's reference to "fearful and inarticulate" employee as in need of union representation. This type of an employee might be most susceptible to being confused, harassed, or badgered by the same question being asked over and over again.

tween himself and the interviewee. Finally, he relied on as he characterized it "just about the final thing," of Huber accusing the security representatives of bugging the room. An examination of the facts underlying these contentions, reveals that the conduct of Respondent's security representatives was equally if not more responsible for any finding that such behavior of Huber was confrontational or adversarial. Indeed it is admitted by Schadewald that the security representatives were speaking loudly as well as Huber throughout the interviews, and I do not deem it significant, as does Schadewald, that Huber may have "spoken loudly first."

The final incident as testified to by Schadewald was the bugging accusation. I note that Huber made the remark in a half sarcastic manner in direct response to the security representative making what I have found to be an unlawful threat to discipline Ehlers, stating merely that Huber hoped that the threat had been picked up on the tape record.²⁰ I find that this comment by Huber was provoked by Respondent's unfair labor practices,²¹ and even at that was not a serious accusation that the room was bugged. It was the security representatives who overreacted to this off hand remark, by dropping their pencils, putting their hands in the air, Esposito jumping out of his seat, loudly proclaiming that Huber had made a serious accusation and suggesting calling in the police. Huber's response was a calm request for the interview to continue. However, the security representatives insisted, without Huber having so requested, on bringing in local management to confirm that the room was not bugged. Moreover I find the overreaction of Respondent's security representatives to be particularly curious and somewhat disingenuous, since it is admittedly Respondent's practice to request at the start of each interview that the hearing be recorded.

Accordingly, I conclude that Huber's actions in representing Woods and Ehlers at the interviews on June 22 were not shown to have transformed such interviews into an "adversarial contest." Therefore Respondent's attempt to regulate his conduct by removing him from further participation in Ehlers' interview, exceeded that which was necessary to ensure the reasonable prevention of an adversary confrontation with the statutory representative. *Texaco*, supra, *Southwestern Bell*, supra.

Thus Respondent's actions in ejecting Huber from the interview without Ehlers' consent, interfered with Ehlers Section 7 rights and is violative of Section 8(a)(1) of the Act.

Since Respondent acted unlawfully by ejecting Huber from the interview, he had a protected right to remain on Respondent's premises to serve as Ehlers' union representative at his investigatory interview. Accordingly he cannot be considered as a trespasser. Therefore, Respondent has violated Section 8(a)(1) of the Act by causing Huber to be arrested on June 22, since he had a legitimate right to be on Respondent's premises. *Tom's Ford Inc.*, 253 NLRB 888, 893 (1980); *Harvey's Wagon Wheel*, 236 NLRB 1670, 1677-1681 (1978), enf. 106 LRRM 2547 (D.C. Cir. 1980).

²⁰ See *Postal Service*, supra.

²¹ It is also noted that on a number of occasions throughout the interviews, the security representatives threatened Huber with discipline because of his protected conduct, which I have also found above would have been unlawful had it been alleged in the complaint.

I do not believe that the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), requires a different result. There the Supreme Court affirmed the Board's right to find unfair labor practices premised upon the baseless filing of state court lawsuits in retaliation for the exercise of protected rights. However the Court cautioned that in order to conclude that a state court suit lacks "a reasonable basis," the Board must first allow the state court to proceed before proceeding to decide the issue, if there exists a genuine issue of material fact with respect to such lawsuit. In the instant case there is no issue of material fact with respect to the trespassing charge, since it is undisputed that Huber refused to leave Respondent's premises. Thus the legality of the trespassing charge is dependent on whether he had a right to be there, which as I have decided above, is protected by NLRB law, and is an issue peculiarly within the province of Board expertise. Moreover, the criminal trespassing proceedings against Huber have by agreement of all parties been stayed pending the disposition of the instant matter. Thus it would be anomalous and a waste of everyone's time to relegate the parties to the state criminal court to resolve this issue. *Diplomat Envelope Co.*, 263 NLRB 525, 535 (1982).

Therefore I reaffirm my conclusion that Respondent violated Section 8(a)(1) of the Act by causing the arrest of Huber on June 22.

C. The Alleged Unilateral Change by Respondent on June 23, and its Causing Huber's Arrest on that Day

The complaint alleges that on June 23 Respondent promulgated, without bargaining with the Union, a requirement that union representatives must obtain permission in order to enter one of Respondent's buildings, in violation of Section 8(a)(1) and (5) of the Act. The General Counsel relies on the fact that on June 23, Huber was asked by Hoffman whether he had permission to be in the garage, and ordered him to leave when informed that Huber did not have such permission. Additionally, he relies on Scairpon's remarks to Huber at his discharge meeting that, "as you know you must obtain permission prior to entering company premises."

The General Counsel couples that evidence with testimony of the many union witnesses that they had never been denied access to the premises, nor ever informed that advance permission was necessary to enter company buildings, and argues that an unlawful unilateral change has been established. I do not agree.

I do not believe that the General Counsel has established that any new rule has been promulgated by Respondent on June 23. In fact the record discloses that at least as far back as 1976, when the Cifrodelli grievance was filed and resolved, Respondent has essentially taken the same position that advance permission is required before union representatives conduct business on Respondent's premises. Moreover the rule was enforced specifically against Huber on three to four occasions between 1983 and 1985, where Huber was told in various ways that he needed prior permission to enter Respondent's premises in order to conduct union business.

The testimony of record reveals however that in practice Respondent has frequently modified the above rule in two respects. First, it appears that Respondent has construed the requirement for advance or prior permission to conduct union business as being satisfied by the union representative ob-

taining permission from the supervisor before conducting the union business, but not necessarily prior to entering the facility.

Second, it appears that while the policy on its face prohibits the conducting of any union business on the premises, without further description, in practice it has not been enforced as to union business on the employees own time, such as at lunch or break time. Thus the testimony of both management and union officials indicated that no permission is required to conduct union business during nonwork time.

While union representatives who testified denied the existence of any company rule or policy with respect to permission to conduct union business, they concede that they generally as a matter of "common courtesy" do request permission from a supervisor when they wish to speak to an employee who is working about union business, if the discussion will exceed a "reasonable" amount of time. It is interesting that the union representatives utilize the term "common courtesy," which is precisely the words used in the settlement of the Cifrodelli grievance.

Therefore I conclude that at least since the Cifrodelli grievance, there has been a policy utilized by Respondent, which the union was aware of, although not agreeing to it, that a union representative should obtain permission from management before conducting union business on company time. Furthermore the requirement for obtaining permission can be satisfied by asking for permission from supervisors after entering Respondent's premises.²²

I do not view Respondent's actions on June 23 as a promulgation of a new rule, but merely Hoffman's enforcement of its old rule, supported by Scairpon. Although the enforcement of the rule is somewhat inconsistent with Respondent's stated policy of requiring permission only before speaking to employees, I note that similar statements were made to Huber in his prior incidents as far back as 1983.²³

Accordingly, I conclude that General Counsel has failed to establish the promulgation of a new rule with respect to access, as alleged in the complaint. The statements of Scairpon and Hoffman do not amount to the promulgation of any rule, but appeared to be their attempt to enforce Respondent's rule then in effect. It is true that their statements do not reflect what I have found to be the established modification of the rule, i.e., that permission to conduct union business can also be obtained after the union representative enters the premises. However, since prior statements and written documents by Respondent's officials, also do not reflect these modifications,²⁴ I conclude that no change in Respondent's position or rules has been established.

²² The record is also clear that very often advance permission has been obtained prior to entering the premises, such as for grievance sessions, negotiations and meetings.

²³ Thus in December 1983, McMullen told Huber that he needed prior permission to enter company buildings. In 1984, at a joint union management meeting, Huber and McLaughlin were told by management officials that union officials must obtain prior approval from management in order to conduct union business on Respondent's property. Huber's disciplinary reprimand in 1984 read that he "entered the building without arranging prior approval from management." Moreover the Cifrodelli grievance indicates that Respondent required advance authorization from management to be on company premises.

²⁴ The Cifrodelli grievance and the prior incidents involving Huber.

Therefore I shall recommend that the 8(a)(1) and (5) allegation in the complaint be dismissed.

Although Respondent's actions concerning Huber on June 23 do not constitute an unlawful unilateral change, this finding does not fully dispose of the legality of Respondent's conduct in ordering Huber to leave and filing trespass charges against him for his failure to do so promptly on that day.

The General Counsel argues that under the principles established in *Fairmont Hotel*, 282 NLRB 139 (1986), and applied in *Schwab Foods Inc.*, 284 NLRB 1055 (1987),²⁵ the employees Section 7 rights of obtaining *Weingarten* information was more compelling than Respondent's tenuous property rights herein. Respondent argues that, *Fairmont* and its progeny involve access to property to picket, organize and handbill, and that a more applicable precedent is *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1980), involving a union's request to enter an employer's property to conduct a noise level test. While I agree with Respondent that *Fairmont* (subsequently modified by *Jean Country*) are not applicable, I do not agree that *Holyoke*, supra, is the appropriate precedent to resolve the issue herein. *Holyoke* involves the access rights of nonemployees union officials to enter a facility, and deals with a balancing of the employees' right to proper representation against the Employer's property rights.

In my view the issue of Respondent's right to restrict Huber's access rights is properly determined by analyzing *Tri-County Medical Center*, 222 NLRB 1089 (1976). The Board in modifying its previously decided case of *GTE Lenkurt Inc.*, 204 NLRB 921 (1973), observed that the latter case "must be narrowly construed to prevent undue interference with the right of employees under Section 7 of the Act freely to communicate their interest in union activity to those who work on different shifts." Accordingly, the Board concluded that in order to bar off-duty employees from its facilities, an Employer's rule is valid only if it "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside non-working area will be found invalid." *Id.* at 1089.

Before considering the applicability of the *Tri-County* standards, it is necessary to decide whether Huber should be considered an off-duty employee. Respondent asserts that Huber should not be considered an employee for the purposes of assessing his access rights, since he has performed virtually no "production" work for Respondent for the past several years. However, Huber although a full-time employee of the Union, retained his employee status, as well as a company I.D. card. Moreover pursuant to the parties collective bargaining agreement, over half of his time was spent on "joint time," for which he is paid by Respondent. *Tri-County* does not distinguish among off-duty employees about their reasons for being off duty. Thus employees on leave as a result of employment related injuries, *Pizza Crust Co.*, 286

²⁵ *Fairmont* has been modified by the Board's recent decision in *Jean Country*, 291 NLRB 11 (1988).

NLRB 490 fn. 1 (1987), enfd. 862 F.2d 49 (3d Cir. 1988), or an employee on layoff status *Ford Motor Co.*, 222 NLRB 855, 857 (1976), do not lose their employees status for purposes of *Tri-County* analysis.

Accordingly, based on the above, it is clear that Huber should be considered an off-duty employee, whose rights under Section 7 to engage in union activity with other employees should not be unduly interfered with. *Tri-County*, supra.

In examining the *Tri-County* criteria, Respondent's rule involving access is limited to the interior of the plant and other working areas, but fails to comply with the other two essential requirements. Thus the rule has not been clearly disseminated to all employees,²⁶ and does not apply to employees seeking access for any purpose, but only to those engaging in union activity. (Here to those "conducting union business.")

Therefore under *Tri-County*, Huber had a right to be on Respondent's premises, contrary to the positions taken by Respondent's supervisors that he needed permission to be there. That still leaves the crucial question of whether Huber's Section 7 rights to communicate union concerns to the other employees, has been unduly interfered with, *Tri-County*, supra, by Respondent's conduct in ordering him to leave and then causing his arrest for his failure to do so promptly.

Since it is clear that Huber was engaged in protected concerted activity while on Respondent's premises (discussing *Weingarten* rights with the employees), Respondent has the burden of justifying its actions by establishing that Huber violated a valid rule or engaged in other improper conduct warranting his removal. I do not believe that Respondent has met its burden in this regard.

Respondent contends that Huber was in violation of Respondent's established rule, which he himself had previously been disciplined for, that permission must be obtained from a supervisor before a union representative conducts union business with employees on working time. I note initially that Hoffman the official who ordered Huber to leave, caused his arrest, and filed trespassing charges against him, asked Huber "if he had permission to be in the garage."²⁷ Hoffman did not ask Huber if he had permission to speak to employees on the job. Moreover, when Huber was terminated for his conduct during this incident, among others, Scairpon the official who made the decision to terminate him, only made reference to Huber having failed to obtain permission to enter the premises, also saying nothing about Huber speaking to employees on the job.²⁸ This evidence tends to suggest that Huber was in fact ordered to leave because of his failure to obtain permission to enter the premises rather than as Respondent contends, for speaking to employees on the job without such permission. If so, this would be squarely in violation of *Tri-County*, supra, since Respondent

clearly had no valid rule preventing access of off-duty employees such as Huber to the premises.

Assuming that Respondent's position is accepted vis-a-vis the reason for its actions, it has still not justified its decision to order Huber to leave. Thus Respondent's rule that it asserts Huber violated, requires him to obtain permission from a supervisor to conduct "unions business" with employees on the job. Such a rule is directed only against the conduct of "union business," and is invalid on its face. *Southwest Gas Corp.*, 283 NLRB 543, 546 (1987); *C.O.W. Industries Inc.*, 276 NLRB 960 (1985). See also *Provincial House Living Center*, 287 NLRB 158 (1988); *Atlas Metal Parts Co.*, 252 NLRB 205, 210 (1980); *Flex Plastics Inc.*, 262 NLRB 651, 659-660 (1982), enfd. 726 F.2d 272, 276 (6th Cir. 1984). Therefore any disciplinary action pursuant to the alleged violation of this rule is unlawful.

Respondent argues, however, that notwithstanding the reference to "union business," in its rule, it is not discriminatory, since in practice it also prohibits any discussions (absent permission) with employees who are working. While Houghtalin's testimony supports this interpretation, the testimony of Respondent's other supervisors, plus its actions with respect to Huber, does not. As noted, Hoffman the supervisor who ordered Huber to leave and filed charges against him, candidly admitted that the rule only applies to "union business." He admits further that if a union official wishes to speak to an employee on the job about baseball or to say hello, he need not obtain permission from a supervisor. However, if in addition to or instead of saying hello, the official informs the employee about a union meeting, permission from a supervisor would be required before speaking to an employee. Additionally, Kurelja, who reported Huber for a prior violation of Respondent's rule, resulting in a disciplinary reprimand, testified in the same manner. Thus according to Kurelja under Respondent's rule, permission would be required for a union official to inform an employee about a union meeting, but not to say "hi," even though both discussions take the same amount of time.

Finally, and most importantly the conduct of Hoffman and Siegel, who were directly involved with Huber on June 23, conclusively demonstrates that Respondent's rule applies only to the conduct of "union business." Thus when Siegel informed Hoffman that Huber was a union delegate speaking to employees, Hoffman admits stating, "let's go find out why he's here"? If Respondent's rule prohibited any discussions with employees on the job, as it contends, there would be no need to find out why Huber "was here," since the substance of his discussions would have been irrelevant. Further, when they approached Huber, they did not immediately ask him about permission or ask him to leave, but asked what he was doing. It was only after they ascertained that Huber was engaged in union business, did Hoffman ask about whether Huber had permission to be there, and ordered him to leave when he admitted that he did not.

Respondent also contends that Huber was ordered to leave because he was interfering with the work of the employees. However the evidence fails to support this assertion. First of all most of the employees with whom Huber was speaking had not been given assignments, and were waiting to be

²⁶ The record contains no evidence of such dissemination. Admittedly respondent has not set forth any such rule in writing.

²⁷ Additionally, when Hoffman called the police, he told the police that there was "a union official on the premises without prior management approval."

²⁸ I note also that Scairpon did not testify herein to explain these remarks that he made to Huber.

taken to security interviews.²⁹ While a few of the employees who walked over to listen to Huber, were not scheduled for interviews that day, and presumably had been given assignments, it is obvious that Respondent was not concerned about this fact. When Hoffman and Siegel encountered Huber, they paid no attention to the other employees. They made no effort to tell any of the employees to get back to work, even after Huber refused to leave until he finished his discussions. Indeed if interference with work were truly a matter of concern to Hoffman and Siegel on June 23, they would have ordered the employees who had assignments to return to work, rather than immediately calling the police to remove Huber.

In my view when Hoffman ordered Huber to leave on June 23, he acted pursuant to what appears to be a generalized consensus among Respondent's officials, that union business or discussions are inherently more of an interference with the work of employees than other types of business or discussions. This policy is unlawful, and cannot justify Huber's removal from its premises.

Moreover, I note that Hoffman was aware of the fact that Huber had allegedly been "disruptive" at the security interviews conducted the day before, requiring his arrest.³⁰ Thus when Hoffman found out Huber was discussing "Weingarten" rights with employees, he was determined to stop such discussions as soon as he could. Respondent was not at all troubled by Huber interfering with employees work, but was concerned with preventing Huber from potentially interfering with the success of the subsequent investigatory interviews, by advising the employees of their "Weingarten" rights. Furthermore its actions in insisting on Huber's arrest, notwithstanding the fact that he already had left the premises provides additional support for this conclusion. Thus when Hoffman called the police he asked for a squad car to come down and "keep the peace and ask the person to please vacate the premises." Huber had finished his discussion with the employees and was outside the premises when the police arrived. Huber explained to the police that he had already left the building. However the police officer replied that Hoffman intended to file trespassing charges, and arrested Huber. It is obvious from the above, that it was at Hoffman's insistence that Huber was arrested, and not as contended by Respondent that the police would take no action unless charges were filed. Here it was not necessary for the police to do anything, since Huber had left on his own. Yet Respondent insisted on Huber's arrest. I conclude that Respondent aware of Huber's actions on June 22, did not want him to be present at any of the interviews scheduled for June 23, and caused his arrest at least in part to prevent him from being available to serve as a union representative at these interviews.³¹

In any event, Respondent has fallen far short of establishing any lawful reason for interfering with Huber's Section 7 rights, as well as the rights of the other employees to obtain

²⁹ See *Mueller Brass Co.*, 204 NLRB 617, 620 (1973).

³⁰ I note that I have found above that Respondent's actions with respect to Huber on June 22 in connection with his conduct at the interviews was violative of the Act.

³¹ Indeed as will be detailed below, Neithardt did not request Huber to serve as his union representative, because he felt Huber was not available because of his arrest either in the day.

Weingarten advice.³² Respondent has therefore violated Section 8(a)(1) of the Act by ordering Huber to leave the premises, causing his arrest and filing trespassing charges against him.

D. *The Refusal to Permit Huber to Serve as Union Representative for Neithardt and Ordering Huber to Leave*

In *Missouri Portland Cement Co.*, 284 NLRB 432 (1987), the Board stated:

Section 7 of the Act encompasses the right of employees, acting through their union, freely to select their representatives Although a party lawfully may, under certain circumstances, refuse to meet with another party's bargaining representatives, the party making such a refusal must establish that the representatives with whom it refuses to meet have created by their own actions an atmosphere of such ill will that good-faith bargaining is virtually impossible or that their participation in bargaining otherwise represents a clear and present danger to the bargaining process. The circumstances justifying a refusal to meet with particular representatives are therefore quite restricted.

Moreover,

[A] fundamental entitlement of the collective-bargaining process must be recognized. This the right of either labor or management to select representatives of its choosing for participation in the various phases of a complex collective-bargaining relationship and, absent extreme reason to the contrary, to be free of interference in the process from the opposite party. [*Arizona Portland Cement Co.*, 281 NLRB 304, 307 (1986), quoted in *Lehigh Portland Cement Co.*, 287 NLRB 978, 984 (1980).]

Finally, the Board has held,

It is well established that in the absence of special circumstances, an employer does not have the right of choice affirmative or negative as to whom is to represent employees for any of the purposes of collective bargaining. [Footnote omitted. *Oates Bros. Inc.*, 135 NLRB 1295-1297 (1962).]

It is true that *Weingarten* interviews are not bargaining sessions, and the above cited cases, arise in 8(a)(5) contexts, and deal with negotiation or grievance situations. However, I believe that the Board's language therein is instructive in analyzing the rights of the employer vis-a-vis the union to select and or refuse to meet with *Weingarten* representatives for its employees. As noted above, the right to select its own representatives extends to all "phases of complex collective bargaining relationship." *Arizona Cement*, supra. Additionally, absent special circumstances, an employer may not

³² I note in this connection that the employees scheduled for interview on June 23 are entitled to consultation with a union representative prior to being interviewed. *Climax Molybdenum Co.*, 227 NLRB 1189 (1977), enf. denied 584 F.2d 360 (10th Cir. 1978); *Pacific Telephone Co.*, 262 NLRB 1048 (1982), enf. 711 F.2d 134 (9th Cir. 1983).

choose who is to represent employees, “for any of the purposes of collective bargaining” emphasis supplied *Oates Bros.*, supra.

In my view, representing an employee at a *Weingarten* interview is clearly one of the purposes of collective bargaining *Oates Bros.*, supra, and at least one “phase of a complex collective bargaining relationship.” *Arizona Portland*, supra. Thus the Board’s view that “the circumstances justifying a refusal to meet with particular representatives, are, therefore, quite restricted,” *Missouri Portland*, supra, would seem to apply to *Weingarten* interviews as well.³³

Here the evidence discloses that Respondent selected David to act as union representative for Neithardt, and more importantly refused to permit the higher ranking union official Huber to substitute for David, and serve as Neithardt’s representative in the interview.

Respondent argues that its conduct in this regard is not violative of the Act, principally because Neithardt made no specific request that Huber serve as his representative. *Appalachian Power Co.*, 253 NLRB 931, 933–934 (1980). It further contends that Respondent supplied Neithardt with a union representative (David) pursuant to its established rule of utilizing the nearest available union delegate and that such action satisfies its obligations under *Weingarten*. *Pacific Gas & Electric Co.*, 253 NLRB 1143, 1144 (1981); *Coca-Cola Bottling Co.*, 227 NLRB 1276 (1977). I do not agree with either Respondent’s assessment of the above-cited cases, nor its analysis of the facts herein.

Appalachian Power, supra, deals only with the well-established requirement set forth in *Weingarten* itself that the employees must initiate a request for union representation, and finds further that the union cannot make such a request for him. It says nothing about the instant situation, where a request has been made by the employee, and the employer decides who should and more significantly, who should not serve as the representative. As I have detailed above, such action by Respondent must be judged in recognition of the Board’s well-established reluctance to interfere with a labor organization’s choice of its representatives.

Moreover, I have credited the testimony of Neithardt that he intended to select Huber as his representative, and in fact preferred that Huber so serve because of his extensive experience, but did not do so because he thought that Huber was unavailable due to his arrest caused by Respondent earlier that morning. I have also found that one of the reasons that Respondent unlawfully caused Huber’s arrest was to prevent or inhibit him from serving as a union representative in the interviews to be conducted that day. Accordingly, since in effect, it was Respondent’s unlawful conduct that caused Neithardt to fail to specifically request Huber as his delegate, Respondent cannot rely upon this failure to justify its refusal to permit Huber to serve.

³³I note in this connection that *Weingarten* rights do not accrue in a nonunionized plant. *E. I. du Pont*, 289 NLRB 627 (1988); *Sears & Roebuck & Co.*, 274 NLRB 230 (1985), in part because the union representatives’ role is to be able to “safeguard not only the particular employee’s interest, but also the interests of the entire bargaining unit.” *Du Pont & Co.*, supra; *Sears & Roebuck*, supra at 231, 232. Additionally, “dealing with” an employer in a *Weingarten* setting is “a primary indicium of labor organization status as well as a traditional union function.” *Sears & Roebuck*, supra at 232.

Additionally, a close examination of the facts in *Coca Cola*, supra, and *Pacific Gas*, supra, do not support Respondent’s position. In *Coca-Cola*, supra, the Board found that an employer need not postpone a *Weingarten* interview with an employee, because the union representative requested by the employee was unavailable. Stressing the Supreme Court’s admonition that the employees’ *Weingarten* rights may not interfere with legitimate employer prerogatives, the Board concluded that the right to hold investigatory interviews without delay is such a “legitimate employer prerogative.” Here there is no “legitimate employer prerogative” involved, or even alleged. There is no question of delay, since Huber and David served at the same time. Thus, Respondent’s assertion that David was “the nearest available union delegate” is simply not accurate. Huber was just as available as David. Moreover, Respondent has asserted no other business or production reason for its decision to choose David and exclude Huber. In fact it would seem that Respondent would if anything lose production time by its action, since if it permitted Huber to serve as union representative, it could have sent David back to work. See *E. I. du Pont*, supra at fn. 14.

As for *Pacific Gas*, supra, the underlying rationale of that case in fact detracts from Respondent’s position rather than supports it. The employee in *Pacific Gas* requested that an offsite steward serve as his representative, rather than the onsite steward provided by the company, which acted in accord with prior practice. The Board relying on *Coca-Cola*, supra, again stressed the availability factor, observing that 40 minutes of production time would be wasted should the company grant the employees’ request for an offsite steward. Additionally however, the Board emphasized the role of the union in the selection of its representatives. Thus the Board concluded that an employee is not always entitled under *Weingarten* to the presence of a specific representative, but to “the presence of a representative designated by the union to represent all employees.” *Id.* at 1143. Although the Board conceded that the employee did not want the onsite steward to represent him, because he doubted the steward’s ability to represent him, it nevertheless relied more heavily on the fact that the union had designated the steward as the representative for the employee. The Board viewed the employee’s action as nullifying the union’s choice of steward, and found that the employer acted reasonably and in “conformity with the Union’s directions” in denying the employee’s request. *Id.* at 1144. It is apparent that the Board’s emphasis in *Pacific Gas*, supra, on the role of the Union in designating its representative, is merely additionally illustrative of its concerns expressed in *Arizona Portland*, supra, *Missouri Portland*, supra, and *Oates Bros.*, supra, as to one party’s right to choose its own representative.

While it is true that David had been designated by the Union as acting shop steward, he had never acted as a *Weingarten* representative before. Huber was a general delegate, with extensive experience in *Weingarten* interviews and other union management meetings, and had the authority over his subordinate David with regard to union matters. Thus under the facts of this case, Huber attempted to designate himself to act as the union representative for Neithardt instead of David. I believe that Respondent must establish some significant business or operational concerns, or other reasons valid in law, in order to deny Huber’s request.

It is clear that Respondent has made no such showing. Houghtalin, who made the decision to forbid Huber from serving, contends that he relied in part on the fact that Neithardt made no specific request for Huber. Not only have I found that reason as discussed above to be insufficient justification for denying the request, I also conclude that it was in fact irrelevant to Houghtalin's decision. As noted above, Houghtalin admitted that his decision to deny Huber the right to participate in the interview, would have been no different even had Neithardt made a specific request for Huber. I find this admission to be particularly significant, especially in view of the conduct of Respondent's officials with respect to Cookson. When Cookson appeared at Oradell and then later at River Edge, he was allowed to interrupt security interviews conducted with employees Testa and Pfeiffer, in order to "talk to his people." On each occasion he spoke with the employees and the union representatives involved, (Baumuller and David), to satisfy himself that the employees were comfortable with the particular representatives, and that the representatives were capable of handling the job. Cookson testified credibly that had he concluded that either of these questions were answered negatively, he would have sought to substitute himself as the union representative. Cookson did not so conclude, so he made no such request. However I am convinced and so find that had Cookson decided to substitute himself for either Baumuller or David, that such request would have been granted.

I note in this connection that unlike the Huber situation, Respondent's representatives allowed Cookson to confer with the employees. Respondent's officials did not as they did with Huber, question Cookson's right to be in the building, in view of his failure to obtain permission.³⁴

It is obvious that Houghtalin's decision to bar Huber from serving as Neithardt's representative, was based solely on the fact that Huber was making the request, and Respondent's desire to prevent him from so serving.

Indeed Houghtalin conceded that the main reason for his decision that Huber not be allowed to participate in the interview, was the "volatility of the situation." Houghtalin clarified this comment further by explaining that since Huber had refused to leave the Ehlers interview on June 22, and refused to leave the garage earlier on June 23, he did not want to risk another such confrontation by permitting Huber to serve as union representative for Neithardt.

I find those reasons to be far from sufficient to justify Respondent's actions. I have concluded that Huber's refusal to leave Respondent's premises on both occasions, was precipitated by unlawful conduct of Respondent.³⁵ Therefore Respondent cannot rely upon Huber's prior refusals to leave the premises, to justify its refusal to allow him to serve as Neithardt's representative. Additionally, I am of the opinion that Respondent was in any event not truly concerned with

³⁴ Respondent relies on the testimony of Cookson to establish that David was in fact fully qualified to serve as a union representative. Such a contention misses the point. The issue is not whether David was qualified to serve as union representative, but who shall make the decision as to who will act or who will not act, as a union representative in *Weingarten* interviews. In my opinion, all other things being equal, it is the right of the union and not the employer to make such determinations.

³⁵ Thus Respondent violated the Act by ordering Huber to leave the interview on June 22 and the garage on June 23.

the possibility of a "confrontation" if Huber was the representative. In my judgment Respondent's real problem with Huber acting as representative, was its belief that his aggressive representation of employees, particularly his persistent advice that questions not be answered more than once, might interfere with the security representatives ability to obtain incriminating information from the employees. Such a fear does not warrant Respondent's decision to prevent Huber from acting as Neithardt's representative.

Accordingly, based on the above analysis, I conclude that Respondent's actions with regard to Huber interfered with the Section 7 rights of Neithardt, as well as interfering with the Union's right to designate its representatives, in violation of Section 8(a)(1) of the Act.

It follows, as detailed above that since Respondent acted unlawfully in preventing Huber from serving as union representative, that its ordering him to leave the premises is also unlawful, as well as its actions in causing his arrest and filing trespassing charges against him. These actions of Respondent are also violative of Section 8(a)(1) of the Act, and I so find.

E. *The Termination of Huber*

Respondent contends that Huber was discharged for failing to observe Respondent's rule against conducting union business involving employees at work, without obtaining permission from employees, plus insubordination in refusing to leave the premises when ordered by supervision to do so. Since I have concluded above that Respondent's rule requiring permission for the conducting of union business is unlawful on its face, any discipline based upon any violation of such rule is consequently unlawful. Moreover, I have found further that the Respondent's motivation in ordering his removal from the premises on the morning of June 23 was to inhibit his exercise of protected activity, rather than any interference with work as Respondent contends.

Therefore his refusal to leave the premises on that morning when so ordered cannot be considered insubordinate, since the order that he leave was itself unlawfully motivated.³⁶

Similarly, I have found that Respondent acted unlawfully when it refused to permit Huber to act as the union representative for Neithardt during his interview later in the day on June 23. Having so concluded, the order by Respondent for Huber to leave the premises is similarly unlawful, and Respondent cannot view Huber's conduct of refusing to leave as insubordinate. *Hilton Hotels*, supra; *Superior Warehouse*, supra.

Finally, with respect to the June 22 incident, Respondent insists that it did not terminate Huber based upon his conduct at the interviews, but only because he did not leave the premises when requested. I reject Respondent's contentions in this regard. In fact, the only reason that Huber was ordered to leave the premises on June 22, was that the security representatives had determined that his conduct at the interviews was "disruptive," and his presence was no longer necessary. Since I have found that this conduct of the security representatives unlawfully interfered with the Section 7 rights of Ehlers, it is obvious that Huber's presence was still

³⁶ See *Hilton Hotels Corp.*, 282 NLRB 819 (1987); *Superior Warehouse Grocers*, 277 NLRB 18, 23 (1985).

essential in order for the interview to lawfully continue. Therefore the order to Huber to vacate the premises is similarly unlawful, and his refusal to leave is not insubordination. *Hilton Hotels*, supra, *Superior Warehouse*, supra. Thus Respondent cannot lawfully discharge Huber for any of the three refusals to obey a supervisory order to leave, since all of the underlying orders were unlawful themselves.

Accordingly, Respondent's action in discharging Huber on June 29 was motivated solely by his exercise of protected, concerted and union activity, in violation of Section 8(a)(1) and (3) of the Act. I so find.

CONCLUSIONS OF LAW

1. The Respondent, New Jersey Bell Telephone Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 827, International Brotherhood of Electrical Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by the following conduct:

a. Threatening its employee Daniel Ehlers with disciplinary action, if his Union Representative Huber continued to represent Ehlers at his investigatory interview.

b. Depriving Ehlers of his right to assistance and representation at his investigatory interview, by ejecting Huber, Ehlers' chosen union representative, from the interview, directing Huber to leave the premises, causing Huber's arrest and filing trespassing charges against him, and continuing Ehlers' interview without the presence of Huber.

c. Depriving Neithardt of his right to assistance and representation at his investigatory interview, by refusing to permit Huber to serve as his representative at said interview, directing Huber to leave the premises, causing Huber's arrest and filing trespassing charges against him, and continuing Neithardt's interview without the presence of Huber.

d. Preventing and attempting to prevent Huber, an off-duty employee from advising other employees regarding their

rights with respect to union representation at investigatory interviews, by ordering Huber to leave the premises, causing his arrest, and filing trespassing charges against him.

4. Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee Huber because Huber engaged in activities on behalf and in support of the Union, and because he engaged in other protected concerted activity.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not engaged in any other unfair labor practices alleged in the consolidated complaint.

THE REMEDY

Having found that Respondent engaged in unfair labor practices violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designated to effectuate the policies of the Act. Having found that Respondent violated Section 8(a)(1) and (3) of the Act by terminating William Huber on September 29, I shall recommend that it be ordered to offer Huber immediate and full reinstatement to his former position of employment or, if this position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make whole Huber for any loss of earnings that he may have suffered. Loss of earnings shall be computed in the manner prescribed in *F. W. Woolworth*, 60 NLRB 289 (1950), and shall include interest as computed in *New Horizons for the Retarded*, 283 NLRB 1073 (1987).

Respondent shall also be ordered to expunge from its files any reference to the discharges of William Huber and notify him in writing that this has been done and that evidence of such actions will not be used by Respondent as a basis for any future action against him.

[Recommended Order omitted from publication.]