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UNION REPRESENTATION AND THE DISCIPLINARY INTERVIEW

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I. INTRODUCTION

The right of an individual to appear with representation when the individual is subject to investigation is an expanding right in our legal system. Where the individual once stood alone before the investigator, now he or she may frequently have a right to appear with the aid and comfort of another person.

This question of representation is increasingly being raised in labor relations.¹ It is the usual practice to have the recognized union

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¹ See Right to Demand Union Representation During Investigative Interview by Em-

represent the employee in presenting his grievances to the employer,² as when, for example, he feels that his discharge or discipline was improper. Recent cases have considered the question of whether to expand the right of representation to cover earlier points in the industrial relations process. Employees are occasionally subjected to an individual meeting with the employer in a pre-discipline or pre-discharge situation, such as one in which the employer interviews the employee concerning an alleged violation of a company rule. Traditionally, employees have attended this interview alone. Some are now seeking representation even though the employer has taken no adverse action upon which a grievance might be based and even though the collective bargaining contract does not authorize such a right to representation.

Employers are reluctant to allow pre-grievance representation,³ and the employee may be left with the choice of either responding to incriminating questions or statements, or remaining silent. If the employee remains silent, the employer may seek to discipline him for insubordination. If the employee answers, he may provide evidence upon which to base discipline for the infraction of the employer's policy that gave rise to the interview. In either case, the employee may file an unfair labor practice charge or seek to grieve the discipline because of the refusal to allow representation. Before considering some of the decisions bearing on the question of representation that have been rendered by the National Labor Relations Board (NLRB or Board), by the courts reviewing the NLRB, by arbitrators, and by the participants in collective bargaining, it will be necessary to explore in greater detail the character of the problem.

The seemingly simple question of representation at the investigatory interview has a number of complex aspects. One of these is the relationship of the investigatory interview to the grievance mechanism. The vast majority of labor contracts involve a multi-step grievance procedure culminating in some form of arbitration.⁴ The contract will usually have a general definition of a grievance, which definition usually relates to some action already taken by the employer. The focus in a grievance is on an aggrieved employee, one

ployer, 79 Lab. Rel. Rep. Anal. 25 (Feb. 14, 1972); Right of Employee to Representation by Union at Investigative Interview, 80 Lab. Rel. Rep. Anal. 61 (Aug. 14, 1972); Right of Employee to Union Representation at Meeting Called by Employer, 83 Lab. Rel. Rep. Anal. 49 (July 30, 1973).

² South Cent. Bell Tel. Co., 59 BNA Lab. Arb. 134, 136 (1972) (Seward, Arbitrator).

³ See, e.g., Quality Mfg. Co., 195 N.L.R.B. No. 42, 79 L.R.R.M. 1269 (1972), enforcement denied, — F.2d —, 83 L.R.R.M. 2817 (4th Cir. 1973); Mobil Oil Corp., 196 N.L.R.B. No. 144, 80 L.R.R.M. 1188 (1972), enforcement denied, — F.2d —, 83 L.R.R.M. 2823 (7th Cir. 1973); Texaco, Inc., Houston Producing Div., 168 N.L.R.B. 361, 66 L.R.R.M. 1296 (1967), enforcement denied, 408 F.2d 142, 70 L.R.R.M. 3045 (5th Cir. 1969).

⁴ A. Cox & D. Bok, *Cases and Materials on Labor Law* 504 (7th ed. 1969).

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to whom something has happened for which he now seeks relief. If the employee has been discharged, he may seek reinstatement, and if he has received a lesser discipline he will seek other appropriate relief. The aggrieved employee is usually entitled to union representation to challenge the employer's action. At the time of the investigatory interview, however, the employer has done nothing to the employee except call him into the interview. Yet, the employee is probably well aware of the subject of the interview, and he is unlikely to feel that the grievance/pre-grievance distinction is important. From the employee's point of view, it is easy to see that whatever representation rights accrue during the grievance process should also accrue in the intimately connected preliminary interview. The union itself may also equate the two. On the other hand, the fact that no discipline has been imposed may lead the employer to argue that no grievance has arisen and hence no grievance representation rights accrue. Accordingly, it is necessary to consider whether the grievance can be entirely separated from the investigation that precedes it. In doing so, it is useful to assess the character of the grievance process. One question to be explored is whether the grievance process is analogous to the criminal law and punishment, or perhaps to administrative law and its sanctions. If it is analogous to areas of law which do not separate preliminary investigations from subsequent activities, that analogy might help to resolve the union representation question.

Another aspect of the question of representation at the investigatory interview is the employee's statutory right to present grievances individually to the employer.⁵ The employee may have certain rights under the contract and certain individual rights under the National Labor Relations Act⁶ (NLRA). If the employee may present his own case under the statute, can he invoke the aid of another party, not necessarily the union, in presenting his grievance? If he has this statutory right, does it carry over to the investigatory interview?

Another matter for consideration, in a general fashion, is the role of union representation in its practical, operative sense. What are the advantages and disadvantages of an increased scope of union representation? At some point, the employer's interest in discipline and production must be weighed against the grant of personal rights to the employee.

This article will first address itself to these three considerations: (1) the nature of the investigatory interview; (2) the nature of the statutory rights of the individual in relation to the employer; and (3)

⁵ See 29 U.S.C. § 159(a) (1970).

⁶ 29 U.S.C. §§ 141 et seq. (1970).

the impact of increased representation on the employer's responsibilities. After discussing these topics, the article will review the decisions of the NLRB, the content of a sample of contracts, and a sample of the arbitration decisions relating to the question of representation at the investigatory interview, in an effort to analyze the contexts in which employees have sought, successfully or not, representation at an investigatory interview. Finally, the article will undertake to present an overview of all three contexts and to suggest some guidelines to assist in analyzing the problem of increased representation at the investigatory interview on a case by case basis.

II. THE INTERRELATIONSHIP OF THE EMPLOYER, THE EMPLOYEE, AND THE LAW IN THE INVESTIGATORY INTERVIEW

A. *The Nature of the Investigatory Interview*

The investigatory interview involves several facets. For the purposes of this article, four aspects will be briefly considered: the interview process itself; the type of individual being interviewed; the purpose of the interview; and the incident giving rise to the interview.

The most common form of interview is the informal discussion between the supervisor and the employee on the shop floor, while a more formal interview may involve calling the employee to a management office.⁷ Other variations are possible. An investigation involving security agents may have preceded the interview and produced evidence.⁸ The employee may be given a prepared statement to sign that incriminates him in some degree.⁹ The interview may be conducted by a trained private detective, who may also suggest the use of a polygraph machine.¹⁰

The individuals being interviewed vary. Some may be fully capable of effective response during the investigatory interview. The employee may also be an elected union official, who may receive special treatment because of his status as a union representative.¹¹

⁷ A series of restrictions has been developed where management interviews employees concerning union activities and membership relating to the initial organization of a plant. See generally C. Morris, *The Developing Labor Law* 90-110 (1971). It must be assumed here that the interview does not delve into these forbidden areas.

⁸ See, e.g., *Illinois Bell Tel. Co.*, 192 N.L.R.B. No. 138, 78 L.R.R.M. 1109 (1971).

⁹ See, e.g., *Texaco, Inc., Houston Producing Div.*, 168 N.L.R.B. 361, 66 L.R.R.M. 1296 (1967). "[M]any workers experience considerable difficulty when they are requested to state their views [on a grievance] in writing." B. Crane & R. Hoffman, *Successful Handling of Labor Grievances* 65 (1956). It is remarkable to think that they can do better when asked to sign a statement under these conditions.

¹⁰ *Lafayette Radio Electronics*, 194 N.L.R.B. No. 77, 78 L.R.R.M. 1693 (1971).

¹¹ S. Slichter, J. Healy, & E. Livernash, *The Impact of Collective Bargaining on*

At the other extreme, the employee may be someone who "had something less than a fourth grade education, could read English very little, spoke Spanish at home, and testified . . . through an interpreter."¹²

The purposes of the interview may also vary. The interviewer may not have a complete understanding of the nature of the alleged incident and may be seeking heretofore unknown information. The interviewer may already have a very clear picture of guilt and may be using the interview to confirm already known facts.¹³ The interviewer may have complete knowledge of the employee's guilt, but may be using the interview to gain information about other activities violating plant disciplinary rules.¹⁴

Finally, a variety of incidents may give rise to the interview. A potential disciplinary action for incompetence or for various types of misconduct may be involved.¹⁵ Some companies may not allow an immediate discharge regardless of the offense, and the confrontation may only involve suspending the employee pending a subsequent investigation.¹⁶ The more serious the incident, the greater the employee's apprehension, and the more likely the request for representation.

From various combinations of the character of the interrogation, the character of the person conducting the interview, the character of the person being interviewed, and the cause of the interview, one can describe cases in which representation would be highly desirable and others in which representation would be less useful. For example, to the extent that guilt has already been established, the employee is not verbally skilled, and the interviewer is a skilled interrogator, it would seem that the right to representation might properly be analogized to a similar right associated with the criminal law.

However, there is a continuing debate as to whether grievance processes should be analogized to other, more judicialized processes. Some would deny that any such analogy is proper, even in the case of a discharge, since in such a case the employee is not being punished; the employer is merely ending the contractual employment relationship because he is not getting what he bargained for.¹⁷

Management 660 (1960) [hereinafter cited as S. Slichter]. See also *Union Reps: The Right to Challenge*, CCH Lab. L. Rep. ¶ 58,586, at 84,258 (1970).

¹² *Texaco, Inc.*, 168 N.L.R.B. at 361, 66 L.R.R.M. at 1296.

¹³ *Id.*

¹⁴ See, e.g., *Lafayette*, 194 N.L.R.B. No. 77, 78 L.R.R.M. 1693 (1971).

¹⁵ O. Phelps, *Discipline and Discharge in the Unionized Firm* 60 n.16 (1959).

¹⁶ S. Slichter, *supra* note 11, at 647.

¹⁷ Ross, *Discussion, in Labor Arbitration—Perspectives and Problems: Proceedings of the Seventeenth Annual Meeting, National Academy of Arbitrators* 144, 147 (M. Kahn ed. 1964). The same commentator had earlier said: "[I]t is apparent that the discharge case most

Yet, discharge is the extreme case in management discipline because it constitutes the end of an employee's service and destroys his accumulated seniority.¹⁸ If an analogy can be drawn from the judicial models to be applied to the grievance process, the clearest analogy would appear to involve discharge, and the analogy becomes weaker as the discipline imposed becomes less serious. Many would argue that the analogy is there.

[T]he worker has come to have what might be called a property right in his job. . . . Like any other property right in our free democratic society, he cannot and should not be deprived of his rights except by due process.¹⁹

In this context, an appropriate analogy might be drawn between the discipline-grievance process and the process encountered in an administrative hearing.²⁰ In this regard, the Administrative Procedure Act provides in part: "A person compelled to appear in person before an agency . . . is entitled to be accompanied, represented, and advised by counsel or . . . by other qualified representative."²¹ The Administrative Conference has argued that this language should be interpreted as meaning that persons compelled to appear or volunteering to appear at an investigation should have counsel present during the investigation. Counsel could advise during the investigation, and could make a brief argument on the record.²² This is not yet the established procedure in all federal agencies.

The Supreme Court has been increasingly active in the administrative law area in providing new rights for the individuals involved. Its decisions primarily involve the constitutional right to a hearing before certain actions are taken, for example, replevin.²³ While no argument based on the Constitution is being raised in the labor relations investigatory context, what is relevant is the Supreme Court's tangential concern with the lack of representation for the

frequently becomes a review of the reasonableness of management's action rather than a trial of guilt or innocence." Ross, *The Arbitration of Discharge Cases: What Happens After Reinstatement*, in *Critical Issues in Labor Arbitration: Proceedings of the Tenth Annual Meeting, National Academy of Arbitrators* 21, 43 (J. McKelvey ed. 1957).

¹⁸ O. Phelps, *supra* note 15, at 44.

¹⁹ Braden, *Scope and Role of the American Arbitration Association*, in *The Grievance Process, Proceedings of A Conference* 27 (Mich. State Univ., March 23-24, 1956).

²⁰ Ziskind, *Discussion*, in *Arbitration and Public Policy: Proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators* 91, 95 (S. Pollard ed. 1961): "The rules laid down by courts, particularly in defining a fair hearing by an administrative agency, are germane to arbitration, and should be accepted by arbitrators."

²¹ 5 U.S.C. § 555(b) (1970).

²² W. Gellhorn & C. Byse, *Administrative Law Cases and Comments* 472-75 (5th ed. 1970).

²³ See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972).

individual involved. In *Fuentes v. Shevin*,²⁴ the Supreme Court noted that "if an applicant for the [replevin] writ knows that he is dealing with an uneducated, uninformed consumer with little access to legal help and little familiarity with legal procedures . . . the applicant may feel that he can act with impunity."²⁵ In *Goldberg v. Kelly*,²⁶ the Supreme Court required a pre-termination hearing for welfare recipients. On the representation point, the Court did not require that representation be provided at the pre-termination hearing, but it did state that the welfare recipient must be allowed to retain counsel if he wished.²⁷ While a rule of law may not yet be specifically identifiable, a trend toward increased representation *can* be identified. If the analogy to administrative law is appropriate, it can be argued that the right of representation should be involved at the investigatory stage in labor relations.

Another analogy that is commonly cited in grievance matters, particularly in discharge cases, is that of the criminal law. Sometimes the analogy is made directly;²⁸ at other times, the reference is more indirect, involving the use of the language of the criminal law.²⁹ At least one eminent authority sees many parallels between industrial punishment and the criminal law: "[T]he criminal law and the process of disciplining employees for unsatisfactory conduct are peas from the same pod; . . . as a consequence each system gives rise to fundamental issues which are essentially similar"³⁰

If there is validity in the analogy, the criminal law cases would also be a precedent for providing representation at the interrogation stage. *Escobedo v. Illinois*³¹ is perhaps the leading case to this effect. The Supreme Court said that the exclusionary rule of evidence would be applied to statements made

where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, [and] the suspect

²⁴ 407 U.S. 67 (1972).

²⁵ *Id.* at 83 n.13.

²⁶ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²⁷ *Id.* at 270.

²⁸ O. Phelps, *supra* note 15, at 21: "To meet the test of due process, discipline must be administered correctly. Administrative standards are drawn in the main from the rules of criminal procedure."

²⁹ J. Kuhn, *Bargaining in Grievance Settlement* 22 (1961): "In important cases such as appealing from 'capital' sentences—for example, a discharge"

³⁰ Kadish, *The Criminal Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations*, in *Labor Arbitration—Perspectives and Problems: Proceedings of the Seventeenth Annual Meeting*, National Academy of Arbitrators 125 (M. Kahn ed. 1964).

³¹ 378 U.S. 478 (1964).

has requested and been denied an opportunity to consult with his lawyer ³²

One of the important aspects of the *Escobedo* opinion is the above listing of the specific conditions which the Court considered necessary to give rise to the requirement of counsel. Though *Escobedo* involved a felony, the right to counsel at trial has recently been expanded to apply to other offenses.³³

However, despite the expanding character of the right to representation in the criminal area, the NLRB has rejected the criminal law analogy. In *Lafayette Radio Electronics*³⁴ the Board adopted the Administrative Law Judge's opinion which contrasted the constitutional right of counsel in *Escobedo* to what the Administrative Law Judge considered to be a contractual right. The opinion, however, did not go into any depth in analyzing the problem, nor did it attempt to distinguish between the various factors that can be involved in an interrogation.

While no one analogy adequately fits the discipline-grievance model, it is not so far removed from other areas of the law as to render comparisons meaningless, and a trend in some of these other areas can be identified as favoring representation. The discipline-grievance model can be sought to be distinguished from areas of the law in which representation is required by showing the obvious availability of union representation at the discipline-grievance hearing and by separating the investigation stage from the hearing stage. This, however, invites closer scrutiny of the question of whether the particular investigation in a given case was really separate. The inquiry is of practical significance, for if the investigatory interview is a part of the grievance process, then the rules of representation of the grievance process would apply. If it is not a part of the grievance process, presumably one can argue that different rules would apply. The NLRB has determined, as will be demonstrated,³⁵ that the investigatory process is not part of the grievance process, but is apparently pre-grievance.

Others have not found the definition of a grievance so clear that it is easy to distinguish between grievance and pre-grievance situations. It can be argued that the definition of a grievance is found in the contract, but it is relatively common for the bargaining agree-

³² *Id.* at 490-91.

³³ See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972): "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."

³⁴ 194 N.L.R.B. No. 77, 78 L.R.R.M. 1693, 1696 (1971).

³⁵ See note 105 *infra*.

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ment not to specifically delineate the meaning of the term "grievance."³⁶ One school of thought feels that "any dispute or difference which does not involve the interpretation, application, or meaning of the contract and its performance or nonperformance is not a grievance."³⁷ Another school feels that "there should be no restrictions or limitations which bar prompt detection and early adjustment of employee discontent."³⁸ Some would argue that a grievance does not arise until the complaint is reduced to writing,³⁹ although others would not be so formalistic.⁴⁰ These varying definitions of a grievance raise a degree of controversy over the possible existence within the collective bargaining relationship of a valid distinction between grievances and other types of disputes.⁴¹ One court suggested this distinction:

[I]t is plain that collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment which will fix for the future the rules of the employment for everyone in the unit, is distinguished from "grievances," which are usually the claims of individuals or small groups These claims may involve no question of the meaning and scope of the bargain, but only some question of fact or conduct peculiar to the employee ⁴²

The broader the definition of a grievance becomes, the easier it is to include the request for representation within the grievance process. If it is part of the grievance definition, then representation becomes more easily available.

In summary, the investigatory interview can encompass many elements. The use of analogies to other areas of law may serve to indicate the existence of a trend to expand representation beyond traditional boundaries. The characterization of the interview as a pre-grievance situation without representation may be begging the question, since neither contractual terms nor commentators on labor relations provide a clear starting point for determining when the preliminary activity ends and the grievance begins.

³⁶ B. Crane & R. Hoffman, *Successful Handling of Labor Grievances* 14 (1956).

³⁷ *Id.* at 6.

³⁸ *Id.* at 8.

³⁹ Rogers, Panel Discussion, *Basic Problems in Grievance Processing*, in *The Grievance Process*, Proceedings of A Conference 42 (Mich. State Univ., March 23-24, 1956).

⁴⁰ Bannon, Panel Discussion, *Grievance Procedure and the Plant Setting*, in *The Grievance Process*, Proceedings of A Conference 21 (Mich. State Univ., March 23-24, 1956).

⁴¹ Sherman, *The Individual and His Grievance—Whose Grievance Is It?*, 11 U. Pitt. L. Rev. 35, 37 (1949).

⁴² *Hughes Tool Co. v. NLRB*, 147 F.2d 69, 72-73, 15 L.R.R.M. 852, 855 (5th Cir. 1945) (citations omitted).

B. *The Individual and the Employer*

While the question of representation should be viewed in light of the entire grievance mechanism, it should also be viewed in light of a specific statutory provision. Section 9(a) of the NLRA states in part:

[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.⁴³

The significance of section 9(a) in the context of the investigatory interview is difficult to divine. The legislative history is not particularly helpful,⁴⁴ nor are industrial contracts helpful, because most contracts do not consider the rights of the employee under the Act.⁴⁵ Thus the usual guides to statutory construction are lacking in this situation.

The question is thus presented whether an individual exercising a section 9(a) right to present an individual grievance is entitled to bring a friend (representative) along to help him present the grievance. In an early case, one court said: "We think an inexperienced or ignorant griever can ask a more experienced friend to assist him, but he cannot present his grievance through any union except the representative."⁴⁶ The usual objection to using a "friend" is the possibility of conflict with the union certified under the NLRA as the "exclusive"⁴⁷ representative.

Whatever may be the individual rights under section 9(a) to present grievances, the problem of his having the assistance of another person is not clear enough to warrant a firm conclusion. The limited precedent and commentary seem to indicate that assistance is proper so long as the assistant is free from any taint of association with a rival union.⁴⁸ Thus it would seem that an employee would be entitled to hire a lawyer or to use another employee to help him

⁴³ 29 U.S.C. § 159(a) (1970) (emphasis in the original).

⁴⁴ Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 624-25 n.51 (1956).

⁴⁵ Sherman, *supra* note 41, at 50.

⁴⁶ 147 F.2d at 73, 15 L.R.R.M. at 856. "The legislative history of the original 1935 Act [NLRA] shows clearly that the earlier proviso was not intended to permit the defeated or minority union any rights to represent employees." Federal Tel. & Radio Co., 107 N.L.R.B. 649, 651, 33 L.R.R.M. 1203 (1953).

⁴⁷ 29 U.S.C. § 159(a) (1970).

⁴⁸ Annot., 9 A.L.R.2d 696 (1950).

present his grievance, although it would be difficult to cite much judicial precedent for the point. One must then also ask, if the employee can use a friend for presentation of a 9(a) grievance, why cannot his union representative also be his friend? The answer is not apparent. If assistance is available to present a grievance, and if a grievance/pre-grievance distinction is not valid, section 9(a) might provide the basis for arguing that the employee's right to representation at the interview could be based on the statute. This approach is not one which has been explored in any depth.

If the employee can present his own grievance, one must also consider whether the section 9(a) grievance is limited by the contract definition of a grievance.⁴⁹ By the wording of section 9(a), the only limitation is that the adjustment of the grievance not be inconsistent with the contract. Presumably the statutory grievance could go beyond the contract, and if so, the employee could raise as a grievance the lack of representation at the interview, and rely on what precedent there is for maintaining that he is entitled to present this grievance with the help of a friend. Thus either the interview is converted into a grievance hearing or the employer runs the risk of denying the employee his statutory protection. While the circularity of the reasoning of this argument is apparent,⁵⁰ it serves to emphasize the important role of section 9(a) individual rights in answering any question involving a claim of individual right by an employee.

There is a belief among some management people that lower level union representatives impede, rather than help, the settlement of grievances.⁵¹ Thus some would argue that not only is union presence not needed at the investigatory interview, but also that it is not desirable at the lower steps in the grievance process itself. From this point of view, the provision of section 9(a) on individual grievances reflects not an increase in rights so much as a statement of a desired end, and the best relationship is the employer-employee relationship, with minimum union involvement. Under this interpretation, section 9(a) is not an extension of rights, but rather a preservation of rights as they existed prior to the collective bargaining agreement. This view, however, tends to ignore what little precedent there is on the question.⁵²

In summary, it is arguable that the individual's right to appear before the employer with the assistance of another is not limited to the terms of the contract and is not limited to the unfair labor

⁴⁹ Annot., 158 A.L.R. 1174 (1945).

⁵⁰ See note 201 *infra*.

⁵¹ B. Crane & R. Hoffman, *supra* note 36, at 42.

⁵² See note 46 *supra* and accompanying text.

practice sections of the legislation. There is, however, little precedent upon which to base a decision in this area, but what precedent there is suggests that the employee, in a grievance situation, can appear with a properly selected assistant.⁵³

C. *Employer Responsibility and Representation*

It is clear that not every communication between the employer and the employee has to be made in the presence of a representative,⁵⁴ even if the right to representation is expanded. The investigatory interview has given rise to most of the cases, but there are other situations in which the unrepresented employee will be confronted by the employer. An employee may properly refuse a job assignment if the working conditions present an unreasonable safety hazard,⁵⁵ and an explanation of why the employee refused to work may be required. If the employee takes a leave of absence, the employer may require that the employee sign a statement which will preclude him from accepting other outside employment.⁵⁶ When an employee is absent from work and alleges illness as the excuse, he may be required to prove that there was in fact an illness.⁵⁷ Refusal to respond or to respond adequately in these types of cases may result in discipline or discharge for insubordination or for violation of some more explicit policy. Just as in the case of the investigatory interview, it might seem reasonable to the employee to ask for union representation in one of these situations, although the cases have not yet presented these problems.

It should also be noted that in other situations, primarily those involving recognition and election campaigns, the employer may be precluded from talking to the employee about certain matters, or from questioning him on certain subjects. Interrogation as to union sympathy and affiliation has been held to violate the NLRA.⁵⁸ In this context, the NLRB has evaluated "interrogation in the light of all the surrounding circumstances, including the time, place, personnel involved, and known position of the employer."⁵⁹

Thus one can cite employer-employee confrontation situations other than the investigatory interview where, historically, no express right of representation is granted, and situations where, depending

⁵³ *Hughes Tool Co. v. NLRB*, 147 F.2d 69, 15 L.R.R.M. 852 (5th Cir. 1945).

⁵⁴ See text at notes 85-91 *infra*.

⁵⁵ Insubordination: *The Safety Exception*, CCH Lab. L. Rep. ¶ 58,545, at 84,135 (1969).

⁵⁶ Cf. *Problems Created by Moonlighting*, CCH Lab. L. Rep. ¶ 58,563, at 84,190 (1970).

⁵⁷ See *Management Rights: Proof of Illness*, CCH Lab. L. Rep. ¶ 58,554, at 84,163 (1969).

⁵⁸ See, e.g., *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 32 L.R.R.M. 2353 (9th Cir. 1953); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 27 L.R.R.M. 2012 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951).

⁵⁹ C. Morris, *The Developing Labor Law* 102 (1971).

upon specific circumstances, the employer is not permitted to interrogate the employee at all. Hence, it is worthwhile to consider some of the pragmatic advantages and disadvantages of increased union representation at the investigatory interview.

1. *Advantages of Increased Representation*

Plant rules may not be clearly spelled out either in the contract or in formalized past practices. Despite an occasional attempt to make rules purporting to cover all possible infractions and to set forth the penalty for each such violation, the administration of the plant discipline system is not always automatic.⁶⁰ An experienced union official might be more useful if he is brought into the matter at an early stage such as the investigatory interview to help explain and interpret the plant's "common law" which may frequently temper the written plant rules. Some problems are highly technical and the union may have, for example, "expert compensation stewards" who need to be consulted at the outset.⁶¹ Some problems involve group rather than individual grievances. These may tend to be "highly explosive" and require early union consultation.⁶² Thus there may be times when union intervention can be used to resolve issues. Obviously the employee often thinks it is to his or her advantage to have the union representative present, and it may be advantageous to an employer to defer to this feeling at times. To the extent that one accepts the analogies from other judicial areas and to the extent that the problem in question might result in a discharge, representation would seem more consistent with current judicial trends in those analogous areas. Many claim that "[t]he overwhelming preponderance of personnel problems occur at the foreman-employee level. Face-to-face communication between the employee and his immediate superior is most effective in terms of employee response and interest."⁶³ However, when the employee must face higher level management interview personnel, few advantages may be lost by having union representation, since the personal relationship characteristic of lower level contact is already absent. In addition, the sooner the union is brought into the matter, the sooner it will be able to complete its own investigation and be able to proceed, if needed, through the grievance process with a fuller understanding of the grievance. The sooner the employer knows the full story, the sooner he will know the proper course of action. In

⁶⁰ S. Slichter, J. Healy, & E. Livernash, *The Impact of Collective Bargaining on Management* 640 (1960) [hereinafter cited as S. Slichter].

⁶¹ J. Kuhn, *supra* note 29, at 8.

⁶² B. Crane & R. Hoffman, *supra* note 36, at 56.

⁶³ *Id.* at 171-72.

discipline cases, if the matter goes to arbitration, the employer has the burden of proof.⁶⁴ Since this burden is a heavy one,⁶⁵ the employer might benefit from early union representation.

2. *Disadvantages of Increased Representation*

Among the disadvantages of union representation at an investigatory interview is the feeling of some employers that the union simply cannot play a constructive role. Union representation also means that another employee will have to leave the production line, and time will be lost. In addition to lost time, some contracts obligate the employer to pay union members for time spent on union matters.⁶⁶ If the company is small, the "open-door" policy of problem resolution may be most effective. A formal grievance system in such small companies would be so much more cumbersome than an informal, face-to-face procedure that it might well defeat the purpose of the entire system.⁶⁷ In addition, the established practice is for the employer to suspend an employee from work prior to the imposition of discipline.⁶⁸ It might be argued that if an employee is given an initial suspension, it will give him the time and opportunity to defend properly his position without representation, assuming, of course, that the suspension is not the result of the investigatory interview. An increasingly used form of discipline today is "progressive discipline whereby sanctions become increasingly severe as offenses are repeated, until correction becomes sufficiently unlikely to warrant discharge."⁶⁹ The use of progressive discipline leading to discharge might argue against maximum representation, since lessened initial sanctions may justify fewer procedural safeguards. Uniformity, it can be argued, might also justify a nonrepresentation rule. If there is uncertainty as to the right of an individual to present a grievance and the right of the exclusively certified union to control grievances, and if this uncertainty leads to undesirable results,⁷⁰ then uncertainty as to when representation is required would also lead to undesirable results.

Few would argue that every employer-employee contact should

⁶⁴ S. Slichter, *supra* note 60, at 656. Myers, *Concepts of Industrial Discipline*, in *Management Rights and the Arbitration Process: Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators* 59, 65 (J. McKelvey ed. 1956).

⁶⁵ O. Phelps, *Discipline and Discharge in the Unionized Firm* 46 (1959): "As a simple matter of statistics, a discharge appealed to arbitration appears to stand a better than even chance of being reversed in whole or in part."

⁶⁶ S. Slichter, *supra* note 60, at 727.

⁶⁷ O. Phelps, *supra* note 65, at 6; B. Crane & R. Hoffman, *supra* note 36, at 75.

⁶⁸ *Discipline: Procedural Due Process*, CCH Lab. L. Rep. ¶ 58,572, at 84,215 (1970).

⁶⁹ Kadish, *supra* note 30, at 139.

⁷⁰ See Cox, *supra* note 44, at 618.

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require union representation. Thus, a serious disadvantage to be considered is union infringement on management. Sometimes the grievance process is used to accomplish what cannot be gained through bargaining. "[A]rbitration is not merely a means of resolving disputes, but, on occasion, a means by which unions try to enlarge their roles in the labor-management partnership."⁷¹ On the other hand, the union may often be reluctant to involve itself too deeply in the preliminary activities relating to discipline, since the union can retain greater flexibility in appealing a disciplinary case if it does not share the responsibility for making plant rules.⁷² Early involvement, giving rise to shared responsibility, may make the union a more concerned participant. A decision made by the employee in the preliminary stages based on the union's advice may subsequently be found to be binding on the employee.⁷³ On the other hand, an employee who does not feel sufficiently competent to represent himself adequately may want the union involved in his case at its early stages. Thus, while both the union and the employer may have reasons for wanting the role of the union minimized, the employee may feel otherwise.

A variety of other advantages and disadvantages could doubtless be listed, but the preceding discussion is probably sufficient to indicate that practical, as well as theoretical, arguments can be made on both sides of the question. These practical considerations become increasingly important if the question of pre-grievance representation is a matter for collective bargaining rather than a matter of statutory directive.

III. NLRB DECISIONS

The problem of representation and the investigatory interview can be dealt with in several different forums, and the decision-making body in each forum makes a judgment based on somewhat different factors than those employed by any other forum. The various forums to be considered here are: (1) the National Labor Relations Board, which is subject to review by the courts; (2) the contract; and (3) the arbitrators.

At the NLRB level, before a case can be brought, there must be

⁷¹ Murphy, Introduction to M. Stone, *Labor Grievances and Decisions*, at XX (1965). "On the other hand, mature labor chiefs are aware of the fact that the usefulness of the grievance procedure is impaired if it is employed to obtain concessions which cannot be achieved through collective bargaining." B. Crane & R. Hoffman, *supra* note 36, at 4.

⁷² S. Slichter, *supra* note 60, at 628.

⁷³ Cf. *H.H. Robertson Co.*, 50 Lab. Arb. 637 (1968) (Kabaker, Arbitrator). The employee was confronted by the employer with certain evidence, and though the union advised him not to quit, he did quit. The arbitrator found that the employee had voluntarily quit when the employee sought to grieve the matter as a discharge.

a decision by the General Counsel to issue a complaint. This decision by the General Counsel has consistently been held not to be subject to review by a court.⁷⁴ If the General Counsel does issue a complaint, then the matter will be heard first by the Administrative Law Judge, who will render a decision and opinion, and then perhaps by the Board. Board decisions may be rendered by panels of at least three members,⁷⁵ with the result that the changing make-up of the panels may bring about different decisions on essentially the same factual questions. Finally, the Board's decisions can be reviewed by the courts.⁷⁶

At an earlier time, the General Counsel did not often issue complaints on the representation issue. In one situation, an employer refused to go to arbitration when the employees were represented by a private attorney. No complaint was issued.⁷⁷ More nearly in point, the General Counsel for some time declined to issue complaints for refusing to recognize a right of representation prior to the imposition of discipline.⁷⁸ Recently, these types of cases have been among the features of the General Counsel's *Report of Case-Handling Developments*,⁷⁹ which gives some indication of when a complaint will issue in a denial of representation case. The recent flurry of activity at the General Counsel and Board levels⁸⁰ indicates that the earlier reluctance to issue complaints has been overcome.

Notwithstanding the prior reluctance of the General Counsel to issue a complaint, the NLRB has nevertheless received cases involving representation problems. When the question is before the Board, up to three sections of the NLRA may be involved. Section 8(a)(1)⁸¹ makes it an unfair labor practice for an employer to interfere with or restrain the exercise by employees of their right to organize under section 7;⁸² section 8(a)(3)⁸³ prohibits discrimination by the employer

⁷⁴ C. Morris, *supra* note 59, at 822.

⁷⁵ 29 U.S.C. § 153(b) (1970).

⁷⁶ 29 U.S.C. § 160(f) (1970).

⁷⁷ Admin. Rulings of NLRB General Counsel, 33 L.R.R.M. 1011 (Case No. 834) (Oct. 23, 1953). See also Admin. Rulings of NLRB General Counsel, 33 L.R.R.M. 1527 (Case No. 923) (Apr. 22, 1954).

⁷⁸ Admin. Rulings of NLRB General Counsel, 37 L.R.R.M. 1076 (Case No. K-71) (Oct. 10, 1955).

⁷⁹ Report of Case Handling Developments at NLRB, 80 Lab. Rel. Rep. 329 (1972); Case-Handling, Administrative Developments at NLRB, 81 Lab. Rel. Rep. 333 (1972).

⁸⁰ See materials cited in note 79 *supra*.

⁸¹ 29 U.S.C. § 158(a)(1) (1970) states: "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]"

⁸² 29 U.S.C. § 157 (1970) states in pertinent part: "Employees shall have the right to self-organization . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

⁸³ 29 U.S.C. § 158(a)(3) (1970) states that it is an unfair labor practice for an employer

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against employees because of their union activity; and section 8(a)(5)⁸⁴ forbids the employer from refusing to bargain collectively with the representative of his employees.

In order to analyze the Board's decisions granting or withholding the right of representation at an investigatory interview, it will be useful to consider some of the Board and court decisions on the representation issue. The cases will be broken down into several classifications, and the cases within each classification will be considered in rough chronological order. The first group of headings will deal with several different types of fact situations with which the Board has been confronted in deciding the representation issue, and the second group of headings will deal with the various tests formulated by the Board for determining whether there is a right to representation in a particular interview. Analysis of the substance of these decisions will be deferred until all the fact situations have been presented, so that they may be considered in relation to each other. The various fact situations will be presented under the headings of (A) explanatory meetings, and (B) insubordination and the request for representation. Under the general classification of Board tests will be the headings of (C) fact-finding, and (D) reasonable employee fear of adverse consequences.

A. *Explanatory Meetings*

Whatever else might be involved in the right of representation, it does not cover every meeting between the employer and the employees. Explanatory meetings do not give rise to representation and they should accordingly be distinguished from investigatory interviews.

In *Ingraham Industries*⁸⁵ the employer held meetings to explain its profit sharing plans to the employees. The union claimed a statutory right to be present. The Administrative Law Judge, affirmed by the Board panel, found no right to be present where "[t]he meeting was to disseminate information . . . concerning a . . . plan which had been negotiated by the Company . . . without any attempt to modify or renegotiate the plan, the details of which must have been well known to the union representatives"⁸⁶ He analogized the meeting to meetings devoted to the explanation of health insurance plans and to meetings concerning individual per-

"by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"

⁸⁴ 29 U.S.C. § 158(a)(5) (1970) states that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees"

⁸⁵ 178 N.L.R.B. 558, 72 L.R.R.M. 1245 (1969).

⁸⁶ *Id.* at 562, 72 L.R.R.M. at 1246.

sonal problems, at which meetings the union was not usually present.⁸⁷

In *Wald Manufacturing Co.*⁸⁸ the Board panel adopted the decision of the Administrative Law Judge, who dismissed a charge involving a lack of union representation. During the course of his opinion, the Administrative Law Judge said:

The Union has a statutory right to be present at the *adjustment* of grievances, but to permit it to insist on attending every routine interview which might culminate in discipline goes beyond the statute and could disrupt personnel practices in a large plant. I do not reach here the question whether if an employee expressed the desire for union representation at such an interview, the Company could lawfully refuse it, nor do I reach the case of an employee called in for some special investigation in a matter other than a mere failure to meet production, or some similar common infraction of the rules.⁸⁹

In *United States Gypsum Co.*⁹⁰ the employee was summoned to the employer's office and handed a misconduct report filed against him, and the employee was warned about the employer's policy relating to the incident. No questions were asked and no suggestions were made concerning the admission or denial of guilt. The Board panel dismissed the section 8(a)(5) charge on the basis that the employee was not in a position in which he was forced to defend himself. Thus there was no need for union representation.⁹¹

B. *Insubordination and the Request for Representation*

The employee is required not to be insubordinate toward the employer. The request for or attempted exercise of the right to representation must be done in the proper manner. The Board has indicated that discipline cannot lie for merely requesting representation, but it can lie for an insubordinate request.⁹²

In *Quality Manufacturing Co.*⁹³ the Board panel found section 8(a)(1) and possibly 8(a)(3) violations by the employer where the union representative was disciplined when she sought to be present

⁸⁷ Id.

⁸⁸ 176 N.L.R.B. 839, 73 L.R.R.M. 1486 (1969), enforced, 426 F.2d 1328, 74 L.R.R.M. 2375 (6th Cir. 1970).

⁸⁹ 176 N.L.R.B. at 846, 73 L.R.R.M. at 1488.

⁹⁰ 200 N.L.R.B. No. 46, 82 L.R.R.M. 1240 (1972).

⁹¹ 82 L.R.R.M. at 1240.

⁹² See, e.g., *American Beef Packers, Inc.*, 196 N.L.R.B. No. 131, 80 L.R.R.M. 1165 (1972).

⁹³ 195 N.L.R.B. No. 42, 79 L.R.R.M. 1269 (1972), enforcement denied, — F.2d —, 83 L.R.R.M. 2817 (4th Cir. 1973).

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at a discipline meeting between an employee and the employer, and where the employee was disciplined solely for requesting such representation. The Board did not find the employee's actions insubordinate, and it distinguished the case from prior cases in which the Board or courts of appeals had refused to find an unfair labor practice by the employer on the basis of whether the employer infringed on the right of the union to bargain collectively by denying the union's request to represent an employee at an investigatory interview.⁹⁴

In *Emerson Electric Co.*⁹⁵ the Board panel found no violations of the NLRA. In that case, an employee anticipating discipline arranged to have two other employees attend the meeting as witnesses. The primary employee was discharged and the two witnesses were disciplined. The Board panel concluded:

We cannot say, however, that Section 7 creates a right to insist, to the point of insubordination, upon having fellow employees as witnesses to a meeting in a private management office at which it is expected that some measure of discipline will be meted out.⁹⁶

Similarly, in *American Beef Packers, Inc.*⁹⁷ the employee was called into a meeting in the presence of a union steward concerning his job performance. He left the meeting without permission and returned with two other stewards; thereupon he argued heatedly and was discharged. The Board panel majority affirmed the Administrative Law Judge's findings of no unfair labor practices, in part because of the insubordination of the employee in leaving the meeting. The Administrative Law Judge also refused to find a failure of the proper exercise of the right to union representation because one steward was present at the interview, and because the employee could have obtained the representation of the other stewards by filing a grievance subsequent to the interview.⁹⁸

In *Napoleon Steel Contractors, Inc.*⁹⁹ an employee got into an argument with the foreman about whether he had to work in the rain. The employee refused to work or to leave until the union steward came. He was discharged for insubordination and the Board panel found that no unfair labor practices had been committed by the employer, who had good reason to believe that the

⁹⁴ 79 L.R.R.M. at 1270.

⁹⁵ 185 N.L.R.B. 346, 75 L.R.R.M. 1028 (1970).

⁹⁶ Id. at 347, 75 L.R.R.M. at 1029.

⁹⁷ 196 N.L.R.B. No. 131, 80 L.R.R.M. 1165 (1972).

⁹⁸ 80 L.R.R.M. at 1166.

⁹⁹ 194 N.L.R.B. No. 134, 79 L.R.R.M. 1184 (1971).

employee's insubordinate activity disrupted the operations of the work site.¹⁰⁰

C. Fact-Finding

The Board's early decisions on the question of union representation were to the effect that if the employer were merely holding a fact-finding investigation, representation would be denied, but if the inquiry went beyond fact-finding, representation would be permitted.¹⁰¹ The majority of the decisions denied representation.¹⁰² The decisions do not seem to involve any close analysis of the content and conduct of the interview, although the fact-finding question would seem to require analysis of what actually happened at the interview in order to see if it really involved fact-finding.

In *Dobbs Houses, Inc.*¹⁰³ the Board panel dismissed a complaint stemming from a request by an employee for the presence of a representative of the certified union during a discharge conversation. The complaint alleged a section 8(a)(1) violation by the employer. The Administrative Law Judge indicated that there was no right to have the union representative present because the employee "was discharged for cause and the discharge conference was not predicated upon her involvement in any protected union activity."¹⁰⁴ There was no discussion of the fact that discharge obviously affects the terms and conditions of employment.

In *Chevron Oil Co.*¹⁰⁵ section 8(a)(1) and 8(a)(5) complaints were dropped in a case involving the interrogation of nine employees to determine if disciplinary action should be imposed upon them without acceding to their request that a union representative be present during the interrogation. Company policy in discipline cases was to determine if a prima facie case existed, and if so, to hold a fact-finding session with the employee. The employee was advised that he need not tell his side, but if he did not, the prima facie case would be assumed to be true. Because of the fact-finding character of the interview, union representatives were not allowed to be present, although the union and employees were allowed to be present at the subsequent disciplinary meeting at which the facts were reviewed, all were allowed to speak, and in appropriate cases, discipline was meted out. In dismissing the complaint, the Adminis-

¹⁰⁰ 79 L.R.R.M. at 1184.

¹⁰¹ See, e.g., *Jacobe-Pearson Ford, Inc.*, 172 N.L.R.B. 594, 68 L.R.R.M. 1305 (1968); *Chevron Oil Co.*, 168 N.L.R.B. 574, 66 L.R.R.M. 1353 (1967); *Texaco, Inc., Houston Producing Div.*, 168 N.L.R.B. 361, 66 L.R.R.M. 1296 (1967).

¹⁰² See text at notes 103-27 *infra*.

¹⁰³ 145 N.L.R.B. 1565, 55 L.R.R.M. 1218 (1964).

¹⁰⁴ *Id.* at 1571.

¹⁰⁵ 168 N.L.R.B. 574, 66 L.R.R.M. 1353 (1967).

trative Law Judge's opinion, which the Board subsequently adopted, reasoned that:

But this is not to say that [under sections 9(a) and 8(a)(5)] a bargaining agent must be privy to management councils, or that represented employees must be shielded by that agent from company inquiries, on each and every occasion when management embarks upon an investigation to ascertain whether plant discipline has been breached.¹⁰⁶ . . . Respondent was under no statutory or contractual duty to conduct preliminary factfinding meetings with the employees prior to the imposition of discipline for the infraction of plant rules. . . . This was . . . patently designed to avoid the possible invocation of the time-consuming grievance procedures ¹⁰⁷

Similarly, in *Jacobe-Pearson Ford, Inc.*¹⁰⁸ a complaint was dismissed when an employee was refused union representation at a meeting with his employer concerning his job performance. The Board panel indicated that no decision had been reached as to discipline, that the employer was still investigating, and it would inform the union of any decision and pursue the matter further at the bargaining table. "The 'potential' for disciplinary action was remote and the purpose of the meeting essentially for the gathering of information."¹⁰⁹

A similar rationale was used in *Texaco, Inc., Houston Producing Division v. NLRB*.¹¹⁰ There a member of the bargaining unit, but not of the union, was disciplined for taking home company kerosene. The individual had had very little education, was only marginally literate, and communicated through an interpreter.¹¹¹ He requested union representation, and it was denied; but he chose to stay when he was told he could leave if he desired; and he signed a company-prepared statement concerning the incident. The Administrative Law Judge dismissed section 8(a)(1) and 8(a)(5) charges, but the Board panel found that those provisions had been violated:

[The] meeting was not simply part of an investigation into some alleged theft and [the employee] was not invited to attend solely to provide the company's representatives with

¹⁰⁶ Id. at 578.

¹⁰⁷ Id. at 579.

¹⁰⁸ 172 N.L.R.B. 594, 68 L.R.R.M. 1305 (1968).

¹⁰⁹ Id. at 595, 68 L.R.R.M. at 1306.

¹¹⁰ 408 F.2d 142, 70 L.R.R.M. 3045 (5th Cir. 1969), denying enforcement to 168 N.L.R.B. 361, 66 L.R.R.M. 1296 (1967).

¹¹¹ 168 N.L.R.B. at 361, 66 L.R.R.M. at 1296.

information. . . . [T]he Company sought to deal directly with [the employee] concerning matters affecting his term and conditions of employment.¹¹²

The Fifth Circuit reversed, however, on the basis that the interview's purpose was merely to ascertain facts from the employee rather than to bargain with him.¹¹³

In *Dayton Typographic Service, Inc.*¹¹⁴ the Board panel concurred in the Administrative Law Judge's dismissal of section 8(a)(1) and 8(a)(3) charges when the employer refused union representation to an employee at a quality control meeting. The Administrative Law Judge summarized the Board's earlier decisions:

The Board has recognized that the Act does not require that a labor organization must be privy to management conferences and investigations concerning its business operations, even where they involve discussions with employees, or that such employees when represented by a union must be shielded by that agent from employer inquiries every time the employer starts an investigation to determine what is wrong with its operation or whether plant rules, practices, or disciplines have been breached. . . . It is only where an employee is called into a discussion with management on a problem involving his performance, which has gone beyond the factfinding or investigation state to a point where management has decided that discipline of that specific employee is appropriate, that the employer is required on demand of either the employee or his bargaining agent to permit that agent to be present.¹¹⁵

In another representation case involving *Texaco, Texaco, Inc. (Teamsters Local 692)*,¹¹⁶ the Board panel affirmed the Administrative Law Judge's dismissal of a complaint involving section 8(a)(1) and 8(a)(5) charges for denial of representation in an interview session with an employee. The Board panel did not affirm all of the Administrative Law Judge's discussion, however, which raised five important considerations in a criticism of the Board's criteria for deciding when representation at an interview is or is not required: (1) The Board's dichotomy between fact-finding conferences and record-building disciplinary conferences does not recognize the mul-

¹¹² Id. at 362, 66 L.R.R.M. at 1297.

¹¹³ 408 F.2d at 144, 70 L.R.R.M. at 3046.

¹¹⁴ 176 N.L.R.B. 357, 72 L.R.R.M. 1073 (1969).

¹¹⁵ Id. at 361 (citations omitted). Note was taken of the Fifth Circuit's decision not to enforce the Board's order in the *Texaco* case. Id. at 364 n.22.

¹¹⁶ 179 N.L.R.B. 976, 72 L.R.R.M. 1596 (1969).

tifarious facets of industrial life; (2) The Board's view of management conduct as embodying a three-step process involving fact-finding, discipline decision making, and a determination as to the degree of discipline to be imposed is unrealistic because it might occur in one meeting or be the responsibility of a single person; (3) The Board's past decisions give little real guidance to employers and employees as to how to conduct themselves; (4) The Board's decisions do not define the degree of prospective punishment which generates the statutory right; and (5) The Board's cases do not distinguish adequately between fact-finding questions and accusatory questions in an interview.¹¹⁷

In *Illinois Bell Telephone Co.*¹¹⁸ employer security agents interrogated the employee concerning an alleged theft of money. The interrogator wrote out a statement for the employee to sign and denied the employee's request for union representation. Later the employee was discharged. The Administrative Law Judge, affirmed by the Board panel, found no violation, saying in part:

. . . [T]hey were merely interrogating him concerning his activities for the purpose of gathering information to be turned over to the line supervisor . . . i.e., the management officials who *did* have authority to effect disciplinary action. . . . Moreover, after such [discipline] decision was made . . . a meeting among all interested parties, including the union representatives, was held the next day where the subject *was* for the purpose of dealing with [the employee] respecting terms and conditions of his employment—specifically what form of disciplinary action was to be imposed.¹¹⁹

In *Lafayette Radio Electronics Corp.*¹²⁰ the union, rather than an individual employee, requested that a steward be present when the employer interrogated employees about the alleged theft of merchandise. The employer refused the request. Interrogation included, in some instances, voluntary signing of statements and possible use of a lie detector. The Board panel approved the Administrative Law Judge's decision that no violation had occurred. Reliance was placed on the Board's earlier distinction between fact-finding (no union presence required) and discipline (union presence required). The argument was carried one step further, however, when the Administrative Law Judge contended that an employee interview might still

¹¹⁷ Id. at 982-83.

¹¹⁸ 192 N.L.R.B. No. 138, 78 L.R.R.M. 1109 (1971).

¹¹⁹ 78 L.R.R.M. at 1110 (emphasis in the original).

¹²⁰ 194 N.L.R.B. No. 77, 78 L.R.R.M. 1693 (1971).

have an investigatory purpose, notwithstanding the fact that the employee's guilt has been established, since the employer might be investigating factors other than the employee's guilt.¹²¹ In the *Lafayette* case, in which several employees had been subjected to interviews by the employer, discharge always followed a finding of guilt, and although guilt was already found, the purpose of interrogation was still investigatory, namely, to recover stolen merchandise.

What makes the *Lafayette* opinion particularly interesting is the Administrative Law Judge's rejection of the obvious analogy to right to counsel in the criminal area, as developed in such cases as *Escobedo v. Illinois*.¹²² To this end, the Administrative Law Judge reasoned:

Escobedo rests on a constitutional guarantee of the right to counsel. Although the General Counsel is here asserting the existence of a statutory right, in reality the right which he seeks to protect is a contract right, namely, the asserted nullification of the grievance and arbitration provisions of the contract. . . . In this case, Respondent had not repudiated any of its contractual obligations.¹²³

In one case, *United Aircraft Corp.*,¹²⁴ the Board looked at the character of the interrogation and found coercive interrogation to be an unfair labor practice by the employer, independent from the refusal to allow representation. The Board panel found, among other things, that in the employer's investigation of union activities, "the investigators behaved toward the employees being interviewed in an overbearing and intimidating manner, and infring[ed] on their statutory rights by coercive interrogation."¹²⁵ The Administrative Law Judge also found that the employer had violated section 8(a)(5) by refusing to provide representation upon request by interrogated employees when in fact the employees were subsequently disciplined.¹²⁶ However, the Board dismissed the 8(a)(5) complaint because the majority status of the union was in doubt.¹²⁷

¹²¹ 78 L.R.R.M. at 1695.

¹²² 378 U.S. 478 (1964).

¹²³ 78 L.R.R.M. at 1696.

¹²⁴ 179 N.L.R.B. 935, 72 L.R.R.M. 1555 (1969).

¹²⁵ Id. at 937, 72 L.R.R.M. at 1558.

¹²⁶ Id., 72 L.R.R.M. at 1559.

¹²⁷ Id. at 938, 72 L.R.R.M. at 1559. The court of appeals affirmed the Board's dismissal of the § 8(a)(5) complaint, stating: "Similarly, we think that the company's refusal to call stewards, which occurred before the dues checkoff cards established a majority at any of these plants, was not a violation of section 8(a)(5)." *United Aircraft Corp. v. NLRB*, 440 F.2d 85, 98, 76 L.R.R.M. 2761, 2772 (2d Cir. 1971).

D. *Reasonable Employee Fear of Adverse Consequences*

At a time when the fact-finding criteria for determining the right to representation seemed well established, one Board panel seemed to switch tests. In a series of cases, with dissenting opinions, a panel majority began to decide that representation was appropriate at an investigatory interview where the employee reasonably feared adverse consequences. The dissenting Board members argued that the question was solely a matter of what the collective bargaining agreement said. Notwithstanding this new test, the majority of the cases deny representation. The Board panel in *Quality Manufacturing Co.*¹²⁸ said that it was not only an unfair labor practice to discipline the employee for demanding representation, but also that it would be a violation to discipline the employee if he or she refused to go through the interview without union representation because of fear of adverse consequences. The Board's decision did, however, except from this rule routine conversations such as instructions by the employer or corrections of work techniques.¹²⁹

Member Kennedy dissented from the decision on the ground that the new test gave the employee the sole right to decide the nature of the interview and transformed the state of mind of the employee into the determinative factor as to whether the employer must permit union representation at the interview. He argued that this would in effect make the employer's motive for conducting the interview irrelevant.¹³⁰ His opinion interpreted the majority as saying that a purely investigatory interview would still be permitted, but only if the employee, not reasonably fearing for his employment, either voluntarily attends the meeting or is allowed to bring a union representative. The dissent argued that by focusing on the employee's subjective intent, rather than applying an objective test, the Board had overturned the prior Board rule on intent.¹³¹ The dissent also noted the earlier *Lafayette* decision¹³² rejecting the argument of a right to representation based on the criminal law analogy of a constitutional right to counsel under *Escobedo*: "[T]he right to union representation during an interview with the employer

¹²⁸ 195 N.L.R.B. No. 42, 79 L.R.R.M. 1269 (1972), enforcement denied, — F.2d —, 83 L.R.R.M. 2817 (4th Cir. 1973).

¹²⁹ 79 L.R.R.M. at 1271.

¹³⁰ Id. at 1272 (dissenting opinion). The majority replied to this argument that: Here also, our dissenting colleague asserts that we will be compelled to resort to purely subjective considerations in judging employer conduct. We disagree. Whether discipline was imposed for cause, or for discriminatory reasons, is a factual matter with which we regularly deal in cases of 8(a)(1) and 8(a)(3) violations.

Id. at 1271 n.4.

¹³¹ Id. at 1273 (dissenting opinion).

¹³² 194 N.L.R.B. No. 77, 78 L.R.R.M. 1693 (1971).

must . . . be based on contract. It should be the subject of the collective-bargaining process like any other term or condition of employment."¹³³ The majority in *Quality Manufacturing* would apparently find the right to representation or rejection of the interview in section 7 as enforced by section 8(a)(1).¹³⁴

In *Service Technology Corp.*¹³⁵ a dispute between several employees led to their being summoned to the employer's office. Each employee requested and was refused union representation and each refused to give information. Discipline resulted and the Board panel found no violation. As for the threat to fire the employees for not participating in the interview, "it was no more than a heated statement, not designed to interfere with the employees' rights to representation in general, but rather to enforce the exclusion of [the union steward] himself, which we find not an unlawful objective."¹³⁶ The peculiar circumstance of the case was that the union steward was also involved in the physical threats to other employees which was presumably the basis of the discipline.

In *Mobil Oil Corp.*¹³⁷ interviews concerning the removal of company property were held without union representation by a security agent who did not have the authority to discipline. The interviews were based on the results of earlier security surveillance. At the termination of the interview, each employee was suspended pending further investigation. The Board panel found that discipline of employees who requested representation at the interviews violated section 8(a)(1).¹³⁸ The Board panel found those employees had had reason to fear that the employer suspected them of stealing company property, and that they might be discharged.¹³⁹ The Board panel said in part:

Such a dilution of the employee's right to act collectively to protect his job interests is . . . unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action. The employer may, *if it wishes*, advise the employee that it will not proceed with the interview unless

¹³³ 79 L.R.R.M. at 1274 (dissenting opinion).

¹³⁴ In both footnotes 6 and 8 of its opinion, the majority said: "We deem it unnecessary to determine whether the discharge also violated Sec. 8(a)(3), as such additional finding would not affect our remedial order." 79 L.R.R.M. at 1271 n.6, 1272 n.8.

¹³⁵ 196 N.L.R.B. No. 121, 80 L.R.R.M. 1187 (1972).

¹³⁶ 80 L.R.R.M. at 1188.

¹³⁷ 196 N.L.R.B. No. 144, 80 L.R.R.M. 1188 (1972), enforcement denied, — F.2d —, 83 L.R.R.M. 2823 (7th Cir. 1973).

¹³⁸ Discipline of employees not requesting union representation prior to or during their interviews did not violate § 8(a)(1). 80 L.R.R.M. at 1191 n.2.

¹³⁹ *Id.* at 1191.

the employee is willing to enter the interview unaccompanied by his representative.¹⁴⁰

As he did in *Quality Manufacturing*,¹⁴¹ Member Kennedy dissented, but on a somewhat different point:

My colleagues are here holding, in effect, that only when the General Counsel establishes that an employee has engaged in misconduct of sufficient gravity to cause him to believe that his job may be affected thereby, or after he somehow concludes that he is under suspicion, does he have the protection of Section 8(a)(1) in the course of an interview with his employer.¹⁴²

Member Kennedy's dissent indicated that deference to the grievance-arbitration machinery, rather than a finding of an unfair labor practice, might be appropriate, and that there was a past bargaining history where union demands for company-union discussions before discipline had been rejected.¹⁴³ In addition, the dissent argued that the Board should also consider in representation cases the disruptive effect on the employer's operations.¹⁴⁴

In *Western Electric Co.*¹⁴⁵ interviews without union representatives were held despite requests for representation, and disciplinary action was subsequently taken. The Board panel dismissed the complaint. Members Kennedy and Penello voted for dismissal¹⁴⁶ on the basis of the same grounds set forth in Member Kennedy's dissents in *Quality Manufacturing*¹⁴⁷ and *Mobil Oil*.¹⁴⁸ Chairman Miller voted to dismiss on different grounds. He suggested that in a case in which the bargaining agreement did not mention the right to union representation at the investigatory interview and in the absence of past practice of any kind on the issue, the employees would probably have a section 7 right to engage in concerted activity to obtain representation at the interview, which they could enforce through an unfair labor practice charge before the Board. However, in *Western Electric*, arbitration decisions had on two previous occasions interpreted the existing contract as not conferring a right of representation, and the union had failed to persuade the employer to

¹⁴⁰ Id. (emphasis added).

¹⁴¹ See text at note 130 supra.

¹⁴² 80 L.R.R.M. at 1193 (dissenting opinion).

¹⁴³ Id. at 1194 (dissenting opinion).

¹⁴⁴ Id. (dissenting opinion).

¹⁴⁵ 198 N.L.R.B. No. 82, 80 L.R.R.M. 1705 (1972).

¹⁴⁶ 80 L.R.R.M. at 1707.

¹⁴⁷ See text at note 130 supra.

¹⁴⁸ See text at note 142 supra.

accede to such a right in subsequent contract negotiations.¹⁴⁹ Thus, Chairman Miller reasoned that since there was within the company an established past practice of not allowing representation at investigatory interviews which had been upheld in binding arbitration, the union should not be allowed to skirt this past practice by bringing an unfair labor practice charge against the employer.¹⁵⁰

E. Summary

By way of summarizing this variety of opinions,¹⁵¹ there would seem to be agreement on preliminary points. Not all meetings, and apparently not all disciplinary interviews, are subject to representation. If the meeting is only explanatory in nature, even though matters subject to bargaining are explained, the union does not have a right to be present. If the meeting is disciplinary in character, but explanatory in the sense that the employee is only told what the employer intends to do and does not call upon the employee to defend himself, no representation need be provided. It is an open question as to how far the Board will go in reviewing what was actually said in the meeting. The present indications are that the Board does not give an intensive review of what was actually said and how it was said, thus limiting the right to representation to only very obvious cases.

The employee is protected from discipline if he asks for representation, and one would expect he would be advised by unions to request representation in most situations. If the request becomes insubordinate, the employee may be disciplined for the insubordination.

At one time, the Board appeared to dismiss complaints based on denial of representation, in part because the employee was able to obtain a subsequent *de novo* hearing on the discipline or discharge. However, this reasoning is not compelling if one accepts analogies from the criminal law and from some administrative law areas. A *de novo* hearing means little, for example, where the employee has signed a statement, has taken a lie detector test, or has given ill-considered responses which he later contradicts. In short, the *de novo* hearing may not actually have been *de novo*.

At this same time, the Board was attempting to distinguish

¹⁴⁹ 80 L.R.R.M. at 1707.

¹⁵⁰ *Id.*

¹⁵¹ For other analysis, see *Right to Demand Union Representation During Investigative Interview by Employer*, 79 Lab. Rel. Rep. Anal. 25 (Feb. 14, 1972); *Right of Employee to Representation By Union at Investigative Interview*, 80 Lab. Rel. Rep. Anal. 61 (Aug. 14, 1972); *Right of Employee to Union Representation at Meeting Called By Employer*, 83 Lab. Rel. Rep. Anal. 49 (July 30, 1973).

between fact-finding investigations and other investigations. Presumably, a fact-finding investigation did not give rise to a duty to honor the request for representation. It seems clear that the Board's distinction, while theoretically meaningful, was not operationally meaningful because the Board did not appear to be actually weighing all of the important circumstances of the matter, or making a thorough determination of whether the interview really was devoted solely to fact-finding. Moreover, the Board seemed to expand the notion from fact-finding about the individual employee to fact-finding in general. In the latter case, the fact-finding distinction becomes one without substance. In many cases turning on the fact-finding distinction, the employer had all the facts needed for discipline from other modes of investigation, and the interrogator sought only to have the employee confirm the prior investigation, that is, to confess. A serious effort to weigh the circumstances of the interrogation could give rise to a workable rule within the fact-finding/investigation distinction, but the Board did not develop the needed criteria, and it has subsequently changed its approach to the problem.

At the same time that the Board was developing the fact-finding/investigation distinction and the line of cases allowing a refusal of representation based on the existence of a *de novo* hearing, the Board was attempting to draw a distinction between the interrogation and the grievance process, setting up a pre-grievance and grievance distinction. This distinction is not at all clear in the cases or commentaries. Furthermore, the distinction was made without reference to the individual's section 9(a) right to present a grievance and the union's right to be present at its resolution. The request for representation could be considered an individual presentation of a grievance and the employer's answer could be a resolution of that grievance. Since the union has a right under section 9(a) to be present at the resolution of the grievance, the attempt to distinguish grievances from employee requests or demands under 9(a) becomes very difficult. While this argument may not be convincing, it is difficult to see how the problem can be resolved without more consideration being given to the rights granted or protected by section 9(a).

A new direction which some members of the Board have taken, creating a division of opinion within the Board, involves the question of whether the issue of representation is solely one of contract or whether a section 7 right is involved, which gives the employee the choice, based on reasonable grounds that his answer might affect his employment status, of not responding if union representation is

denied. Those members who rely on contract analysis contend that bargaining and arbitration are the answer,¹⁵² which relieves the Board from making a difficult decision. There is no indication whether the issue of representation at an interview would be a mandatory or permissive subject of bargaining, and there is no indication of how the existence of bargaining on this issue would affect the union's duty of fair representation, which might itself give rise to an alleged unfair labor practice. Those who rely on the section 7 analysis are left with the difficult, but not impossible, task of deciding each case of denial on its particular circumstances, gradually establishing landmarks which will guide the employer, the employee, and the union.

Viewed only in light of the Board's decisions, the employer is in a dilemma when the employee makes the protected request for union representation. Depending on the Board panel involved, the result might turn on the contract, on the fact-finding/investigation distinction, or on the reasonable apprehension of the employee about the consequences of the interview. The first thing the employer probably should do is distinguish explanatory from investigatory meetings. Probably one of the more meaningful distinctions is whether the employee is required to defend himself. Assuming that the interview can be classified as one which might give rise to a right of representation, the employer apparently can still interrogate. If the employee requests representation, the employer then has the choice of allowing representation or terminating the interview. This decision may depend on whether the interview goes beyond fact-finding or puts the employee in jeopardy. At this point there is no indication that the employer must give the employee a warning and there are no guides on what the role of the representative is. It has not been determined whether the representative can present oral argument, present argument on a record, present written argument, cross-examine, or possibly perform all of these functions. Finally, it has not been determined whether the right to representation extends beyond union representatives to include lay friends or attorneys. There is also some indication that overly coercive interrogation, in the absence of representation, might give rise to a separate section 8(a)(1) violation.¹⁵³ Although the interrogation in the existing precedent concerned union activity, it would appear that excessive coercion itself might be the basis for an invasion of section 7 rights in other interview situations. Finally, it must be noted that, taking all of the employer-employee confrontation cases together, in most of them the Board denied the right to representation. Moreover, the

¹⁵² See text at notes 149-50 *supra*.

¹⁵³ See text at notes 124-25 *supra*.

courts of appeals have uniformly rejected the right to representation even in cases in which the Board has found such a right to exist.¹⁵⁴

IV. UNION CONTRACTS

Some decisions of the NLRB draw a correlation between a right to representation and the terms of the contract. In *Western Electric Co.*¹⁵⁵ the Board's opinion spoke of permitting "parties, by agreement, to determine how representation rights shall be channeled,"¹⁵⁶ and Member Kennedy has said that "the right to union representation during an interview with an employer must . . . be based on contract."¹⁵⁷ Several provisions of the contract may be relevant to a determination of the right to representation, including the management prerogative clause and the grievance procedure clauses, as well as any other contractual clauses specifically in point.

It should be noted here that no effort is being made to exhaustively survey all contract provisions and no attempt is being made to examine the actual practices under the contract, even though actual practice under the contract frequently differs from its provisions.¹⁵⁸

A recent General Motors Corporation collective bargaining agreement is illustrative of a contract having provisions relating to representation. The management responsibility provision provides that "[t]he right to . . . discharge or discipline for cause; and to maintain discipline and efficiency of employes, is the sole responsibility of the Corporation"¹⁵⁹ A four step grievance procedure is provided. At Step One, the employee-foreman level, the foreman is required to call a union committeeman into the discussion without delay upon the request of the employee.¹⁶⁰ Higher steps directly involve the union; hence the question of representation is obviously mooted for these purposes. The higher step provisions, however, are important in another respect. They specifically provide for a union investigation at both Steps Two¹⁶¹ and Three.¹⁶² The Step Three investigation procedures are quite detailed as to purpose, manner, and procedure of the investigation.¹⁶³ It would seem likely that to

¹⁵⁴ See *NLRB v. Quality Mfg. Co.*, — F.2d —, 83 L.R.R.M. 2817 (4th Cir. 1973); *Texaco, Inc., Houston Producing Div. v. NLRB*, 408 F.2d 142, 70 L.R.R.M. 3045 (5th Cir. 1969).

¹⁵⁵ 198 N.L.R.B. No. 82, 80 L.R.R.M. 1705 (1972).

¹⁵⁶ 80 L.R.R.M. at 1707.

¹⁵⁷ *Quality Mfg.*, 79 L.R.R.M. at 1274 (dissenting opinion).

¹⁵⁸ Whyte, *The Grievance Procedure and Plant Society*, in *The Grievance Process, Proceedings of A Conference* 12 (Mich. State Univ., March 23-24, 1956).

¹⁵⁹ General Motors Corp. Contract, CCH Lab. L. Rep. ¶ 59,905.08 (1971).

¹⁶⁰ General Motors Corp. Contract, CCH Lab. L. Rep. ¶ 59,905.15 (1971).

¹⁶¹ General Motors Corp. Contract, CCH Lab. L. Rep. ¶ 59,905.16 (1971).

¹⁶² General Motors Corp. Contract, CCH Lab. L. Rep. ¶ 59,905.17 (1971).

¹⁶³ *Id.*

the extent that union representatives are involved in the early investigation of an incident, particularly a potentially serious incident, such early involvement would lessen the need for a subsequent, detailed investigation. The General Motors contract also specifically covers the investigatory interview. The contract provides:

Any employee who, for the purpose of being interviewed concerning discipline, is called to the plant, or removed from his work to the foreman's desk or to an office, or called to an office, may, if he so desires, request the presence of his District Committeeman to represent him during such interview.¹⁶⁴

Similar provisions can be found in other contracts. The United States Steel Corporation contract provides as follows:

An employee who is summoned to meet in an office with a supervisor other than his own immediate supervisor for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by his grievance committeeman . . . if he requests such representation, provided such representative is then available, and provided further that, if such representative is not then available, the employee's required attendance at such meeting shall be deferred only for such time during that shift as is necessary to provide opportunity for him to secure the attendance of such representative.¹⁶⁵

Probationary employees may be dealt with in a different manner than regular employees under some contracts.¹⁶⁶

The General Electric contract provides one procedure for serious offenses and a separate procedure for non-serious offenses. For serious offenses (e.g., insubordination, fighting, willful destruction of property), the employee "shall be advised in writing, a copy of which shall be given to the Union, stating the reason for the discipline or discharge."¹⁶⁷ For non-serious offenses, oral and written notices are used, and the union's role appears to be limited to the

¹⁶⁴ General Motors Corp. Contract, CCH Lab. L. Rep. ¶ 59,905.26 (1971). Discipline and discharge may be synonymous, as the same provision provides: "any employee who has been *disciplined by a suspension, layoff or discharge*" *Id.* (emphasis added).

¹⁶⁵ United States Steel Corp. Contract, CCH Lab. L. Rep. ¶ 59,908.27 (1972).

¹⁶⁶ [N]othing in this Article contained shall be construed to affect the probationary status of employees during the first three (3) months of their employment, or to limit in any respect the Company's prerogatives herein to discharge or take any other action towards such employees during said period in its sole discretion. Brooklyn Union Gas Co. Contract, CCH Lab. L. Rep. ¶ 59,911.06 (1969).

¹⁶⁷ General Electric Co. Contract, CCH Lab. L. Rep. ¶ 59,915.045 (1971).

grievance processes. "The supervisor will orally discuss with the employee the nature of the offense and the necessity for corrective action" ¹⁶⁸

Some contracts impliedly exclude the union representative from management activities prior to a formal grievance by provisions which state, for example, that "[t]he Local Union President will be notified promptly when an employee has been indefinitely suspended, discharged or involuntarily separated."¹⁶⁹ Some contracts also distinguish individual complaints from complaints affecting many workers. Often in the latter situation, only the higher grievance steps may be involved, which usually means direct union involvement.¹⁷⁰ Some contracts also distinguish levels of union presence in grievance procedures, and make specific provision as to when the international representative can appear to assist the local representative.¹⁷¹

To the extent that a union representative is to be present at a meeting or interview, many contracts limit representation to designated representatives.¹⁷² Some contracts provide the conditions under which the union representative may leave his station, for example, by notifying the foreman and returning without delay.¹⁷³ The NLRB has given considerable discretion to management in requiring that grievances be presented at a reasonable time and in a reasonable manner.¹⁷⁴

Some types of employment require special rules. For example, in the trucking industry, not only may the availability of union representation be involved, but the employee may be far from the employer's place of business at the time of investigation or decision. The National Master Freight Agreement provides that a discharge or suspension must be appealed within ten days, or within ten days after an employee returns to the home terminal if he is out on the road when the disciplinary action is taken.¹⁷⁵

Other special procedures may be used. For example, in some contracts, potentially emotional issues such as demotions, layoffs, and discharges are expedited by eliminating the lower level grievance steps to promote faster settlements. This procedure serves to cool employee emotions, to reduce the total amount of time and

¹⁶⁸ General Electric Co. Contract, CCH Lab. L. Rep. ¶ 59,915.050 (1971).

¹⁶⁹ B.F. Goodrich Co. Contract, CCH Lab. L. Rep. ¶ 59,917.026 (1971).

¹⁷⁰ See, e.g., B.F. Goodrich Co. Contract, CCH Lab. L. Rep. ¶ 59,917.020 (1971); Brooklyn Union Gas Co. Contract, CCH Lab. L. Rep. ¶ 59,911.19 (1969).

¹⁷¹ See, e.g., B.F. Goodrich Co. Contract, CCH Lab. L. Rep. ¶ 59,917.024 (1971).

¹⁷² See, e.g., B.F. Goodrich Co. Contract, CCH Lab. L. Rep. ¶ 59,917.0273 (1971). See also B. Crane & R. Hoffman, *Successful Handling of Labor Grievances* 90-91 (1956).

¹⁷³ See B. Crane & R. Hoffman, *supra* note 172, at 100.

¹⁷⁴ Santa Clara Lemon Ass'n, 116 N.L.R.B. 44, 64, 38 L.R.R.M. 1189, 1190 (1956).

¹⁷⁵ Nation Master Freight Agreement, CCH Lab. L. Rep. ¶ 59,944.77 (1971).

money spent on grievance processing, and in an improper discharge case, it may reduce the amount of back pay owed to the employee.¹⁷⁶

By way of comparison with the industrial contracts, one can look to the detailed rules of the United States Civil Service Commission. Actions against employees are divided generally into two classes: (1) removal or suspension for more than thirty days, and (2) suspensions of thirty days or less.¹⁷⁷ In the event of a suspension for more than thirty days, the employee is entitled to "at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action."¹⁷⁸ This provision refers to notice of the proposed action, not notice after the adverse action has been taken. During the thirty day period the employee is entitled to answer orally or in person. No provision is specifically made granting or prohibiting representation, although the nature of the notice—"including statements of witnesses, documents, and investigative reports"¹⁷⁹—indicates that it is unlikely that the employee will have to go alone.¹⁸⁰ Additionally, no provision is made specifically for the investigatory interview, but the provision for notice does give the employee some of the advantages of early representation. After these preliminary actions, the action can be appealed, at which time representation is specifically provided.¹⁸¹ For suspensions of thirty days or less, notice is also required, and the employee is entitled to a reasonable period of time in which to file a written answer.¹⁸²

While the Civil Service Commission regulations are not totally comprehensive, they differ from collective bargaining contracts in several significant ways. One is the detail involved in the grievance process, which is considerably greater than the usual contract. Secondly, the regulations distinguish discharge and serious discipline from less serious discipline. Bargaining agreements often treat discharge and all levels of discipline in the same procedural manner. Finally, the regulations provide the employee with notice and an opportunity to answer after he has had time to assemble his own case.

In summarizing the contract provisions, obviously a bare read-

¹⁷⁶ B. Crane & R. Hoffman, *supra* note 172, at 57 (1956).

¹⁷⁷ 5 C.F.R. §§ 752.201, .301 (1973).

¹⁷⁸ 5 C.F.R. § 752.202(a)(1) (1973).

¹⁷⁹ 5 C.F.R. § 752.202(a)(2) (1973).

¹⁸⁰ Exceptions on notice or continuation of duties are made for emergencies, reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, or where continuation in that position would be detrimental. 5 C.F.R. §§ 752.202(c), (d) (1973).

¹⁸¹ 5 C.F.R. § 771.105(a)(2) (1973).

¹⁸² 5 C.F.R. § 752.302 (1973).

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ing of the contract will not reveal the employees' total rights because much will depend upon past practices and bargaining history. The contract is most likely to be ambiguous on the subject of representation and the parties' bargaining history may become determinative, but in all likelihood the definition of the details of the right will be left to arbitration.

If the Board's panel which looks to the contract holds sway, there is some probability that the subject of representation will become increasingly important at the bargaining table. If the union and company are bargaining, several considerations may well be involved if the parties agree on terms. The right can be specifically limited to discharge, as opposed to other types of discipline. The personnel who may be representatives can be limited; indeed the whole right can apparently be waived. The role of the representative can be defined. The conditions of the representation can be delineated. For example, permission to leave one's work station may be required, the time to be spent on it may be reasonably limited, and the pay or non-pay status of the representative may be determined. There remains, however, the high probability that, like other terms in the contract, many of the essential details will be left ambiguous, just as most contract details surrounding discharge and discipline remain ambiguous.

V. ARBITRATION DECISIONS

In addition to looking to the courts, the NLRB, and the collective bargaining contracts for information on the character of the right to representation during the investigatory proceedings, it is useful to look to the decisions of arbitrators. No attempt will be made to be exhaustive, in part because no arbitrator is obligated to follow another arbitrator's decision, although there are many precedents in arbitration.¹⁸³

The touchstone for the arbitrator is the contract, which encompasses the limits of his authority. Yet contracts normally do not spell out in detail the procedures to be used in discipline and discharge cases.¹⁸⁴ Fair procedure, even though not spelled out in a contract,

¹⁸³ "While some arbitrators show great deference to the precedent value of prior awards and others hold the precedent value of prior awards to a minimum, the great majority of arbitrators view prior awards as persuasive but not binding." *Are Prior Arbitration Awards Binding?*, CCH Lab. L. Rep. ¶ 58,602, at 84,313 (1970). "There has been developed over the years a considerable body of principles through the arbitration of discipline disputes" Myers, *Concepts of Industrial Discipline*, in *Management Rights and the Arbitration Process: Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators* 59, 64 (J. McKelvey ed. 1956).

¹⁸⁴ Wolff, *Discussion*, in *Critical Issues in Labor Arbitration: Proceedings of the Tenth Annual Meeting, National Academy of Arbitrators* 56, 58 (J. McKelvey ed. 1957). See also O. Phelps, *Discharge and Discipline in the Unionized Firm* 74 (1959); S. Slichter, J. Healy, & E.

often plays an important role in aiding the arbitrator to fill in the details of the collective bargaining relationship.¹⁸⁵ The role of the arbitrator may extend beyond the scope of his immediate decision. "Oftentimes the very way in which parties settle grievances is determined by their best guess as to how an arbitrator might dispose of the case."¹⁸⁶

When the contract is explicit as to the scope of the arbitrator's authority, the more liberal the phraseology, the greater the scope of authority of the arbitrator. While some contracts speak in the traditional terms of discharge "for just and proper cause,"¹⁸⁷ other contracts may speak in apparently broader terms, such as: "Should it be decided under the rules of the Agreement that an injustice has been dealt the mine worker" ¹⁸⁸

Procedural due process can be an important consideration in the arbitrator's decision. The arbitrator has a wide range of possibilities in affording a remedy for a lack of procedural fairness. He can reverse the discharge or discipline, with or without back pay, or he can mitigate the discipline. Since he is not confined to the damages-or-nothing mode of remedy of the judicial system,¹⁸⁹ the arbitrator can give effect to the nuances of procedural fairness.¹⁹⁰ In considering the aspect of procedural fairness within the right to representation in an investigatory interview, the character of the investigation is important. The investigation may be incomplete from at least two perspectives: one is that the employer did not have enough facts to prove that the employee violated a plant rule; the other is that while the employer may have had sufficient evidence if taken alone, the original evidence would be insubstantial when viewed in light of other mitigating facts. From the first perspective,

Livernash, *The Impact of Collective Bargaining on Management* 768 (1960) [hereinafter cited as S. Slichter].

¹⁸⁵ Jones, *Ramifications of Back-Pay Awards in Suspension and Discharge Cases*, in *Arbitration and Social Change: Proceedings of the Twenty-Second Annual Meeting, National Academy of Arbitrators* 163-74 (G. Somers ed. 1969):

One cannot escape the conviction that in many cases of reinstatement without back pay, the basis for reinstating the individual to work was simply the arbitrator's belief, based on some unknown standard of fair play, that the individual should have another chance

¹⁸⁶ S. Slichter, *supra* note 184, at 741.

¹⁸⁷ Brooklyn Union Gas Co. Contract, CCH Lab. L. Rep. ¶ 59,911.20 (1969).

¹⁸⁸ Bituminous Coal Contract, CCH Lab. L. Rep. ¶ 59,914.014 (1968).

¹⁸⁹ See Summers, *Individual Rights in Collective Agreements: A Preliminary Analysis*, 9 Buffalo L. Rev. 239, 250 (1960).

¹⁹⁰ But see Wirtz, *Due Process of Arbitration*, in *The Arbitrator and The Parties: Proceedings of the Eleventh Annual Meeting, National Academy of Arbitrators* 1 (J. McKelvey ed. 1958):

To speak of "due process of arbitration" is to risk a seeming confusion of terms. For "due process" is a symbol borrowed from the lexicon of law, and therefore suspect in this shirtsleeves, seat-of-the-pants, look!-no-hands business of arbitration.

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investigatory interrogation of the individual may be imperative, but from the second perspective, the more complete picture may result from an investigation aided by the resources of union representation. Management's overall record in discipline cases is not so outstanding as to indicate that more union input is unneeded at the investigatory stage. "Available evidence indicates that management's disciplinary decisions have not fared well at the hands of arbitrators."¹⁹¹ If union representation would improve this record, the implication is obvious.

The role of representation at the arbitration level should be briefly considered. Obviously the union is representing the employee at the arbitration hearing, but there remains the question of whether the grievant can also bring in counsel of his or her own choosing, in addition to the union. An argument can be made that if independent representation is not provided at arbitration, given the possible disinterest of the union in the individual, the absence of any representation at the investigation may not be so serious.

However one may view these preliminary points, some arbitrators have considered the procedural due process questions. In *All American Stamp and Premium Corp.*¹⁹² three employees were fired for refusing to appear for an investigatory interview. The employees requested representation, the request was denied, and a deadline was placed on their appearance. The arbitrator held the discharges improper:

Any person in civil or criminal law is entitled to representation, and the courts will delay the case a reasonable time to enable a party to obtain counsel. . . . [T]his interview . . . could have been delayed for a reasonable period of time at no disadvantage to the Company. But instead, these grievants were given an ultimatum and in effect, felt that they were on trial In labor relations, as in law, an employee is entitled to representation by higher authority in the Union organization.¹⁹³

In *Thrifty Drug Stores Co.*¹⁹⁴ grievants had been implicated by others in a theft from the company. Union representation was requested but denied in some cases, or not proffered by the employer in other cases. The question was whether the grievants had committed theft, and the arbitrator found the case to turn on the reliability of the statements of others made without representation. The arbi-

¹⁹¹ S. Slichter, *supra* note 184, at 657.

¹⁹² 65-1 CCH Lab. Arb. Awards ¶ 8091 (1965) (May, Arbitrator).

¹⁹³ *Id.* at 3360.

¹⁹⁴ 50 Lab. Arb. 1253 (1968) (Jones, Arbitrator).

trator found the statements to be unreliable. He looked at the *Miranda* decision in the criminal law area, saying:

Of course, we are not here concerned with "the forces of the law." Our setting is an industrial one Nor are we directly concerned . . . with the constitutional privilege against self-incrimination. But our concern is not unlike that of the Courts when they are coping with the testimonial privilege or with custodial interrogations by police. We must determine whether there was truth-telling despite these custodial interrogations as they were conducted in the Company's security cubicles in the absence of union representatives.¹⁹⁵

The arbitrator refused to accept the "pre-grievance" characterization of the interrogation, reasoning that since discipline was a potential outcome of the interview, the employees had a contractual right to be represented by the union, and the employer was required to inform them of this right.¹⁹⁶ However, no contract provisions were cited.

Not all arbitration decisions are favorable to representation. Some arbitrators look solely to the contract. In one case, the employee was interviewed concerning thefts of company property. During the interview, the employee signed a statement concerning a company-owned lawnmower that had been removed from the plant, signed a document consenting to a general search of his home, and signed a document consenting to a polygraph test. The employee then talked with his attorney-brother who advised him not to allow the search unless the employer would limit it to a search for specified property. The employer would not agree and the consent was withdrawn. The employer refused to allow the attorney-brother or other witness to be present at a subsequent interview. When the employee refused to be interviewed, he was discharged. The arbitrator denied the grievance, relying on the terms of the collective bargaining agreement, which contained no provision for representation at such an interview.¹⁹⁷ The arbitrator also rejected the obvious analogies to constitutional law: "However, where these constitutional rights were raised in the cited authorities, they generally involved the sovereign

¹⁹⁵ *Id.* at 1260-61. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁹⁶ 50 Lab. Arb. at 1262.

¹⁹⁷ *Firestone Synthetic Rubber & Latex Co.*, 71-1 CCH Lab. Arb. Awards ¶ 8274, at 3959 (1971) (Rohman, Arbitrator): "Further, when the grievant repeated he wanted . . . his brother . . . to go in with him—the Company was not obligated to honor this request, as nowhere pursuant to the collective bargaining agreement is there a requirement for such procedure."

power—the State—rather than the private rights flowing from a Company-employee relationship.”¹⁹⁸

In *South Central Bell Telephone Co.*¹⁹⁹ two employees were denied their request for representation at investigatory interviews. The arbitrator rested his decision on the basis that the investigatory interview was not part of the grievance procedure and that the contract provided for union representation only in the grievance procedure. He argued that abandoning the grievance/pre-grievance distinction would increase, rather than decrease, the confusion over the representation issue.²⁰⁰ The arbitrator also rejected the notion that the request for representation was itself a grievance. “[T]he Union argues that after these oral grievances were presented, Union representation at the interview should have been permitted. This contention, however, is clearly an effort by the Union to pull itself up by its own bootstraps”²⁰¹

Commentators on the labor scene have expressed great concern about the need for fair play and due process in the discipline-grievance machinery. One summary states that

The first step in the process of according fair and just treatment to a person accused of wrong-doing is to find out *exactly* what it was that he did. . . . [I]t has also been the reason for most arbitration cases in the field of procedural due process.²⁰²

Another commentator states: “An essential part of any investigation is to give the employee affected full opportunity to explain his actions.”²⁰³ The need for obtaining full information and for giving the employee an opportunity to state his case highlights the potential problems involving the representative. The presence of a representative at the investigatory interview might be justified by the idea that it will protect the employee and it might enhance the efficiency of the investigation. If the employee tells an incomplete story the first time, he may have difficulty correcting it later and being believed.²⁰⁴ On matters of credibility, when the choice is either to believe the employee or to believe the supervisor, the supervisor

¹⁹⁸ *Id.*

¹⁹⁹ 59 Lab. Arb. 134 (1972) (Seward, Arbitrator).

²⁰⁰ *Id.* at 139.

²⁰¹ *Id.*

²⁰² Discipline: Procedural Due Process, CCH Lab. L. Rep. ¶ 58.572, at 84,212-13 (1970) (emphasis in the original).

²⁰³ S. Slichter, *supra* note 184, at 646.

²⁰⁴ Cf. Insubordination: The Safety Exception, CCH Lab. L. Rep. ¶ 58.545, at 84,136 (1969).

may receive the benefit of the doubt.²⁰⁵ The presence of a representative might help the employee with his story, thus helping management with its ultimate decision. However, the union representative might not, in fact, be able to be of assistance.²⁰⁶

On the other hand, it can be argued that if the more experienced lower level union representative does not have a complete grasp of the matter, it is even less likely that an individual employee will be competent to give best expression to his position. This is more likely to be true of the newer employee and it is the newer employee who is more likely to face a discharge situation.²⁰⁷

Some commentators have emphasized the desirability of maximum management-union participation in the investigatory process.²⁰⁸ The goal here is to maximize the efficiency of the system, as viewed by all of the participants—union, employer, and individual. "In effect a company must now proceed in discipline with the expectation that its action will be subjected to the most searching examination"²⁰⁹ The examination is most likely to occur in cases involving severe discipline. It is known that unions have a high rate of success in contesting grievances over the discipline issue, and the rate rises as the severity of the discipline increases.²¹⁰

The discipline-grievance system can be more profitably viewed in its total perspective, ranging from initial hiring and developing of plant rules through contract negotiation and arbitration. To achieve a successful grievance system, both the union and employer must be willing to expend as much energy in preventing disputes as in settling them.²¹¹ One commentator states: "It may well be advisable for unions and management to approach disciplinary problems with less emphasis on defending individuals or prosecuting individuals.

²⁰⁵ Alcoholism, Drinking and Intoxication, CCH Lab. L. Rep. ¶ 58,506, at 84,023 (1969).

²⁰⁶ J. Kuhn, *Bargaining in Grievance Settlement* 119 (1961):

Union officers and chief representatives in most of the locals estimate that not more than half and frequently as few as 25 per cent of all shop stewards or committeemen can without help competently advise workers, write up grievances, and process complaints.

²⁰⁷ Ross, *The Arbitration of Discharge Cases: What Happens After Reinstatement*, in *Critical Issues in Labor Arbitration: Proceedings of the Tenth Annual Meeting, National Academy of Arbitrators* 21, 29 (J. McKelvey ed. 1957).

²⁰⁸ O. Phelps, *supra* note 184, at 113-14:

[T]here is much to be said for letting the union share the responsibility throughout. . . . If the objective is equity, the two parties together can do a better job than working separately and in opposition. . . . There is no obvious reason why the same theory should not apply to prior notification and consultation, as well as to joint rule formulation and interpretation.

²⁰⁹ S. Slichter, *supra* note 184, at 646.

²¹⁰ O. Phelps, *supra* note 184, at 139.

²¹¹ J. Kuhn, *supra* note 206, at 42.

More attention to cooperation from a broader viewpoint will better serve the needs of both."²¹²

While the Board may feel inhibited in drawing analogies between the investigatory interview and other areas of the law,²¹³ arbitrators may not feel as restricted. Indeed, the arbitrator is likely to look to other areas of the law for analogies, and it is easy to find analogies which support the employee's request for representation, particularly if contract terms, past practices, and bargaining history permit. Decisions by other arbitrators are also available to serve as precedents if precedents are applicable. A great many factors enter into the arbitration process, however, and by the time the arbitrator is ready to make a decision, the multitude of variables unrelated to representation may play a predominant role in denying the right in a particular case. If the discipline-grievance system is viewed as a whole, the earlier a true picture of what actually happened can be developed, the better it will be for all parties concerned. There are no studies upon which to base a conclusion, but representation at some interviews might contribute to faster and more accurate fact-finding.

VI. OVERVIEW

A. Analogies

One of the strongest forces influencing the demand for the right of representation is the development of the right to counsel in other areas of the law, particularly in the criminal and administrative law areas. This right appears likely to continue to expand in the long run. As long as this trend continues, it is also probable that demands for analogous rights will be felt in the labor relations field. The more severe the discipline, the greater will be the demand, particularly in an economy that has significant unemployment. The right to representation in these other areas is not apt to be transferred in an unaltered state, but the NLRB's summary rejection of *Escobedo*²¹⁴ is unlikely to be the last opinion on the matter.

Procedural due process is an important part of labor relations. It is the basis of many arbitration decisions; it is important in the union's duty of fair representation; and it has been written into the union's relationship with its members. Its importance is also likely to expand, particularly when the reasons for denying the right turn on such questionable distinctions as that between a grievance and a pre-grievance situation, and between fact-finding and discipline in

²¹² Myers, *supra* note 183, at 75.

²¹³ See text at notes 122-23 *supra*.

²¹⁴ *Id.*

an interview in which confessions and detectives are used. It seems that the relationship will be one of analogy, rather than identity. The right to counsel found in other areas is likely to be, at most, a right to increased union representation. With a statutorily recognized exclusive representative, the ability or need to use a lawyer may be diminished.

B. *Relationship of the Union and Employer*

On the surface, it may seem that the right to union representation at the investigatory interview stage would result in a marked increase in union power and yet another intrusion into the employer's rights. The current law does not, however, make that result inevitable because the problem is still in its infancy. It seems more probable that, if it is generally granted, representation may not be an unmitigated boon to the unions. If representation is permitted or required, this development would seem to necessitate increased union responsibility. When the representative is giving advice to the employee or arguing on his behalf, it is likely that the employee and union may be bound by what is said and done. If the union's advice or actions are inappropriate, it will have to face the wrath of the voting membership. Greater union responsibility at the outset in a disciplinary matter may also make the use of subsequent steps in the grievance procedures more predictable, with the result that fewer actions may go to arbitration.

If the union obtains this new responsibility, it will probably become a new facet of the duty of fair representation. The union's exercise of its new responsibility would seemingly require that it perform in a positive fashion at the request of the employee and not on the basis of its own good faith evaluation of the matter. This action would be required because of the preliminary character of the proceedings. The union's representation would have to be measured against some objective standard prohibiting discrimination in representation and quite possibly requiring a minimum ability to advise the employee of the consequences of various paths of action. Further development of the right to representation should require an expansion of the duty of fair representation to cover the new situation.

C. *Unfair Labor Practice Approach*

The unfair labor practice approach to the problem appears to offer the greatest amount of flexibility in developing a right of representation. This would appear true not only because the Board can develop the needed criteria, but because the Board can also use the expanded doctrine of deferral to arbitration²¹⁵ to let the parties

²¹⁵ See *Collyer Insulated Wire*, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971).

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work out most of the details, except in the more outrageous cases. Through a combination of the unfair labor practice and deferral approaches, the various panels of the Board might be able to reach a common ground, giving greater certainty to the subject.

However the Board may approach the matter, greater attention will have to be given to section 9(a) and the character of the individual's rights. Section 9(a) is significant because it can be interpreted as giving the individual some rights as an individual that may transcend his rights under a contract.

The unfair labor practice approach may seem to be unduly harsh, particularly if the analogies to other areas of the law are rejected. In the total labor relations context, however, employers do not have unlimited authority to interrogate their employees. It is not uncommon to find that the employer is prevented from interrogating the employee in the recognition-representation election context. The employer has a variety of tools available to detect employee misconduct, including surveillance and trained detectives. Furthermore, portions of the activity described in the cases might well involve violations of the criminal law, with its panoply of detection techniques and personnel. Finally, a closer reading of some of the fact patterns may in the applicable cases point to violation of a particular section: 8(a)(3) (discrimination to encourage or discourage union membership) or section 8(a)(5) (failure to bargain in good faith) in aspects of the interrogation itself. If the interview becomes a critical stage by the use of prepared statements to be signed, and the union could not be present, the 8(a)(3) implications become more evident. If the union itself requests the right to representation the section 8(a)(5) implications become clearer.

Assuming that the unfair labor practice approach were to be finally adopted as the Board's position, it would be necessary to formulate guidelines on the exercise of the right. Based on what the Board has discussed, the following breakdown, based largely on the cases, represents at least some alternatives:

(1) Availability of the representative: anytime requested; reasonably available while accommodating the production efficiency goal; reasonably available with burden on employer to prove unavailability resulted from actual production needs.

(2) Employee request: employee must specifically request representation; employer gives employee choice to leave or to remain without representation; employer gives employee choice to leave or to remain without representation, but if he leaves *prima facie* case will be held against employee.

(3) Role of representative: representative will actively represent employee; representative will be a witness to the interrogation only.

(4) State of mind: employer is intending to seek only investigatory facts; employee reasonably fears adverse effects.

(5) Interrogator: interrogator with authority to discharge or discipline; interrogator without authority to discharge or discipline; interrogator who is a trained detective.

(6) Potential consequences: might affect employment or substantial working conditions; common infraction relating to performance or production which is not likely to have long term effect.

(7) Type of investigation: truly investigatory; goes beyond mere fact-finding.

(8) Manner of interrogation: questions; presenting statement for signature; presenting choice on use of lie detector; bargaining with employee.

(9) Need for information: employer without other facts: employer with established prima facie case.

(10) Employee response: reasonable response; insubordinate response.

(11) Character of person being interrogated: fluent in language; not fluent in language.

The Board has not selected critically among the various possibilities listed above, almost all of which have been mentioned at one time or another in Board decisions. Obviously the categories are not necessarily exclusive, but a breakdown is needed for analysis. Again assuming that the unfair labor practice approach were to be adopted by the Board, the following choices among the alternatives appear reasonable:

(1) Availability of the representative: Reasonable availability should be based on a comparison of the need for representation and production efficiency. The timing of the interrogation, by definition, usually lies with the employer; hence the employer would need to show that the call for interrogation was reasonably timed and the rules of availability versus production were reasonable. It is unrealistic to require a large employer to prove actual production interference if the request for representation were met. If the employer times the interview so that representation could not be made available, there would seem to be section 8(a)(5) considerations involved.

(2) Employee request: It is likely that the employer need not give the employee a "representation" warning. The union should bear the responsibility for informing the employee of his rights and if the employee does not exercise the right, then the problem lies between him and his union. Any warning that would be required would have to be phrased to apply to both union members and

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non-members to avoid discriminating between them. Since the mere request is protected, the warning appears pointless.

(3) Role of the representative: It is unlikely that the representative would remain mute. Whatever the rule, actual participation appears likely. Any bargaining with the employee would involve section 8(a)(5) considerations; hence the silence of the representative is probably not recommended.

(4) State of mind: This relates to other factors, but a rule looking to the state of mind of either party (*e.g.*, intend only fact-finding, personally fear adverse consequences) would be difficult to administer. The employee is always likely to feel in jeopardy either from the beginning or at some point during the interview. The "employer" is often several individuals at various steps of the cases, and divining whether the questions were intended to be aimed at eliciting only truly investigative facts is difficult. Instead, the Board should look at the actual questions used and at what the employer knew prior to the interview in light of the potential consequences.

(5) Interrogator: Whether the interrogator has the authority to discipline or discharge seems to be a nonproductive inquiry. Employers often use skilled detectives who can obtain maximum information. From the employee's perspective, the detective without authority to fire might be more menacing than the top personnel manager. Whether or not the interrogator had disciplinary powers, bargaining with the employee would be forbidden.

(6) Potential consequences: It seems reasonable to exclude investigatory interrogations not resulting in or potentially resulting in fairly immediate serious discipline or discharge. Suspensions involving more than a specified number of days might be a dividing line, as noted in the Civil Service regulations.²¹⁶ Interviews about routine performance or common infractions could be excluded. The Board has not sought to distinguish the potentially serious infraction from the less serious, but the distinction is reasonable and can be analogized to other areas of the law. While it is a difficult line to draw, it is not an impossible task. Clearly not every employee-employer contact would give rise to representation. However, looking to the potential consequences would accord with the Board's recent decisions (although not with its statements on employee's state of mind) and would accord with tests used in analogous areas of the law.

(7) Type of investigation: While the Board has tried to turn the question on fact-finding versus non-fact-finding, the distinction is, to

²¹⁶ See text at notes 177-82 *supra*.

say the least, unclear. If the seriousness of the potential outcome were a basis for distinction, it would eliminate the need for the vague fact-finding distinction.

(8) Manner of interrogation: Clearly, an interrogation which goes beyond questions to signing statements and using lie detectors warrants a response to a request for representation even if no other type of interrogation does. The questionable history of signing prepared confessions is not so encouraging as to think that representation would be an unwarranted intrusion into management's prerogatives. While looking to potential consequences might be used as the major test for representation, representation should be allowed in any interview in which the employer's representatives become unduly coercive. If the rationale of investigation is to find true facts, then coercion is not an acceptable or useful way of arriving at the truth. Coercion of the employee would also seem to have an impact on his section 7 rights to participate effectively in union activities.

(9) Need for information: The case for representation becomes much stronger where the employer already has a *prima facie* case against the employee. This accords with the Board's attempted distinction between investigatory and non-investigatory interviews. Where the employer has a case based on surveillance or other techniques, the investigatory interview loses its investigatory overtones and comes closer to confirming the discipline decision. The Board, however, has not looked at what the employer already knew, and has not looked at the actual need for an investigatory type of interview. It seems nevertheless to be an important distinction.

(10) Employee response: The Board has regularly held that requests or responses of an insubordinate character are not protected, and this seems a highly reasonable approach.

(11) Character of the person being interrogated: While these cases would be few in number, it would seem that where an employee has an obvious language difficulty or some other obvious difficulty the interrogator is under a greater obligation to balance the relationship. The Board has been silent on this point in the few cases which present it.

Two other factors which the Board has not considered in this context appear to be of additional significance:

(12) Character of the representative: It can be argued that a "friend" could be the representative, particularly if section 9(a) is relied upon. The representative should be either a neutral or an authorized union representative. Those who have considered this aspect of the representation issue have condemned the notion of

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allowing a rival union to be the representative.²¹⁷ The limitation of reasonable work rules might well be sufficient to restrict availability to the union representative, who presumably would have more flexibility to leave his station than would most other employees.

(13) Effect of representation: If the statute protects the request for representation, then both the employer and the employee also deserve protection. The actions of the employee based on the advice of the representative should be found generally to be a binding choice, and the statements of the employee would seem to be particularly credible when a representative is present. The employer's subsequent decisions could be more firmly based upon the fact of representation. By the same token, the union's duty of fair representation should be expanded to cover the interview situation. It would then be an extremely rare situation in which the union could refuse to honor the request, and the union would be bound by the decisions of the representatives obliging the union to fairly represent the employee. To date, the decisions have only related to the employer's duty to allow the representative to be present, but the Board will have to develop criteria on the union's responsibility. A one-sided doctrine would be destined to ultimate failure.

D. *Contract-Arbitration Approach*

The question of representation has theoretically been a question of contract for a long period of time. Some contracts deal with the right to representation implicitly, but the recent increase in cases suggests that the issue has not been generally resolved at the contract level. It is probable that the matter will come before the bargaining table with greater frequency as the courts expand the procedural protections of individuals in other areas.

The contract approach offers great potential to the parties to tailor the right of representation to their particular needs if agreement can be reached. Considerable leeway has been given as to the manner, time, method, pay status, and priorities of grievance resolution. Representation can be as broad or as narrow as circumstances require, and unnecessary infringement on employer or employee rights can be avoided. This being so, it nevertheless remains true that labor contracts are not characterized by great detail in grievance resolution provisions. By the same token, it must also be recognized that serious discipline cases are given the closest scrutiny in arbitration, and the arbitration forum is probably the most favorable forum for the recognition of procedural rights, including representation.

²¹⁷ See text at note 46 *supra*.

The arbitration approach is closely tied to the contract approach, since the availability of arbitration depends upon the terms of the contract. Arbitration can also be related to the unfair labor practice approach through the deferral criteria of the Board. Because of the interrelatedness of arbitration to the other approaches, it would seem possible that the greatest development of the nature of representation will be found in the decisions of arbitrators, rather than in the decisions of the Board.

To the extent that one can generalize about arbitrators' decisions, their concern with procedural due process seems to increase with the severity of the consequences. It is also likely that the arbitrator will look at the manner in which the representative performs his function, just as it was suggested that the union's duty of fair representation should become involved in the investigatory interview.

One could also argue that early union representation might define the issues more completely at an earlier stage and thus would involve important union decisions and investigations earlier. This process could have the effect of reducing the role of arbitration somewhat since the parties might reach agreement sooner. The effect would be similar, perhaps, to adding another step to the grievance process, albeit a preliminary step. On the other hand, case loads could increase solely on the question of whether a representative should have been present, or on the effect of the representative's actions during the interview. The decisions of arbitrators, based on such a great variety of factors, offer an agreed-upon forum in which the basic concepts of industrial due process can be developed.

VII. CONCLUSION

The question of the right of the employee to representation at the investigatory interview illustrates that the grievance process is in fact a continuing process. The process begins when the employee is hired and trained, and ends only after a final discharge. To separate out parts of the process and to accord rights based upon the label given to a segment of the process is unrealistic and ignores what the employee knows to be a continuous process.

Developments in analogous areas of law are characterized by an increasing sensitivity to the general question of representation. This sensitivity has resulted, in some measure, from a close scrutiny of the procedural fairness within the judicial or administrative processes in question. The NLRB, the courts, and the arbitrators might benefit from a closer weighing of the facts of the investigatory interview to determine whether the employee either needs or is

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entitled to representation. Some of the elements of such a scrutiny have been suggested above. An increased emphasis on individual rights, protected by the NLRA, might give a truer answer to the problem than the current tendency to view the matter as a struggle between management and the union. While a finding of a right to representation in appropriate cases might infringe somewhat upon current management prerogatives, the recognition of such a right should also require a higher degree of responsibility on the part of the union by way of the duty of fair representation. The union's potential responsibility has been almost ignored to date; yet recognition of this factor would put the problem in a much clearer focus.

The central point in this discussion is the individual employee. The union, upon certification, is the exclusive statutory representative of the majority, but the individual's identity is not lost in that process. It is usually not the union, but the individual who first raises the representation question. It is the individual who seeks representation, be it from the union or another source. In our increasingly dependent society, in the context of an employment situation in which collective action is the norm, it seems to be an anomaly to see the individual not merely standing alone, but being forced to stand alone on matters intimately related to his or her economic existence.