



1992

Labor Law - The Current Scope of Weingarten Rights in the Third Circuit

Stephen Donweber

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Stephen Donweber, *Labor Law - The Current Scope of Weingarten Rights in the Third Circuit*, 37 Vill. L. Rev. 1139 (1992).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol37/iss4/24>

This Issues in the Third Circuit is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

LABOR LAW—THE CURRENT SCOPE OF *WEINGARTEN* RIGHTS IN THE
THIRD CIRCUIT:

NLRB v. New Jersey Bell Telephone Company (1991)

I. INTRODUCTION

In *NLRB v. Weingarten, Inc.*,¹ the Supreme Court of the United States stated that section 7 of the National Labor Relations Act (NLRA) “creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline.”² The *Weingarten* Court stated that this right is only triggered when the “employee requests representation”³ and “reasonably believes the investigation will result in disciplinary action.”⁴

Under *Weingarten*, the circuit courts have seldom denied an employee’s statutory right to union representation upon request during a disciplinary interview.⁵ Neither the Supreme Court⁶ nor the majority of circuit courts, however, have addressed the issue of what form the re-

1. 420 U.S. 251 (1975). For a discussion of *Weingarten*, see *infra* notes 44-51 and accompanying text.

2. *Weingarten*, 420 U.S. at 256. The Court was approving a National Labor Relations Board construction of § 7 of the NLRA first announced in *Quality Mfg. Co.*, 195 N.L.R.B. 197 (1972) and refined in *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972). *Weingarten*, 420 U.S. at 256.

3. *Weingarten*, 420 U.S. at 257. In *Weingarten*, the employee had asked repeatedly for a union representative to be present. *Id.* at 254.

4. *Id.* at 257. The Court emphasized that “reasonable belief” would be measured by objective standards and not by probing an employee’s subjective motivations or state of mind. *Id.* at 257 n.5.

5. See, e.g., *Slaughter v. NLRB*, 794 F.2d 120, 128 (3d Cir. 1986) (permitting interpretation of § 7 of the NLRA as guaranteeing nonunion employee right to representation at investigatory interview); *Pacific Tel. & Tel. Co. v. NLRB*, 711 F.2d 134, 137 (9th Cir. 1983) (holding that *Weingarten* rights under § 7 of NLRA include right to know purpose of interview and right to pre-interview conference with union representative); *NLRB v. Kahn’s & Co.*, 694 F.2d 1070, 1071 (6th Cir. 1982) (finding unfair labor practice to refuse employee’s request to have union steward present during interview leading to employee’s discharge); *IRS v. Federal Labor Relations Auth.*, 671 F.2d 560, 562 (D.C. Cir. 1982) (finding unfair labor practice for IRS to deny employee request for union representation when that employee reasonably fears discipline may result, even though that employee is not subject of investigation). *But cf.* *Johnson v. Express One Int’l, Inc.*, 944 F.2d 247, 251-52 (5th Cir. 1991) (holding lack of “mutual aid or protection” language in Railway Labor Act means that no right exists under Act for nonunion employee to have co-worker present during investigatory interview when no elected bargaining unit exists); *Slaughter v. NLRB*, 876 F.2d 11, 12-13 (3d Cir. 1989) (noting that in non-union setting, reasonable to find employee’s *Weingarten* rights do not extend to request for presence of fellow employee of own choosing in investigatory meeting).

6. See *Weingarten*, 420 U.S. at 257. The *Weingarten* Court simply stated that “the right arises only in situations where the employee requests representation.

quest must take.⁷ Relying on *NLRB v. Illinois Bell Telephone Co.*,⁸ the Third Circuit, in *NLRB v. New Jersey Bell Telephone Co.*,⁹ determined that an employee's question as to whether a union representative should be present at a meeting is a request for such representation and is sufficient to trigger that employee's rights under *Weingarten*.¹⁰

In *New Jersey Bell*, the Third Circuit focused on three major issues. First, the court reiterated the proper standard for reviewing decisions of the National Labor Relations Board (NLRB).¹¹ Second, the court determined whether an employee's question as to the necessity or desirability of a union representative at a meeting is sufficient to trigger that employee's *Weingarten* rights.¹² Third, the court determined whether New Jersey Bell's refusal to release certain information to a bargaining representative fell within the *Anheuser-Busch, Inc.*¹³ exception to the *NLRB v. Acme Industrial Co.*¹⁴ interpretation of section 8(a)(5) of the NLRA.¹⁵

This Casebrief will examine the reasoning in *New Jersey Bell* and will

In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." *Id.*

7. See *NLRB v. Illinois Bell Tel. Co.*, 674 F.2d 618, 621 (7th Cir. 1982) (holding employee question as to whether union representative should be present during interview to be adequate request to trigger *Weingarten*); *Lennox Indus., Inc. v. NLRB*, 637 F.2d 340, 345 (5th Cir.) (finding that single initial request for union representation made to supervisor is sufficient for multiple meetings when meetings are part of "single, interrelated episode" and supervisor attends all meetings, even though company official conducting meetings is unaware of initial request), *cert. denied*, 452 U.S. 963 (1981).

8. 674 F.2d 618 (7th Cir. 1982). In *Illinois Bell*, the Seventh Circuit held that an employee's question, "Should I have someone in here with me, someone from the union?" was sufficiently direct to trigger the employee's *Weingarten* rights. *Id.* at 621.

9. 936 F.2d 144 (3d Cir. 1991).

10. *Id.* at 149. For a discussion of the facts and the specific query in *New Jersey Bell*, see *infra* notes 16-29 and accompanying text.

11. *New Jersey Bell*, 936 F.2d at 146-48. For a discussion of the standard of review, see *infra* notes 30-40 and accompanying text.

12. *New Jersey Bell*, 936 F.2d at 148-50. For a discussion of the right to union representation, see *supra* notes 1-7 and accompanying text, and *infra* notes 41-62 and accompanying text.

13. 237 N.L.R.B. 982 (1978). The NLRB stated: "We do not believe that the principle set forth in *Acme* [sic] and related cases dealing with the statutory obligation to furnish information may properly be extended so as to require an employer to provide a union with [witness] statements obtained during the course of an employer's investigation of employee misconduct." *Id.* at 984. For a discussion of *Anheuser-Busch*, see *infra* notes 67-69 and accompanying text.

14. 385 U.S. 432 (1967). For a discussion of *Acme*, see *infra* notes 64-66 and accompanying text.

15. *New Jersey Bell*, 936 F.2d at 150-53. In *Acme*, the Supreme Court confirmed a union's statutory right to request and receive certain information from a company during a grievance process when the information appears necessary to the proper performance of the union's representative duties. *Acme*, 385 U.S. at 435-36.

explain the current scope of an employee's *Weingarten* rights in the Third Circuit.

II. CASE ANALYSIS

A. *Facts*

Elizabeth Lynch, an employee of New Jersey Bell, was investigated for the alleged unauthorized access and disclosure of an unlisted telephone number.¹⁶ Two security representatives interviewed Lynch concerning this matter.¹⁷ At the beginning of the interview, Lynch asked whether she should have a union representative present.¹⁸ Lorraine Vasilik, one of the security representatives, told Lynch that she should see what the interview was about first and then make her decision regarding the union representative.¹⁹ After disclosing the purpose of the interview, the security representative did not ask Lynch whether she then wanted to have a union representative present.²⁰ The security representative simply moved on and began to present Lynch with evidence of the alleged accessing of the account.²¹ Even though she had denied disclosing the unlisted number, Lynch signed a confession at the end of the interview, apparently without realizing that it included an admission to the disclosure.²² Five days after the interview, the customer complained again. Lynch was not informed of the second complaint.²³ The complaint became part of a security report which formed the basis of a memo to Bell's Director of Business Services.²⁴ On the basis of this memo, Lynch was suspended for five days.²⁵

16. *New Jersey Bell*, 936 F.2d at 145. A customer had complained about calls to her unlisted number. *Id.* A security representative at New Jersey Bell found that Elizabeth Lynch had accessed that customer's account without authorization. *Id.*

17. *Id.*

18. *Id.* According to Carmine Inteso, one of the security representatives, Lynch's request occurred as soon as the two security representatives had introduced themselves. *Id.* at 145 n.1.

19. *Id.* at 145.

20. *Id.* at 145-46. When Vasilik finished explaining the purpose of the interview, she asked Lynch whether she could tape the meeting and then proceeded immediately with the investigation. *Id.* at 146.

21. *Id.* After seeing the evidence in the form of computer records, Lynch admitted accessing the account. *Id.*

22. *Id.* The confession was an admission to accessing the account *and* disclosing the unlisted number. *Id.*

23. *Id.* The memo was written by Lynch's manager who had relied on Vasilik's security report. *Id.* The customer alleged that Lynch had called her, told her about the interview and that she, Lynch, was going to lose her job and be criminally prosecuted. *New Jersey Bell Tel. Co.*, 135 L.R.R.M. (BNA) (300 N.L.R.B. No. 6) 1241, 1241 (Sept. 28, 1990). Lynch allegedly stated to the customer that she, the customer, could be sued for defamation of character. *Id.*

24. *New Jersey Bell*, 936 F.2d at 146.

25. *Id.* Bell's Director of Business Services decided the length of the suspension and Lynch's manager imposed it. *Id.*

After the imposition of the suspension, Lynch's union filed a grievance on her behalf.²⁶ The union was denied access to the security report and to certain portions of the evidence against Lynch.²⁷ Following repeated denials of access to the information, the union filed charges of unfair labor practices with the NLRB under sections 8(a)(1) and 8(a)(5) of the NLRA.²⁸ The Board concluded that New Jersey Bell had engaged in unfair labor practices by violating Lynch's right to have a union representative present and by withholding the requested information.²⁹

B. *The Third Circuit's Analysis*

1. *Standard of Review*

The Third Circuit first determined the appropriate standard of review for the NLRB's decision that New Jersey Bell had engaged in unfair labor practices by failing to provide union representation and withhold-

26. *Id.* Lynch's union, Communications Workers of America (CWA), was an intervenor in this appeal. *Id.* at 146 & n.4.

27. *Id.* at 146. The union requested copies of the security report and the computer records. *Id.* Lynch's manager at New Jersey Bell, Anne Tovey, withheld part of the computer records on the basis that they were irrelevant and the entire security report on the basis that it was confidential. *Id.*

28. *Id.* Section 7 of the NLRA creates the statutory right to union representation to receive such information upon request. *NLRB v. Weingarten*, 420 U.S. 251, 256 (1975). The denial of this right violates section 8(a)(1) of the NLRA. *Id.* at 257 (quoting *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972)). Section 7 of the NLRA reads in full:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1988).

Section 8(a)(1) of the NLRA reads in full:

(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 157 of this title[.]

Id. § 158(a)(1).

Further, a company will violate its statutory obligation to bargain collectively under section 8(a)(5) of the NLRA if it refuses "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967). Section 8(a)(5) of the NLRA reads in full:

(a) It shall be an unfair labor practice for an employer—

...
(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(a)(5) (1988).

29. *New Jersey Bell*, 936 F.2d at 146; *New Jersey Bell Tel. Co.*, 135 L.R.R.M. (BNA) (300 N.L.R.B. No. 6) 1241 (Sept. 28, 1990).

ing information.³⁰ The *New Jersey Bell* court relied on the United States Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³¹ The Court in *Chevron* outlined a two-part analysis for federal court review of an agency's interpretation of the statute it administers.³² The Third Circuit, using *NLRB v. United Food & Commercial Workers Union*, added a third prong to the analysis.³³ First "is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . ." ³⁴ The court will follow the express language of the statute and decide on the agency's ruling accordingly.³⁵ Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."³⁶ In other words, "[w]hen the Board's con-

30. *New Jersey Bell*, 936 F.2d at 146. The Board maintained that the issue of Lynch's request for union representation was purely a question of fact and the decision should be upheld if it is supported by "substantial evidence on the record as a whole." *Id.* at 146-47 (quoting 29 U.S.C. § 160(e) (1988)). The Third Circuit, however, held that the issue was one of mixed law and fact. *Id.* at 147. The Third Circuit stated that the question of whether Lynch actually asked for union representation was one of fact and to be upheld if supported by "substantial evidence." *Id.* On the other hand, the question of whether Lynch's query was sufficient to trigger her rights under *Weingarten* was a question of law concerning the construction of the NLRA to be examined using the test outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Third Circuit also determined that the *Chevron* test was applicable to the second issue regarding the Board's construction of the NLRA with respect to Bell's withholding of information. *New Jersey Bell*, 936 F.2d at 147. For a discussion of *Chevron*, see *infra* notes 31-32 & 34-36 and accompanying text.

31. 467 U.S. 837 (1984). *Chevron* involved the Environmental Protection Agency's construction of the Clean Air Act Amendments of 1977. *Id.* at 839-40. The Third Circuit invoked the Clean Air Act case because, while *New Jersey Bell* clearly did not involve the Clean Air Act, *Chevron* sets forth "the general principles to be applied when federal courts review an agency's interpretation of the statute it implements." *New Jersey Bell*, 936 F.2d at 147 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 663 (1990)). In *New Jersey Bell*, the court was reviewing the Board's interpretation of the NLRA. *Id.*

32. *Chevron*, 467 U.S. at 842-43.

33. *New Jersey Bell*, 936 F.2d at 147. The Third Circuit cited the *United Food* Court as stating: "[W]e have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute." *Id.* (quoting *United Food*, 484 U.S. 112, 123 (1987)).

34. *Chevron*, 467 U.S. at 842. "[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. The Court added in a footnote: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

35. *Id.* at 842-43.

36. *Id.* at 843. The Supreme Court stated:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than

struction of the Act is one permissible interpretation out of many, this court is not free to substitute its preference for that of the Board."³⁷ Finally, if the NLRB's interpretation is a permissible one, the court must determine whether that interpretation is consistent with past Board decisions on the matter.³⁸

In *New Jersey Bell*, the Third Circuit found that the NLRB's actions did not directly conflict with congressional intent or the express language of the statute.³⁹ Therefore, the court analyzed the Board's decision to determine whether it was a permissible construction of the NLRA.⁴⁰

2. Requirement of Union Representation

The second, and most important, issue the Third Circuit faced was whether New Jersey Bell committed an unfair labor practice by failing to grant Lynch's apparent request for union representation.⁴¹ In order to make this determination, the court relied on two cases: *NLRB v. Weingarten, Inc.*⁴² and *NLRB v. Illinois Bell Telephone Co.*⁴³

In *Weingarten*, the Supreme Court upheld the NLRB's construction of section 7 of the NLRA.⁴⁴ This construction created a "statutory right in an employee to refuse to submit without union representation to an interview which he [or she] reasonably fears may result in his [or her] discipline."⁴⁵ In *Weingarten*, a store employee had been accused of stealing.⁴⁶ During the investigative interview, the employee asked several

explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44.

37. *New Jersey Bell*, 936 F.2d at 147.

38. *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987). In *United Food*, the Supreme Court stated: "We also consider the consistency with which an agency interpretation has been applied, and whether the interpretation was contemporaneous with the enactment of the statute being construed." *Id.*

39. *New Jersey Bell*, 936 F.2d at 148. New Jersey Bell did not contend that the NLRB's findings conflicted with congressional intent or with the text of the NLRA. *Id.* The Third Circuit, therefore, did not address that question and proceeded to the second prong of the *Chevron* test. *Id.* For the text of the relevant portions of the NLRA, see *supra* note 28.

40. *New Jersey Bell*, 936 F.2d at 148. The Third Circuit reviewed the Board's findings to see "whether the Board implemented a permissible interpretation of the Act, and [to ensure] consistency with prior Board practice." *Id.*

41. *Id.*

42. 420 U.S. 251 (1975).

43. 674 F.2d 618 (7th Cir. 1982).

44. *Weingarten*, 420 U.S. at 260. For the text of § 7 of the NLRA (29 U.S.C. § 157), see *supra* note 28.

45. *Weingarten*, 420 U.S. at 256.

46. *Id.* at 254. Employee Collins had been accused of stealing \$1.98 worth of chicken. *Id.* After Collins' explanation for the erroneous interpretation of

times for the presence of the shop steward or some other union representative.⁴⁷ The store manager denied each request.⁴⁸ The employee's union subsequently filed charges of unfair labor practices with the NLRB.⁴⁹

Nevertheless, the *Weingarten* court emphasized that the right to a union representative is limited. First, the employee must request such representation.⁵⁰ Second, the right only arises in situations where the employee reasonably believes that disciplinary action will result from the interview.⁵¹

The threshold question, therefore, is whether the "employee expressed some desire to have a union representative present during the interview."⁵² The issue in *New Jersey Bell* was whether Lynch's query as to the desirability or necessity of the presence of a union representative

her actions had "checked out" and the store manager had apologized, Collins started to cry and said that the only thing that she had received for free from the store was lunch. *Id.* at 255. Collins had apparently been under the impression that free lunches were store policy. *Id.* The manager thought otherwise, and along with a store investigator, began to interrogate Collins. *Id.*

47. *Id.* at 254-55. Collins asked for union representation both before and after breaking into tears and revealing her practice of taking free lunches. *Id.*

48. *Id.* The Court noted:

The denial of this right [to have a union representative present] has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act [NLRA]. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy.

Id. at 257 (quoting *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972)).

49. *Id.* at 256. The NLRB found that almost everyone in employee Collins' department, including the manager of the department, took free lunches from the store. *Id.* at 255. In fact, the company headquarters actually told the investigator interrogating Collins that it was uncertain as to the policy regarding free lunches. *Id.* at 255-56. At that point, the investigator terminated the interview and told Collins not to tell anyone about it. *Id.* at 256. Nevertheless, Collins reported the incident to her union. *Id.*

50. *Id.* at 257. Even though there is a statutory right to union representation, "the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." *Id.*

51. *Id.* The Court noted:

We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instruction or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.

Id. at 257-58 (quoting *Quality Mfg. Co.*, 195 N.L.R.B. 197, 199 (1972)).

52. *NLRB v. New Jersey Bell Tel. Co.*, 936 F.2d 144, 148 (3d Cir. 1991). According to the testimony of the two security representatives, the first words employee Lynch uttered in the interview were concerning whether she should have union representation. *Id.* at 149.

at her interview was a request sufficient to trigger her rights under *Weingarten*.⁵³

To answer this question, the Third Circuit relied on *NLRB v. Illinois Bell Telephone Co.*⁵⁴ In *Illinois Bell*, an employee was being investigated for misuse of toll call privileges.⁵⁵ After learning the purpose of the interview, the employee asked, "Should I have someone in here with me, someone from the union?"⁵⁶ The security agent replied, "No, it is not necessary as long as you are honest with me."⁵⁷ In the proceeding before the NLRB, the company stated that it had not denied the employee the right to union representation because the employee had never requested it.⁵⁸ The Seventh Circuit held that such a query is sufficient to trigger an employee's rights under *Weingarten* because the "question . . . put [the security agent] on notice of [the employee's] interest in having 'someone from the union' present during the interrogation."⁵⁹

Based upon *Illinois Bell*, the Third Circuit in *New Jersey Bell* held that Lynch's query had been sufficient to trigger her *Weingarten* rights.⁶⁰ The Third Circuit stated:

Once on notice that an employee desires representation, the company acts at its peril if it does not exercise one of three options: grant the employee's request for a representative, give the employee the option of either continuing the interview

53. *Id.* at 148. In *Weingarten*, employee Collins had asked specifically and repeatedly for the presence of a union representative. *Weingarten*, 420 U.S. at 254-55. In *New Jersey Bell*, employee Lynch did not specifically request representation, she only asked whether a union representative should be there. *New Jersey Bell*, 936 F.2d at 145. Furthermore, she only made this inquiry once. *Id.*

54. 674 F.2d 618 (7th Cir. 1982).

55. *Id.* at 620-21. The investigation concerned the alleged reduction of time charges on long distance calls made from a local prison. *Id.* at 620.

56. *Id.* at 621.

57. *Id.*

58. *Id.* In order for an employee's *Weingarten* rights to be triggered, the employee must request union representation. *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 257 (1975).

59. *Illinois Bell*, 674 F.2d at 621-22.

60. *New Jersey Bell*, 936 F.2d at 149. The Administrative Law Judge had concluded:

Thus, [security representative] Vasilik in my view misled [employee] Lynch into believing that once the purpose of the interview was explained to her, she would have an opportunity to decide whether she wants representation, before the interview proceeded. Not only did Vasilik not ask Lynch at that point whether she now wished union representation or not, but charged ahead without even a hesitation to interrogate Lynch about matters under investigation. . . . Vasilik instead proceeded with the interview, without as much as a pause to permit Lynch to make a decision, that Vasilik had suggested to her that she would be able to make.

Id. (quoting Appendix at 36a-37a, *New Jersey Bell* (Nos. 90-3857, 91-3060) (opinion of Administration Law Judge)).

without representation or foregoing the interview, or, terminate the interview.⁶¹

Since New Jersey Bell had notice of Lynch's desire for representation and did none of the above, the company committed an unfair labor practice in violation of the NLRA.⁶²

3. *Withholding of Information*

The third issue the court faced was whether the NLRB's finding that New Jersey Bell violated the NLRA by withholding certain information was a "permissible construction of the statute."⁶³

In *NLRB v. Acme Industrial Co.*,⁶⁴ the Supreme Court stated that "[t]here can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties."⁶⁵ The Court further noted that this disclosure extended to grievances because, otherwise, a union would be forced "to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim."⁶⁶

61. *Id.* at 148-49.

62. *Id.* at 149. Under the applicable standard of review, the court must also determine that the ruling of the Board is consistent with past decisions. For a discussion of the standard for reviewing the NLRB's decisions, see *supra* note 38 and accompanying text. The Third Circuit determined that "[t]he Board has consistently held that a request must only be sufficient to put the employer on notice that the employee desires representation." *New Jersey Bell*, 936 F.2d at 149; see also *Montgomery Ward & Co.*, 273 N.L.R.B. 1226, 1227 (1984) (holding that request for statutorily ineligible *Weingarten* representative is still sufficient request because it puts employer on notice that employee desires representation); *Southwestern Bell Tel. Co.*, 227 N.L.R.B. 1223, 1223 (1977) (holding that statement "I would like to have someone there that could explain to me what was happening" is sufficient request to trigger rights under *Weingarten*).

63. *New Jersey Bell*, 936 F.2d at 150. The Third Circuit characterized a company's duty to provide information as "part of its statutory obligation to bargain collectively." *Id.*

64. 385 U.S. 432 (1967). In *Acme*, a union's collective bargaining agreement provided certain safeguards for workers in the event that equipment and jobs were moved out of the plant. *Id.* at 433-34. When the union discovered that equipment was being moved from the plant, it requested certain information about this activity. *Id.* at 434. The company claimed that no violation of the collective bargaining agreement had occurred and, therefore, they refused to disclose the information. *Id.* at 434-35. In response, the union filed unfair labor practices charges with the NLRB. *Id.* at 435.

65. *Id.* at 435-36. The NLRB had found in this case that the information was "necessary in order to enable the Union to evaluate intelligently the grievances filed." *Id.* at 435.

66. *Id.* at 438. The actual issue in this case had been whether the "Board must await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights." *Id.* at 436. The Court concluded that the Board's action of enforcing the rights of the union aided arbitration because "[a]rbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims." *Id.* at 438.

New Jersey Bell argued that the information in this case was exempted from disclosure because of the exception to *Acme* outlined in *Anheuser-Busch*.⁶⁷ In *Anheuser-Busch*, the Board held "that the duty to provide a union with information related to a pending grievance does not extend to witness statements."⁶⁸ The Third Circuit, however, indicated that the NLRB has strictly limited that holding to witness statements.⁶⁹ Further, the court found persuasive the NLRB's holding in *United Technologies Corp.*,⁷⁰ in which the Board "ordered the disclosure of all inter-

67. *New Jersey Bell*, 936 F.2d at 150-51; see *Anheuser-Busch*, 237 N.L.R.B. 982 (1978). In *Anheuser-Busch*, employee Roberts had been involved in several altercations with other employees at work and had been suspended. *Id.* at 982. He filed a grievance alleging unjust suspension. *Id.* During the investigation, the company asked the employees that Roberts had had altercations with to put their versions of the stories in writing. *Id.* At the grievance hearing, the union requested copies of those statements. *Id.* The company refused, saying that the names of the witnesses were confidential. *Id.* The Board held that there was no statutory obligation to disclose witness statements because such statements "are fundamentally different from the types of information contemplated in *Acme* [sic], and disclosure of witness statements involves critical considerations which do not apply to requests for other types of information." *Id.* at 984. Specifically, exemption of witness statements from disclosure is intended to prevent coercion or intimidation of witnesses into changing their testimony or refusing to testify. *New Jersey Bell*, 936 F.2d at 150-51 & n.9 (discussing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-40 (1978), as foundation of *Anheuser-Busch* holding).

68. *New Jersey Bell*, 936 F.2d at 150 (discussing *Anheuser-Busch, Inc.*, 237 N.L.R.B. 982 (1978)).

69. *Id.* at 151. The Third Circuit commented that "[t]he Board has refused to extend the *Anheuser-Busch* holding beyond witness statements. . . . Notably, *Anheuser-Busch* specifically left intact a prior holding that lists of witnesses' names and addresses had to be released to employee representatives." *Id.*; see also *Pennsylvania Power & Light Co.*, 136 L.R.R.M. (BNA) (301 N.L.R.B. No. 138) 1225, 1228-29 (Feb. 28, 1991) (holding that while protecting informant's identity, company must disclose summary of informant's statement in sufficient detail for union to determine basis for company's suspicions regarding employee); *GHR Energy Corp.*, 294 N.L.R.B. No. 76, 1989 NLRB LEXIS 402, at *167-68 (June 13, 1989) (holding that company had duty to provide union with information regarding alleged sabotage including names of witnesses of alleged sabotage, but excluding witness statements).

70. 277 N.L.R.B. 584 (1985). In *United Technologies*, employee Lovely was suspended and discharged for alleged gross negligence in the performance of his assigned duties as an x-ray film reader. *Id.* at 584. The union filed grievances with respect to these disciplinary actions. *Id.* During the proceedings, the company refused to disclose certain information requested by the union. *Id.* at 585. One piece of information was an internal security report which the company refused to disclose on the ground that it contained witness statements. *Id.* The NLRB concluded that because the alleged witness statements in the report were actually compilations of data by the company's own technical experts and because they formed the basis for the disciplinary action against Lovely, they should have been released. *Id.* The NLRB distinguished *Anheuser-Busch* on the grounds that the statements in that case had

nothing to do with technical data and the rationale . . . [in *Anheuser-Busch*] would not, in any event, cover the situation of this case. In the present case, the identity of the persons who made the reports—or, as the Respondent would have it, who gave the statements—is already

nal security investigative reports concerning alleged employee negligence."⁷¹ The Third Circuit acknowledged factual differences between *United Technologies* and *New Jersey Bell*,⁷² but stated that "*United Technologies* stands for the broader proposition that investigative reports, relied upon by management when disciplining an employee, are generally discoverable."⁷³ Consequently, the Third Circuit ruled that the Board's finding of a violation based on the withheld information was a permissible interpretation of the NLRA.⁷⁴

III. CONCLUSION

In reaching its conclusions in *New Jersey Bell*, the Third Circuit relied on the proposition that if the NLRB makes a reasonable and permissible interpretation of a statute, that interpretation will be upheld absent contrary congressional intent.⁷⁵ Consistent with this standard, the Third Circuit upheld the NLRB's ruling that a mere query by an employee about whether a union representative will be necessary or desirable triggers the employee's *Weingarten* rights.⁷⁶ Furthermore, the Third Circuit upheld the NLRB's ruling that disclosure of certain information in a disciplinary proceeding is required under *Acme* despite the *Anheuser-Busch* witness-statements exception.⁷⁷

known and the nature of the information contained in them is such that their disclosure cannot result in recantation or modification of the facts stated in them by reason of intimidation of the investigators who furnished the statements or anyone who might be named in their statements. They did not investigate incidents. They investigated pieces of film. No amount of intimidation can change what is on that film.

Id. at 589.

71. *New Jersey Bell*, 936 F.2d at 151 (discussing *United Technologies Corp.*, 277 N.L.R.B. 584 (1985)). For a discussion of the Board's reasoning in *United Technologies*, see *supra* note 70.

72. *New Jersey Bell*, 936 F.2d at 151. The security reports in *United Technologies* involved technical data regarding the employee's exercise of a duty of care in reading x-ray film to inspect aircraft engine parts for defects. *United Technologies*, 277 N.L.R.B. at 589.

73. *New Jersey Bell*, 936 F.2d at 151. "It would be difficult for an employee's representative to be effective without access to the facts underlying management's disciplinary decision." *Id.*

74. *Id.* at 152. There was a dissent on the NLRB as to the disclosure issue. *Id.* The Third Circuit noted that "neither view conflicts with Congressional intent as expressed in the NLRA. It is in this twilight zone of administrative discretion where we believe that the Board should be affirmed under either the view of the majority or of the dissent." *Id.*

75. *Id.* at 147, 153. The Board's interpretation must also be compatible with prior Board decisions in order to be upheld. *Id.* at 153. For a discussion of the determination of compatibility with prior decisions, see *supra* notes 38 & 62 and accompanying text.

76. *New Jersey Bell*, 936 F.2d at 150.

77. *Id.* at 153. The Third Circuit determined that the duty to balance the interests between the right to know certain information and the problem of harassment of witnesses is a duty delegated to the wisdom and expertise of the

These rulings are important for two major reasons. First, the Third Circuit has extended the triggering of *Weingarten* rights to include mere queries by employees as to the necessity or desirability of union representation.⁷⁸ Once such a query is made, the employer is deemed to be on notice that the employer desires union representation.⁷⁹ At that point, an employer can either allow union representation, give the employee the choice of continuing the interview without a representative or end the interview.⁸⁰ If an employer takes any other action, that employer is risking a violation of the NLRA.⁸¹ Second, an employer's disclosure obligations in a grievance or disciplinary proceeding are now expanded. The witness-statements exception outlined in *Anheuser-Busch*⁸² will be narrowly construed in the Third Circuit, and investigative reports used in disciplinary action will generally be discoverable.⁸³

Stephen Donweber

NLRB by Congress. *Id.* Therefore, as long as the result reached by the Board is reasonable, it will be upheld. *Id.*

78. *Id.* at 148-50.

79. *Id.* at 148; see *NLRB v. Illinois Bell Tel. Co.*, 674 F.2d 618, 622 (7th Cir. 1982). For a discussion of *Illinois Bell*, see *supra* notes 54-59 and accompanying text.

80. *New Jersey Bell*, 936 F.2d at 148-49.

81. *Id.* at 148.

82. For a discussion of the exception, see *supra* notes 67-68 and accompanying text.

83. *New Jersey Bell*, 936 F.2d at 151.