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Some Personal Observations About *Values and Assumptions:* What Can Jim Teach Wilma and the Board?

ROBERT J. RABIN†

I came to know Jim Atleson when I worked with him on the first edition of our widely unknown casebook, *Collective Bargaining in Private Employment*.¹ It was a joy to work with Jim. We discovered that the geographical center for the five authors was New York City, and so we stayed at the Algonquin Hotel and enjoyed restaurants and plays while we debated the contours of the book.

Jim's unique contribution to the casebook was the opening historical section.² We had some of the classic cases on criminal conspiracy and labor injunctions, excerpts from several of the best labor historians, and historical notes prepared by Jim himself.³ In those materials, Jim teased out some of the values that animated the courts' decisions,⁴

† Professor of Law at Syracuse University College of Law. I was a co-author with Professor Atleson and others of two editions of *Collective Bargaining in Private Employment*, published by BNA Books in 1978 and 1984. I thank Camille M. Castro, about to become a third year student at the College of Law, for her superb research assistance and constant encouragement and good cheer in helping prepare this article.

1. JAMES B. ATLESON, ROBERT J. RABIN, GEORGE SCHATZKI, HERBERT L. SHERMAN, JR. & EILEEN SILVERSTEIN, *LABOR RELATIONS AND SOCIAL PROBLEMS: COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT* (1st ed. 1978) [hereinafter ATLESON ET AL.].

2. *See id.* at 1-45.

3. *See id.* The cases included *Plant v. Woods*, 57 N.E. 1011 (Mass. 1900), and a summary of the Philadelphia Cordwainers case. *Commonwealth v. Pullis*, (Phila. Mayor's Ct. 1806), *reprinted in* 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-248 (John R. Common et al. eds., 1958). Also, the readings included excerpts from Walter Nelles, *The First American Labor Case*, 41 YALE L.J. 165 (1931), and Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825 (1926), as well as generous notes prepared by Jim, drawing upon the work of labor historians.

4. ATLESON ET AL., *supra* note 1, at 21 (discussing *Vegelehn v. Guntner*, 44 N.E. 1077 (Mass. 1896)).

presaging his work in *Values and Assumptions*.⁵ He exposed those opinions for what they really were—not expressions of established doctrine, but reflections of the values of common law judges.⁶ Only with that historical background could students understand the later statutory enactments that are the heart of the casebook and a course on labor law.

At about the time I was invited to participate in this conference, I had just completed an arbitration award that had been deferred to arbitration by the National Labor Relations Board (NLRB or Board).⁷ Under the deferral doctrine,⁸ if the union files a charge and the Board determines that the issue may be resolved through arbitration, the Board directs the parties to try to resolve the dispute through that machinery.⁹ If the parties agree to this procedure, I must send the NLRB a copy of my award so that the Board can make sure it is not “repugnant” to the National Labor Relations Act (the Act), under the Board’s current standard of review.¹⁰

In my particular case, the company had unilaterally banned smoking on all company property, following years of a practice in which they consistently negotiated the issue with the union. As a result of the new rule, employees had to trek across the parking lot to a public highway to have a smoke. This took up most of the break time, and, in the long and harsh winter months of upstate New York, could be quite a hardship.

5. JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983).

6. See ATLESON ET AL., *supra* note 1, at 1-45.

7. See *IBEW v. N.Y. State Elec. & Gas Corp.*, No. 3-CA-26507 (Dec. 7, 2007) (Rabin, Arb.) (unreported) (on file with the author).

8. The original deferral doctrine is from *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955) (stating that the proceedings in arbitration must appear to be fair and regular, the parties must agree to be bound by the decision of the arbitrator, and the decision of the arbitrator must not be “clearly repugnant” to the purposes and the policies of the Act). The court also articulated a fourth part of the doctrine in *Raytheon Co.*, 140 N.L.R.B. 883, 884-86 (1963) (stating that the arbitrator must consider and decide the unfair labor practice issue).

9. *Raytheon*, 140 N.L.R.B. at 884-86.

10. See *Spielberg*, 112 N.L.R.B. at 1082 (stating that arbitrator’s decision must not be “clearly repugnant” to the purposes and policies of the Act).

The case struck me as an obvious one to require bargaining. However, the company cited and briefed an NLRB case that on analogous facts concluded that bargaining was not required. That case involved making employees park in a different parking lot, further away, requiring a walk that was about as long as the one in my case. The majority held that the walk and inconvenience were not sufficiently burdensome to meet the Board's test of "material, substantial, and significant."¹¹ What was I to do?

Fortunately, there was a dissent by Wilma Liebman. Seeing the situation through the eyes of the workers, Board Member and now Chairman Liebman perceived that, especially in the cold, dark months of winter, this change had a real world impact upon the workers.¹²

I had two thoughts about Member Liebman's dissent. First, it shows that the question of substantial impact is ultimately a factual issue, and so I could make the factual call that in my case the smoking policy change had a substantial impact upon employees, and this conclusion would not be repugnant to the Act.

Second, I thought what everyone in this conference probably thought: thank goodness that Wilma Liebman has been a Board Member all these years.¹³ For, in a world in which the Board is constantly changing direction, Liebman has presented a constant and strong vision of the purposes of the Act, one that I think is true to the statutory intent. I believe she has learned much from *Values and Assumptions*, which she refers to several times in her paper in this volume.

Our other panelist, Virginia Seitz, paid Jim the highest accolade a former student could offer her former law professor: She actually found his book useful in her work. I

11. Berkshire Nursing Home, LLC, 345 N.L.R.B. 220, 221 (2005). The Board held that in order to trigger the obligation to bargain, it is not enough that a change merely disadvantage an employee, but rather the change must be "material, substantial and significant." *Id.* (quoting Crittendon Hosp., 342 N.L.R.B. 686, 686 (2004)).

12. See *id.* at 222 (Member Liebman, dissenting).

13. Wilma Liebman has served as a member of the NLRB since November 14, 1997. President Clinton first appointed Liebman, and President Bush subsequently reappointed her to serve second and third terms. On January 20, 2009, President Obama appointed Liebman as Chairman of the NLRB.

suspect that when Jim heard that, he asked himself, "Now where did I go wrong?" Virginia skillfully showed us how you could advance your case by understanding the assumptions of the judges who are deciding the case, and by placing your case within their comfort zone and within the values that they share.

These inspiring presentations raise an important question for me. It has to do with respect for the NLRB as an institution, in light of a cycle of changes in Board doctrine over the last couple of decades. As Liebman points out in her paper, the Clinton Board, on which she first served, made numerous changes to existing Board law. She describes them as modest, but I think that some of them, like the decision to extend the Act's coverage to graduate students, are very important, not only symbolically, but in terms of their actual impact on workers.¹⁴ The Bush Board in turn reversed many of those decisions.¹⁵ The reversals are summarized in Liebman's paper, and she observes that some of them push the doctrine back even further than where the Clinton Board took it.

The full Obama Board is likely to be in place soon, and as Chairman, Wilma Liebman will be a key member.¹⁶ The new Board will undoubtedly revisit many of these cases, and in many, I think the Board will reinstate rulings of the Clinton Board. As Ms. Liebman said in her paper, it will be Groundhog Day all over.

As a law teacher, I try to convince my students that there is something called law—a body of decisions that reflects the values of our society. The late John Mortimer's Rumpole muses in *Rumpole à la Carte* that "the law represents some attempt, however fumbling, to impose

14. See the Bush Board's decision in *Brown University*, 342 N.L.R.B. 483 (2004), which overruled the Clinton Board decision of *New York University*, 332 N.L.R.B. 1205 (2000). *New York University* originally extended § 2(3) of the Act to graduate students. *Brown University* reversed *New York University*, holding that graduate students are not employees under § 2(3) of the Act.

15. See, for example, the Bush Board's decision in *H.S. Care, L.L.C.*, 343 N.L.R.B. 659 (2004), which overruled the Clinton Board case *M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000). *H.S. Care* held that contingent workers are not in the same unit as regular employees.

16. Wilma Liebman is currently serving her third term, which will expire on August 27, 2011.

order on a chaotic universe.”¹⁷ But the oscillating Board decisions seem primarily to impose chaos. When I worked on our casebook, I tried to convince Jim and the other authors, somewhat facetiously, that we should have a pocket part, so that we can replace the Board decisions of one administration with those of another. How do you instill in students that there is some underlying set of principles and values that explains these decisions in terms other than raw politics?

By the same token, how do you convince a reviewing court that the Board’s decision deserves deference, even if the court might reach a different result? In the various editions of our labor law casebook, even after Jim no longer worked with us, we included a number of cases in which the Supreme Court had to decide whether to defer to a decision of the NLRB. The decisions were all over the place, and it was hard to find a consistent rationale. For example, in the fairly recent “salting” case, *NLRB v. Town & Country Electric, Inc.*,¹⁸ the Court upheld the Board’s decision that employees who were also on the payroll of the union and who took a job in order to help organize the workers were “employees” under the broad definition of that term in the Act.¹⁹ Justice Breyer wrote, “the Board often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act’s application.”²⁰ Justice Breyer thought the answer compelled by the statute was so clear that the Board needed “very little legal leeway” to convince the Court it was correct.²¹ In *Erie Resistor*,²² the Court upheld the Board’s conclusion that giving striker replacements “super-seniority” (more seniority than the most senior worker who went on strike) violated the Act.²³ The Court deferred to the Board’s “experienced eye.”²⁴ However, in *Insurance Agents*,²⁵ when

17. JOHN MORTIMER, *RUMPOLE À LA CARTE* 1 (1990).

18. 516 U.S. 85 (1995).

19. *Id.* at 87.

20. *Id.* at 89-90.

21. *Id.* at 90.

22. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

23. *Id.* at 225.

24. *Id.* at 230.

the Board held that the union's use of the strike demonstrated that it was not bargaining in good faith,²⁶ the Court rejected the Board's position, concluding that "when the Board moves in this area, with only § 8(b)(3) for support, it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."²⁷ In *American Ship Building*,²⁸ the Court reversed the Board for concluding that the employer's use of the lockout violated the Act²⁹:

There is of course no question that the Board is entitled to the greatest deference in recognition of its special competence in dealing with labor problems. . . . However, we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management.³⁰

I suppose that by a careful and imaginative analysis, a commentator could make some sense out of the pattern in which the Court defers to some decisions and not to others. However, a cynic might conclude that the degree of judicial scrutiny really turns on whether the Court agrees with the decision on the merits. In *Values and Assumptions*, Jim points out the irony of the courts making the ultimate policy call when the Act was designed to curb the judicial imposition of values, and instead give the Board the role of primary interpreter of the Act.³¹ Of the three entities of government involved—legislature, agency, and court—the Court would seem to have the least expertise and competence to make these value decisions. In our field we live out our own version of the *Chevron*³² problem as the dance continues between Board and Court.

25. *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477 (1960).

26. *Id.* at 494-95.

27. *Id.* at 497.

28. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

29. *Id.* at 318.

30. *Id.* at 316.

31. See ATLESON, *supra* note 5, at 30.

32. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The *Chevron* problem is essentially that a federal court will give deference to an administrative body's permissible interpretation of a statute, even if that interpretation is not the best one.

The challenge of the current Board, with Liebman as Chairman, is to write decisions that earn the respect and deference of reviewing courts. But this is harder to do each time the Board shifts positions because each switch feeds the perception that the Board's decisions are not based upon its greater expertise or its careful analysis, but upon the changing political winds. What can the Obama Board do to command greater deference by reviewing courts? What can Jim teach Wilma and her colleagues?

Liebman describes a number of examples in which she thinks the Board has lost its way, and all of them raise important issues. I want to describe just one of these issues, for it presents one of the more stark examples of the twists and turns in Board policy.

The question is whether in a non-unionized workplace an employee who is summoned for questioning is entitled to bring another employee with her to act as her representative. Section 7 of the Act states that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through their representatives . . . and to engage in *other* concerted activities for the purpose of collective bargaining or *other* mutual aid or protection.”³³ Does it confer this right of representation upon the worker in a non-union setting?

In the 1975 *Weingarten*³⁴ decision, the Supreme Court addressed the issue of whether an employee in a unionized workplace had the right to refuse his employer's command that he attend an investigation that had potential disciplinary consequences, unless his union representative could be with him.³⁵ In that case, an employee named Collins was suspected of taking money from the cash register.³⁶ When summoned for questioning, Collins asked for her shop steward or some other union representative to be with her.³⁷ The employer refused, and Collins went through the interview alone.³⁸ Collins held her own even

33. National Labor Relations Act of 1935 § 7, 29 U.S.C. § 157 (2006) (emphasis added).

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

35. *Id.* at 252-53.

36. *Id.* at 254.

37. *Id.*

38. *Id.*

without her representative, and convinced the company that she did not do it.³⁹ However, in an ironic turn, when the company told Collins she had been vindicated, she blurted out that the only thing she had ever gotten from the company without paying for it was her free lunch.⁴⁰ This led to a further investigation, another refusal to allow Collins' shop steward to attend the interview, and yet another exoneration.⁴¹ The Court upheld the Board's conclusion that the company's refusal to allow her shop steward to be present violated Collins' rights under section 7 of the Act.⁴²

The *Weingarten* right is qualified. The Court made clear that the right attaches only if the employee requests it and where the threat of discipline is obvious.⁴³ The opinion also states that the exercise of the *Weingarten* right "may not interfere with legitimate employer prerogatives," a qualification whose breadth is not indicated in the opinion.⁴⁴ The dimension of the right is somewhat limited. The employee does not have an absolute right to have her representative present.⁴⁵ Rather, if the employee refuses to participate without the assistance of her representative, the employer may conduct the investigation without interviewing the employee in question.⁴⁶ But the bottom line is that it may not discipline the employee for refusing to attend the interview without her union representative.⁴⁷

Weingarten took place in a unionized setting, and there is no indication that the *Weingarten* Court gave any thought to the application of its doctrine to a non-union workplace. One of the hurdles Ms. Collins had to overcome in *Weingarten* was to meet the statutory obligation of concerted activity.⁴⁸ After all, she was the only employee in

39. *Id.* at 255.

40. *Id.*

41. *Id.* at 255-56.

42. *Id.* at 267.

43. *Id.* at 257.

44. *See id.* at 258.

45. *Id.* at 259.

46. *Id.* at 258.

47. *Id.* at 259.

48. *Id.* at 260.

jeopardy.⁴⁹ However Justice Brennan, writing for the Court, pointed out that the union representative who is asked to come into the picture has in mind the interests of the entire bargaining unit, to make sure that this sort of thing doesn't happen to others.⁵⁰ Justice Brennan observed that because the employee standing alone has little power to alter the outcome, this "perpetuates the inequality the Act was designed to eliminate," and the attendance of the union representative corrects that imbalance.⁵¹ You could read the opinion to suggest that even in the non-union setting the representative would have in mind the interests of others, thus satisfying the requirement of concerted activity and that the presence of another worker mitigates to at least some extent the inequality of power.

The Board first applied the *Weingarten* right to a nonunionized workplace in the 1982 *Materials Research* case.⁵² Ronald Reagan had recently been elected President, and this may have been one of the last gasps of the Board appointed during the previous Democratic administration. In *Materials Research*, the Board located the right to representation in section 7 rather than section 9, and concluded that as a result the *Weingarten* right did not depend upon whether the employees were represented by a union that obtained its status through section 9.⁵³

But just a few years later, in 1985, the Reagan Board reversed *Materials Research* in the *Sears*⁵⁴ case, concluding that an employer has a statutory right to deal with employees on an individual basis where there is no union.⁵⁵ The Board that decided *Sears* then defended its position in the Third Circuit in the *DuPont* case, where the court upheld the Board position.⁵⁶ There, the Board stated that its

49. *Id.*

50. *Id.* at 260-61.

51. *Id.* at 262. But compare Justice Brennan's opinion in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984) (finding that concerted activity seemed to rest at least in part upon the union's role in a unionized workplace).

52. *Materials Research Corp.*, 262 N.L.R.B. 1010, 1010 (1982).

53. *Id.*

54. *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985).

55. *Id.* at 231.

56. *E.I. DuPont & Co.*, 289 N.L.R.B. 627 (1988).

position represented a "permissible" rather than mandatory interpretation of the Act.⁵⁷ The Board stated that the *Weingarten* right had no place in the nonunion setting because the representative had no statutory duty of fair representation, and was less likely than in a union setting to safeguard the needs of the entire work force, and was also less likely to have the skills of a union representative.⁵⁸ The Board concluded that the employee would lose his best chance to tell his side of the story if he insisted on a representative, as the employer would most likely proceed with the investigation anyway, and, in contrast to the union setting, where arbitration is available, the employee would have no other forum in which to tell his story.⁵⁹

This remained the state of the law until fairly late in the Clinton Board's tenure. In the 2000 *Epilepsy Foundation*⁶⁰ decision, the Board, including Member Liebman, returned to the rule of *Materials Research*, holding that *Weingarten* rights apply to a nonunionized workplace.⁶¹ In *Epilepsy Foundation*, two employees wrote a memo critical of their supervisor.⁶² When one of them was called in to explain himself, he insisted that the other be present.⁶³ The employer turned down that request, and when the first employee refused to attend alone, he was terminated for insubordination.⁶⁴ The Board rested its decision on the language of section 7, which draws no distinction based upon union representation, and indeed would seem to compel such a conclusion from the "other" language in section 7 that I underscored earlier.⁶⁵ The Board also rested upon its earlier decision in *Materials Research*, and upon its conclusion that the concerns expressed by the Board in the intervening cases were not compelling.⁶⁶ These included the

57. *Id.* at 628.

58. *Id.* at 629-30.

59. *Id.* at 630.

60. *Epilepsy Found.*, 331 N.L.R.B. 676, 676 (2000).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 677.

66. *Id.*

argument that the representative would not take into the account the interests of other workers or might not have the skills necessary for effective representation.⁶⁷

The Board that came to power during the Bush administration in turn reversed *Epilepsy Foundation* in the 2004 *IBM* decision.⁶⁸ The Board in *IBM* conceded that the application of *Weingarten* rights to a nonunionized workplace was “a permissible construction of the Act,” taking the same position as the Reagan Board did when it defended its position in the *Sears* case before the court.⁶⁹ So the Board viewed its task as determining as a policy matter which of the competing views to follow.⁷⁰ Repeating the considerations raised by the Board in the *Sears* case, which I summarized earlier, the Board in *IBM* concluded that the *Weingarten* right had no place in the nonunion setting.⁷¹

But the Board in *IBM* went even further in justification of its position. It said that developments since *Epilepsy Foundation* make it more imperative for the employer to engage in investigations, and cited a parade of horrors, such as illegal aliens in the workforce, the increase in workplace violence and harassment, the recent examples of corporate misfeasance, and the dangers of terrorism after the September 11 attacks.⁷² Because of these threats, the concerns expressed by the Board when presenting its *Sears* rationale to the courts become even more real.⁷³ One of those arguments seemed especially compelling to the *IBM* Board: a co-worker who is not in a union cannot be trusted to maintain the confidentiality of information she learns in the investigation, while a union representative, by virtue of her

67. *Id.* at 677-78.

68. *IBM Corp.*, 341 N.L.R.B. 1288, 1288 (2004). In *IBM*, the employer denied three non-union-represented employees' requests to have a coworker present during investigatory interviews. Within one month of the interviews, the employer discharged all three employees. In reversing *Epilepsy Foundation*, the Board held that employees who work in a nonunion workplace are not entitled under section 7 to have a coworker accompany them to an interview with their employer. *Id.*

69. *Id.* at 1289.

70. *Id.* at 1290.

71. *Id.* at 1291.

72. *Id.*

73. *Id.* at 1291.

obligations under the duty of fair representation, can be trusted.⁷⁴

Jim exposes this myth of the irresponsibility of workers in a chapter in *Values and Assumptions* on work stoppages.⁷⁵ On the question of the right of a worker to refuse hazardous work, Jim points out that the law places a heavy burden upon the worker because of the value of uninterrupted production, and "the assumption that employees are unreliable and irresponsible judges of workplace safety."⁷⁶ Ultimately, the Board rested its conclusion in *IBM* on a balancing of the advantage to an employee of having a representative present with the employer's need to conduct prompt and thorough confidential investigations.⁷⁷

The dissent in *IBM*, by Members Liebman and Walsh, questioned whether there was any empirical evidence to support the worries claimed by the majority.⁷⁸ The dissent began, "Today, American workers without unions, the overwhelming majority of employees, are stripped of a right integral to workplace democracy."⁷⁹

At this writing we don't know the composition of the Obama Board. However, I expect that Chairman Liebman's tenure will continue for a while, and it safe to say that the new Board will be inclined to go back to the rule of *Epilepsy Foundation*. I am concerned with how the Board's decisions on this and other key issues will fare in the reviewing courts. The Board is entitled to deference by the courts, as I have indicated in cases I cited and quoted earlier. However, the Obama Board may have a more difficult task of justifying its position if it overrules *IBM* and goes back to the rule of *Epilepsy*. That would be the fifth change in the Board's position, starting with *Materials Research*. It is reminiscent in some ways of the experience in the 80s and 90s when an executive agency, the Department of Transportation, tried to impose an airbag requirement upon

74. *Id.* at 1292.

75. ATLESON, *supra* note 5, at 97-107.

76. *Id.* at 100.

77. *IBM*, 341 N.L.R.B. at 1288.

78. *Id.* at 1305 (Members Liebman & Walsh, dissenting).

79. *Id.*

the auto industry.⁸⁰ It is hard to imagine there was a time when the auto industry resisted this development, but recent events demonstrate that the industry has not kept up very well with the times. In any event, the Department's position varied with each new presidential election. When President Reagan's Transportation Secretary refused to continue the air bag requirement imposed by the previous administration, the Supreme Court rejected its position because it was so political in nature.⁸¹ Chief Justice Rehnquist, in dissent, argued that it was quite appropriate for an executive agency to reflect the will of the voters who elected that administration.⁸²

What can the new Board do to insure that its decision is affirmed in the reviewing courts? How can the new Board earn respect and confidence that its decisions rest upon rational considerations and not upon the changes in administration?

The application of the *Weingarten* rule to the non-unionized workplace raises serious questions of policy and practicality. This might be an ideal issue to address through rulemaking. The NLRB stands relatively alone among agencies in its use of the adjudicative model as opposed to rulemaking. However, it has used rulemaking from time to time,⁸³ and the Court has upheld its choice of procedure.⁸⁴

80. Federal Motor Vehicle Safety Standards, 42 Fed. Reg. 34,289 (Sept. 1, 1981).

81. See *Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

82. See Justice Rehnquist's language:

A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

Id. at 59 (Rehnquist, J., dissenting).

83. See, e.g., *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978); *NLRB v. Nat'l Jewish Hosp.*, 593 F.2d 911 (10th Cir. 1978); *NLRB v. Presbyterian Med. Ctr.*, 586 F.2d 165 (10th Cir. 1978); *NLRB v. St. Joseph Hosp.*, 587 F.2d 1060, 1064 (10th Cir. 1978); *St. John's Hosp. & Sch. of Nursing v. NLRB*, 557 F.2d 1368 (10th Cir. 1977).

84. See *Beth Israel Hosp.*, 437 U.S. at 492-93, 507; *Presbyterian Med. Ctr.*, 586 F.2d at 166.

While adjudication may provide a sharper focus on an issue when it is tied to the particular facts and litigants involved, the search for a more general, universal rule may be better accomplished through rulemaking, where a wider array of voices and interests may be heard. The use of rulemaking may convince a reviewing court that the Board has brought a new range of considerations to the problem, thus justifying its change of position.

In terms of its impact upon individual situations, there is no doubt that the *Weingarten* rule may be more effective for workers in the unionized setting. To begin with, the relationship between the union and management is institutionalized. The parties are used to dealing with one another. The steward who assists a worker in a disciplinary interview is likely to have had more experience with these sorts of issues, and her opinion and advice may be more respected by management. More significantly, the greatest spur to effective representation in a union setting is the realization that if a satisfactory solution is not reached at the investigative stage the resulting discipline may be challenged by the union through arbitration. Many arbitrators conclude that just cause requires procedural fairness in the investigation, and that the denial of union representation may invalidate the resulting discipline.⁸⁵ From the limited sampling of my own experiences in arbitration, it appears that some collective bargaining agreements expressly provide for such a right. Management in a unionized setting has a double incentive to allow a representative to be present at the interview. One is to settle the matter in order to avoid a challenge through arbitration. Another is to comply with the procedural requirements of just cause that may come into play if the matter is arbitrated.

In contrast, the worker in the non-unionized workplace has little or no recourse if she cannot convince the employer not to discipline her. She does not have the fall back of arbitration. If the employer opposes the presence of a representative during the investigation, under *Weingarten* the employee need not be permitted to attend, but she will then forfeit her only chance to tell her story, as the

85. See *In re Enter. Wire Co.*, 46 Lab. Arb. Rep. (BNA) 359, 363-64 (1966) (Daugherty, Arb.) (establishing seven elements of "just cause").

employer is likely to conduct the investigation without her.⁸⁶ The employer has much less incentive to permit the representative to attend the investigation, as the resulting discipline will not be tested through arbitration, and there will be no issue of a denial of just cause if the representative is not allowed to attend.⁸⁷ The employee may have more to lose than the employer if the representative is not permitted to attend.⁸⁸

As the *IBM* Board viewed it, employer concerns about the confidentiality of the interview process are heightened in the contemporary workplace.⁸⁹ The new Board must make a careful analysis of whether these are legitimate concerns. But any modification of the *Weingarten* rule should be limited to those situations where there is a genuine concern with security or with the other problems raised in *IBM*.⁹⁰ I suspect that most interrogations involve the garden-variety types of infractions that involve the ordinary failings of workers and not the heightened concerns put forth in *IBM*.⁹¹ The Board can craft special rules for these circumstances if appropriate.

The balancing inquiry put forth in *IBM* is too narrow if on one side of the equation it focuses on just the effectiveness of the *Weingarten* rule to protect the individual worker in a non-union setting. Such a limited analysis might well lead the Board to conclude, as it did in *IBM*, that the potential compromises in confidentiality outweigh the limited gains an employee may achieve by having a *Weingarten* right.⁹²

However, the policy issues go beyond the practical concerns about the protections of a single employee in individual cases. At stake here is the larger question of the purpose of section 7 of the Act.⁹³ The statutory language, which uses the term "other" twice, suggests that the

86. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 258 (1975).

87. *Id.* at 262.

88. *Id.* at 263-64.

89. *IBM Corp.*, 341 N.L.R.B. 1288, 1290 (2004).

90. *Id.* at 1290.

91. *Id.*

92. *See id.* at 1289.

93. National Labor Relations Act § 7, 29 U.S.C. § 157 (2006).

protections of the Act are not limited to workers in a unionized setting.⁹⁴ As Virginia Seitz suggests in her paper, it is reasonable to assume that courts will be faithful to statutory language. This is the clear import of the Court's landmark decision in *Washington Aluminum*⁹⁵ that section 7 protects the rights of workers in a non-unionized shop to protest unreasonably cold conditions by walking off the job.⁹⁶

The policy behind that expansive reading of the scope of section 7 requires a deeper understanding of the organizing process. Unions do not appear overnight. They come about only through a tedious process of building relationships and trust among workers and, ultimately, with the union. The ability of one worker to stand up for another may well be a first step towards the realization that there is strength in collective action. This may simply be the beginning of the equalization of bargaining power that was stated so eloquently by Justice Brennan in *Weingarten*.⁹⁷

The significance of a *Weingarten* right in the non-unionized workplace may go beyond whether it can achieve any practical gain in a particular employee situation. The right really tests society's commitment to protect the aggregation of small steps that ultimately leads to a full-blown selection of a bargaining representative. If we view the *Weingarten* right as more than merely symbolic, but as a vital component of the nascent stages of unionization, just like the rights of workers in non-union workplaces to take concerted action, then there is no question but that it applies to the non-union workplace. It is a reading of the Act that embraces the ninety percent of the work force that does not presently enjoy the advantages of union representation.

This is a story that must be developed from the language of the statute, from the history behind it, from an understanding of the workplace of today and what workers value in it, and from a debunking of some of the myths about the irresponsibility of workers.

94. *Id.*

95. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9 (1962).

96. *Id.* at 15.

97. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262 (1975).

These are lessons that emerge from *Values and Assumptions*. Virginia Seitz learned them when she was a student of Jim's. Wilma Liebman learned them when she read his book. *Values and Assumptions* is very much alive in the articles and thinking of both those authors. I hope Jim will continue to teach Wilma and the rest of the Board.

