

WHEN UNION MEMBERS IN A MEMBERS-ONLY NON-MAJORITY UNION (MONMU) WANT *WEINGARTEN* RIGHTS: HOW HIGH WILL THE BLUE EAGLE FLY?

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Labor law scholars and union advocates have written about setbacks to individual and collective employee rights as the NLRA and section 7 in particular have been more narrowly interpreted by the NLRB.¹ Board Member Wilma Liebman has lamented the weakening of employee rights that has accompanied globalization and the decline of organized labor.²

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1. See James J. Brudney, *Isolated and Politicized: The N.L.R.B.'s Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005) (noting that N.L.R.B.'s recent decisions weaken rights of workers to engage in organizing and collective bargaining); William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23 (2006) (criticizing N.L.R.B.'s narrow interpretation and arguing N.L.R.A. protection should extend to nonunion employees engaged in section 7 conduct); Lawrence E. Dube, *N.L.R.B. in Decline, Distrusted, Board Member, Union Leader, Say*, DAILY LAB. REP. (BNA), No. 106, June 4, 2007, at C-1 (quoting N.L.R.B. member Wilma Liebman and Bruce Raynor, president of Unite Here, regarding the functional decline and narrowing interpretations of the N.L.R.A.). Section 7 of the National Labor Relations Act provides:

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.

29 U.S.C. § 157 (2000).

2. Wilma B. Liebman, N.L.R.B. Member, Speech at the 33rd Annual Robert Fuchs Labor Law Conference (Oct. 27, 2005); Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 572 (2007) ("Somewhere along the way, New Deal optimism has yielded to raw deal cynicism about the law's ability to deliver on its promise."); Susan J. McGolrick, *Liebman Discusses N.L.R.A.'s Evolution From 'New Deal' to 'Raw Deal' for Workers*,

AFL-CIO General Counsel Jon Hiatt has also noted the narrowing of the NLRA's coverage and protections, highlighting in particular the Board's most recent decision that employees who are not represented by a union do not have a *Weingarten* right to have assistance from a co-worker during an investigatory interview. He criticized this as the Board holding "that there is only one form of representation recognized by the Act and that it would not allow the over 90 percent of workers who do not enjoy exclusive representation or collective bargaining to have any taste of the benefits of representation."³

Labor law scholar Charles Morris' latest book, *The Blue Eagle at Work*,⁴ posits numerous legal hypotheses and methods for reviving worker rights in the modern era. Because employees in private sector workplaces are increasingly not organized or represented by a majority union, Professor Morris proposes reviving basic tenets of the seventy-year-old NLRA. In particular, Morris proposes using the section 7 right 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" as an American bill of democratic rights in the workplace.⁵ Professor Morris advocates the use of a members-only non-majority union (MONMU) as a step towards worker empowerment. A non-majority union represents only a minority of employees in a bargaining unit, yet Professor Morris contends that it may still represent and bargain (non-exclusively) on behalf of its employee members.⁶ Section 8(a)(5)'s duty to bargain with representatives of employees is not limited to section 9(a) exclusive majority unions, according to Morris.⁷ The right to "freely and easily join labor unions and effectively engage in collective bargaining—which implicitly includes the rights of all employees, not just those who comprise a bargaining-unit majority—is a fundamental human right," which Morris notes is supported by the International Covenant on

DAILY LAB. REP. (BNA), No. 210, Nov. 1, 2005, at C-1; see also Dube, *supra* note 1. See *infra* notes 28-37 and accompanying text (discussing *Weingarten* rights).

3. Susan J. McGolrick, *Union, Management Attorneys Disagree on Significance of Recent N.L.R.B. Rulings*, DAILY LAB. REP. (BNA), No. 103, May 31, 2005, at C-1. Hiatt referred to the N.L.R.B.'s decision in *IBM Corp.*, 341 N.L.R.B. 1288 (2004).

4. CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (Cornell Univ. Press 2005). The Blue Eagle refers to the Blue Eagle "Codes of Fair Competition" promulgated under the precursor to the National Labor Relations Act, the National Industrial Recovery Act (NIRA). Section 7(a) of the NIRA "guaranteed the right of employees 'to bargain collectively through representatives of their own choosing.'" *Id.* at 9 n.51 (citing 29 U.S.C. §§ 101-115 (2000)).

5. See MORRIS, *supra* note 4, at 2-3 (citing Clyde Summers, *Unions Without a Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990)).

6. Susan J. McGolrick, *Members-Only Bargaining 'Long-Forgotten,' But Permitted by N.L.R.A., Professor Argues*, DAILY LAB. REP. (BNA), No. 51, Mar. 17, 2005, at A-9.

7. *Id.*

Civil and Political Rights, as well as the First Amendment right to freedom of association.⁸

Some agree with the premise that non-majority unions support employee rights and activism, while others point out the inadequacies of non-majority unions.⁹ The major weakness in the MONMU concept arises when one supposes that the employer has a *duty* to recognize and bargain with a MONMU—for this notion flies in the face of the long accepted presumption in labor law that only a section 9(a) exclusive majority representative has the right to demand and receive recognition and bargaining.¹⁰ Consequently, Professor Morris's interpretation of the NLRA

8. *Id.* at A-10.

9. Carol Brooke, *Nonmajority Unions, Employee Participation Programs, and Worker Organizing: Irreconcilable Differences?*, 76 CHI.-KENT L. REV. 1237, 1269 (2000) (explaining how NMUs help workers to organize and achieve change); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 388 & n. 266 (2005) (citing trade unions and advocates that support the use of nonexclusive nonmajority forms of employee representation); Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195 (1993); Alan Hyde et al., *After Smyrna: Rights and Powers of Unions That Represent Less Than a Majority*, 45 RUTGERS L. REV. 637 (1993); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993) (arguing that NMUs and employee caucuses are helpful to employees); Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397 (2004) (discussing advantages of non-majority unions); Clyde Summers, *supra* note 5, at 536 (1990) (arguing centrality of section 7 of N.L.R.A. improperly obscured by increased focus on section 9(a) majority representative, and that non-majority union has right to represent its members under section 7). Others point to shortcomings of non-majority unions, such as their presumed inability to bargain collectively without violating section 8(a)(2) of the Act. See Brooke, *supra* at 1239-40 (maintaining that NMUs cannot engage in collective bargaining); Julius Getman, *The National Labor Relations Act: What Went Wrong?; Can We Fix It?*, 45 B.C. L. REV. 125, 136 (2003) (asserting problems with NMUs bargaining based on section 8(a)(2) of N.L.R.A.).

It should be noted that there is some variance in terminology surrounding non-majority unions (NMUs), or, as they are sometimes called, minority unions. This Article will use the term members-only non-majority unions (MONMU) rather than minority unions to avoid the confusing multiple meanings associated with the term "minority." One might say that "minority" and "union" are both words that carry a pejorative connotation and thus in combination, are unlikely to grow a brand in this market. "Non-majority" obviously could be cast as a negative term as well, but it has the merit of clearly stating its case, as does "members-only." Cf. Joseph E. Slater, *Do Unions Representing a Minority of Employees Have the Right to Bargain Collectively?: A Review of Charles Morris, The Blue Eagle at Work*, 9 EMP. RTS. & EMP. POL'Y J. 383 (2005) (using the term "minority union bargaining" (MUB)).

10. Even Professor Morris notes that "conventional wisdom has come to assume that a union must represent a majority of the employees in an appropriate unit before it can represent or bargain on behalf of any employees." Nonetheless, he reflects that this "popular notion" is "but latter-day conventional wisdom" and not the "original wisdom contained in the language of the N.L.R.A." Charles J. Morris, *Members-Only Collective Bargaining: Rejecting Conventional Wisdom*, LERA: PERSPECTIVES ONLINE COMPANION,

and its precursor, the National Industrial Recovery Act (NIRA), on this issue has been greeted with some skepticism, and he has responded to those who are skeptical of his thesis.¹¹ It seems significant that an employer's duty to recognize and bargain with a MONMU did not fare well before the NLRB in a recent challenge, which will be discussed in Part II of this Article. The failure of this collective right may be predictive of the status of other individual and mutual aid or protection rights of employees in MONMUs, in particular, the *Weingarten* right of employees in a MONMU. Section 7 of the Act contains these important employee rights in close proximity: "to bargain collectively through representatives of their own

<http://www.lera.uiuc.edu/Pubs/Perspectives/onlinecompanion/Fall05-morris.htm> (last visited March 2, 2008). Professor Morris also discusses the filing of the first N.L.R.B. case asserting this right in a case involving Dick's Sporting Goods, discussed in Part II of this Article. *Id.* at 2. See also MORRIS, *supra* note 4, at 1 (beginning his argument that the Blue Eagle of the NIRA is not extinct with this statement: "[A]lmost all Americans involved in employment relations believe that a minority union has no right to engage in collective bargaining, even where no majority union has yet been designated."). *Id.*

Section 9(a) of the Act provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any 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.

29 U.S.C. § 159(a) (2000).

Another statutory concern regarding MONMUs lies in section 8(a)(2), which provides in part: "It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2) (2000). See David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 504-510 (2006) (discussing problems arising under N.L.R.A., section 8(a)(2) in particular, with respect to application of Professor Morris's non-majority union theory). Rosenfeld notes: "Whether minority unions are permitted under the N.L.R.A. is an important debate . . ." *Id.* at 509. See also Getman, *supra* note 9 (discussing NMU problems with section 8(a)(2)).

11. Charles J. Morris, *Minority Union Collective Bargaining: A Commentary on John True's Review Essay on The Blue Eagle at Work and a Reply to Skeptics Regarding Members-Only Bargaining Under the N.L.R.A.*, 27 BERKELEY J. EMP. & LAB. L. 180 (2006); see also Lisa Schur, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*, 31 LAB. STUD. J. 107, 108 (2006) (book review) (noting skepticism regarding Morris' legal strategies for achieving recognition of minority unions in light of current legal and political climate and N.L.R.B.'s narrowing of section 7 rights, citing example of retraction of *Weingarten* rights for non-union workers).

choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹²

One might note that the promise of rights pursuant to exclusive bargaining representative status under section 9(a) of the NLRA seems great, but the reality is that few employees and unions gain access to these rights today.¹³ The exclusive representative concept is an “all or nothing” approach that is presently undermining union organizing.¹⁴ It seems that the exclusivity principle for gaining a bundle of rights under the NLRA worked well when unions were on the upswing, but it does not work on the downswing of today’s intensely competitive global labor economy. This is likely because work will go to low-wage countries if too many labor complaints arise and costs escalate in the United States. The workplace is very different than it was seventy years ago. Workers are much more mobile and they carry their skill sets with them. Workplaces are diffuse with work spread among workers and clients, and employers are experts at out-sourcing, subcontracting, and maximizing the efficiencies of temporary help.¹⁵ Big box stores offer low wage packages, and focus on customer-friendly rather than employee-friendly work schedules. While access to the bundle of rights provided under the NLRA has declined, there has been a rise in individual rights originating from other federal and state laws that emphasize worker protections.¹⁶ In this modern day labor environment, it

12. 29 U.S.C. § 157 (2000). *See also* Morris, *supra* note 11, at 207 (concluding that employer’s duty to bargain with a minority union for its members-only is based on the broadly written language of section 7’s right to bargain collectively); *but see* MORRIS, *supra* note 4, at 156-57 (discussing distinctions between the first and second track of concerted activities under section 7).

13. Only 7.5% of the private sector work force had union membership in 2007. Bureau of Labor Statistics, Union Members Summary, <http://www.bls.gov/news.release/union2.nr0.htm> (last visited March 2, 2008).

14. *See* John M. True, III, *Review Essay: The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*, 26 BERKELEY J. EMP. & LAB. L. 181, 183 (2005) (discussing an “all or nothing” approach that worked in early days but became futile in the late twentieth century). Professor Morris chose an interesting term when he titled one chapter of his book “Obtaining *Imprimatur* from the Labor Board and the Courts.” MORRIS, *supra* note 4, at 173 (emphasis added). The use of the word “*imprimatur*” seems to capture Morris’s perception that the Board process has grown too sanctified, too much of a monopoly, and consequently there should be “alternative routes to legal acceptance” for unions in light of the lack of success that unions are encountering with the N.L.R.B.’s process for section 9(a) status. *See id.*

15. *See* Charles B. Craver, *The Labor Movement Needs a Twenty-First Century Committee for Industrial Organization*, 23 HOFSTRA LAB. & EMP. L.J. 69, 83-84 (2005) (discussing use of temporary help, impact of globalization driving employers search for lower-cost labor, and practices of big box stores such as Wal-Mart).

16. *See* True, *supra* note 14, at 188 (discussing the “dramatic shift from collectively bargained workplace rights to individual rights, some derived from statutes passed by Congress and state legislatures and some mandated by common law judges”); *see also*

is no wonder that unions have lost ground. Whether unions and their members will be able to regain momentum and power in the workplace through innovative use of MONMUs is another question. That question will be answered in large part by how the Board interprets the relevant statutory language when choosing between permissible interpretations, and by what sections of the Act are deemed relevant to the legal issues raised. Key sections of the NLRA that apply to employee rights, the legal status of their representatives, and pertinent employer unfair labor practices are outlined next to provide a context for the NLRB's consideration of the legal issues surrounding *Weingarten* rights and the representational status of MONMUs.

Section 7 of the Act entitled "Rights of Employees" specifically addresses individual and collective rights of employees, including the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹⁷ The mutual aid or protection language of section 7 is referenced as a basis for the *Weingarten* right to have a representative at an investigatory interview that reasonably might lead to discipline. Section 8 of the Act is entitled "Unfair Labor Practices" and section 8(a) specifies the unfair labor practices for employers.¹⁸ Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in section 7 and section 8(a)(2) further proscribes employer labor practices "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."¹⁹ Section 8(a)(3) prohibits "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."²⁰ Section 8(a)(3) permits mandatory union membership with certain provisos where the labor organization is a section 9(a) representative.²¹ Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with representatives of his employees, subject to the provisions" of section 9(a).²²

Section 9 of the NLRA is entitled "Representatives and Elections" and section 9(a) states that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all

Craver *supra* note 15, at 96 (noting difficulty in organizing with majority rule concept of section 9(a)).

17. 29 U.S.C. § 157.

18. 29 U.S.C. § 158 (2000).

19. 29 U.S.C. § 158(a)(1) & (2).

20. 29 U.S.C. § 158(a)(3).

21. *Id.*

22. 29 U.S.C. § 158(a)(5).

the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”²³ The section further provides for an individual employee or group of employees to present grievances to the employer and seek adjustment as long as there is no conflict with a collective bargaining agreement and the bargaining representative has been given the opportunity to be present.²⁴ Section 9 of the Act contains other provisions that relate to the process of bargaining unit determination, qualification for employee status therein, the initiation of representation petitions, the certification of a representative, and the impact of that certification.²⁵ In order to attain the status of a section 9(a) representative, a union must comply with the requirements of the section and the precedents surrounding the described requirements. For example, an employer may voluntarily recognize a majority representative based upon a showing of valid union authorization cards signed by employees, but the employer need not acquiesce to this showing and may insist upon a Board-conducted secret ballot election. There, a majority of those that are qualified to vote and are voting must select the representative in order for the representative to attain section 9(a) exclusive representative status. Clearly, a MONMU does not meet the requirements of section 9(a) because it does not represent a majority, cannot proffer cards from a majority, and is not able to succeed at a secret ballot election absent support of a majority of those voting. Further, it should be noted that no part of section 9 refers to non-majority representatives or to investigatory interviews. Investigatory interviews are different from presentation of grievances and their adjustment; they are processes that tend to be formally prescribed within a collective bargaining agreement.

The Board looks to the language of the statute itself, its legislative history, and prior precedent when seeking to address matters before it. The General Counsel of the NLRB has appellate authority over regional directors’ rulings on charges of unfair labor practices.²⁶ This gives the General Counsel significant authority in terms of interpreting the statute and the application of prior precedent to changing times and issues. Consequently, the General Counsel’s refusal to issue a complaint on an unfair labor practice is a significant setback to the claim that an unfair labor practice exists as his discretion in this context is essentially not reviewable.²⁷ In general, the courts accord rulings of the NLRB deference

23. 29 U.S.C. § 159(a) (2000).

24. *Id.*

25. 29 U.S.C. § 159.

26. DAVID P. TWOMEY, *LABOR & EMPLOYMENT LAW* 49 (13th ed. 2007).

27. *THE DEVELOPING LABOR LAW* 2805 (John E. Higgins, Jr. ed., 5th ed. 2006).

in light of the agency's expertise, and permit the Board to select between permissible interpretations of the NLRA.²⁸

I. IS THERE A *WEINGARTEN* RIGHT TO REPRESENTATION IN A MONMU?

An important question that is raised by Professor Morris' work is whether employees who join a non-majority union are entitled to exercise *Weingarten* rights. These rights are named after a 1975 United States Supreme Court decision that affirmed an employee's right to request the presence of a union representative at an employer's investigatory interview when the employee reasonably believed that the interview might lead to disciplinary action.²⁹ In 2004, the National Labor Relations Board issued *IBM Corp.*,³⁰ a controversial decision in which the Board withdrew *Weingarten* rights from non-union workers.³¹ Board Member Liebman has referred to the *IBM* case as the "most noteworthy" example of the board narrowing workers' rights.³² Professor Morris notes that after the *IBM* decision, the "typical role of a union steward in a brand-new members-only union will now be more important than ever in the organizational process."³³ He advocates that a non-majority union can advertise the *Weingarten* right among the employees in the bargaining unit as one of the advantages of joining, and provide instant membership, upon execution of a card, in the event that a non-union member suddenly finds himself facing an investigatory interview.³⁴ Morris posits that "*Weingarten* rights can be alive and well in the minority-union workplace" regardless of the "Board's regressive decision in *IBM*."³⁵ The union steward exercising a *Weingarten* right in a non-majority setting provides the union with an opportunity to

28. See *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) (noting where Board's construction of the Act "is a permissible construction . . . [it] should have been sustained.").

29. *Id.* at 251; see also MORRIS, *supra* note 4, at 188-91 (discussing *Weingarten* rights).

30. 341 N.L.R.B. 1288 (2004).

31. See Christine Neylon O'Brien, *The N.L.R.B. Waffling on Weingarten Rights*, 37 LOY. U. CHI. L.J. 111 (2005) (reviewing the origin and recent history of the *Weingarten* right, the National Labor Relations Board's changing perspective on the right for nonunion workers, and analyzing some of the implications of the Board's *IBM Corp.* decision upon section 7 rights); see *infra* notes 79-115 and accompanying text (discussing the *IBM* decision with respect to assessing the prospect of *Weingarten* rights in a MONMU); see also Sarah Helene Duggin, *The Ongoing Battle Over Weingarten Rights for Non-Union Employees in Investigative Interviews: What Do Terrorism, Corporate Fraud, and Workplace Violence Have to Do With It?*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 655 (2006) (discussing *Weingarten* rights and the *IBM* decision).

32. See McGolrick, *supra* note 2, at C-1 (quoting Member Liebman's speech on N.L.R.A.'s evolution and trend away from employee rights).

33. MORRIS, *supra* note 4, at 189.

34. *Id.* at 190.

35. *Id.*

“demonstrate its importance by providing on-the-job worker representation.”³⁶ According to Morris, *Weingarten* rights can be used as “an organizational tool that a minority union might use during the early stages of its development.”³⁷ Morris’s theory merits further analysis of the individual and collective rights that MONMU members presently have under the NLRA.

II. EMPLOYER DUTY TO RECOGNIZE OR BARGAIN WITH A MONMU— DICK’S SPORTING GOODS

Part of Morris’s MONMU theory was recently tested in a case where a non-majority union, Dick’s Employee Council, filed unfair labor practice charges concerning their employer’s refusal to recognize and bargain with them at Dick’s Sporting Goods in Smithton, Pennsylvania.³⁸ The union organizing director there noted that he was following the tenets described in Morris’ *Blue Eagle* book.³⁹ Dick’s Employee Council was formed as a dues-paying group of employees at Smithton, and it is an affiliate of the United Steelworkers International Union.⁴⁰ The Council was formed with the intent of bargaining with the employer before reaching majority status while eventually hoping to form a traditional local union, presumably one with exclusive majority representation rights.⁴¹ The Council requested bargaining on behalf of its members over a number of issues including: discharge of one member, health and safety, and the need for a grievance procedure. The employer refused to bargain with the Council.⁴² The Council alleged violations of sections 8(a)(1) and (5) because the employer refused to supply requested information on work-related injuries or illnesses, told employees it was not obligated to bargain, and unilaterally disciplined and discharged a council member.⁴³ Apparently due to the novelty of the issues presented in the charges, and perhaps due to the Charging Party’s explicit reliance on Morris’s theory, the Director for Region 6 of the NLRB requested advice as to whether to issue a complaint.

36. *Id.* at 191.

37. Morris, *supra* note 11, at 185.

38. See Jim McKay, *Union Tries Very Old (New) Tactic to Organize Dick’s Workers*, PITTSBURGH POST-GAZETTE, Sept. 4, 2005, at E1 (describing the Dicks’ minority union’s efforts to force management negotiation).

39. *Id.*

40. N.L.R.B. Advice Memorandum, 6-CA-34821, at 1 & n.1 (June 22, 2006), available at http://www.nlr.gov/shared_files/Advice%20Memos/2006/6-CA-34821%2806-22-06%29.pdf. The United Steelworkers International Union joined the Council as Charging Party. *Id.*

41. *Id.* at 2.

42. *Id.*

43. *Id.*

The Advice Memorandum from the Office of the General Counsel of the National Labor Relations Board concluded that the Region should dismiss the charge rather than issue a complaint since the employer had no obligation to recognize or bargain with the Council.⁴⁴ The Memorandum outlined its reasoning by refuting the Charging Party's theory that the employer was obligated to bargain with a minority, members-only union.⁴⁵ The Advice Memorandum looked to the language of the Act, its legislative history, and cases interpreting the provisions, before concluding that the concept of collective bargaining is "firmly based on the principle of majority rule."⁴⁶ The Memorandum outlined that enactment of section 9(a) of the Act reflected Congress' rejection of other forms of representation such as plural or proportional that had previously been permitted under the NIRA.⁴⁷ Explicit language that would have permitted minority bargaining in the absence of a majority was discarded prior to enactment of section 9(a) of the NLRA, which indicates that minority bargaining is not required under the Act.⁴⁸ Senator Wagner himself, who sponsored the Act, outlined the important reasons for majority rule as the "only rule that makes collective bargaining a reality" and noted how "the unscrupulous employer" could take advantage of minority groups by playing one off against another.⁴⁹ In addition, the Advice Memorandum noted that a Senate report reflected upon majority rule as best for employers and employees alike, and a House report repeated a similar rationale for majority rule, namely that requiring employee representation by a union with minority support would be unworkable.⁵⁰ From the legislative history, the Division of Advice concluded that Congress saw minority bargaining as undermining meaningful collective bargaining.⁵¹

The Advice Memorandum in *Dick's Sporting Goods* noted that the Supreme Court has upheld the importance of majority rule.⁵² According to the Memorandum, the duty to bargain is only required where there is a majority representative because the section 8(a)(5) duty is premised on section 9(a).⁵³ While the Board may have *allowed* employers to recognize

44. *Id.*

45. *Id.* at 3.

46. *Id.* at 6.

47. *Id.* at 6-7.

48. *Id.* at 7.

49. *Id.* at 8 (citing LEON H. KEYSERLING, *Why the Wagner Act?*, in *THE WAGNER ACT: AFTER TEN YEARS 19-20* (Louis G. Silverberg ed. 1945)).

50. Advice Memorandum, *supra* note 40, at 9.

51. *Id.* at 9-10.

52. *Id.* at 10 (citing *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975)).

53. *Id.* at 11. The Memorandum noted that "the Board has never construed Section 8(a)(5) as operating independently from Section 9(a)." *Id.* Section 8 (a)(5) provides: "It shall be an unfair labor practice for an employer—to refuse to bargain collectively with the

and bargain with minority, member-only unions in the absence of a majority union, the NLRA did not establish a *duty* to recognize or bargain with a MONMU.⁵⁴

The *Dick's* Memorandum discussed the Board's 1972 decision in *Don Mendenhall*.⁵⁵ There, the employer, Don Mendenhall, was engaged in the installation of floors and ceilings in residential and commercial establishments. Mendenhall signed a collective bargaining agreement (CBA) with a union and also authorized an employer association to represent the company in bargaining. The union was a members-only one, and the employer paid non-union employees the same wages as he did to the union members but did not provide health and welfare benefits to the non-union employees.⁵⁶ When the employer refused to bargain over the subcontracting of residential work that the union claimed affected union members, the Board dismissed a section 8(a)(5) refusal to bargain charge on the basis that the union was members-only. The union was not the exclusive bargaining representative nor had it claimed to be.⁵⁷ The employer had acquiesced to an arrangement whereby the union represented only its members.⁵⁸ Indeed, the initial grant of recognition by the employer was for the "limited purpose of representing its members."⁵⁹ Because of the members-only nature, the Board concluded that Mendenhall's actions "[could not] be held violative of Section 8(a)(5) That section, by reference to Section 9(a), requires . . . [an] exclusive representative It has been settled since the early days of the Act that members-only recognition does not satisfy statutory norms."⁶⁰

The Advice Memorandum in *Dick's Sporting Goods* further noted that no section 8(a)(1) bargaining order will be issued absent the prerequisite of a union's majority status.⁶¹ A majority was deemed necessary to effectuate

representatives of his employees, subject to the provisions of section 9(a) of this title." 29 U.S.C. § 158(a)(5) (2000). See *supra* note 10 for the language of section 9(a).

54. Advice Memorandum, *supra* note 40, at 11.

55. *Id.* at 12 (citing *Don Mendenhall, Inc.*, 194 N.L.R.B. 1109 (1972)).

56. *Don Mendenhall, Inc.*, 194 N.L.R.B. 1109 (1972).

57. Advice Memorandum, *supra* note 40, at 12 (citing *Don Mendenhall*, 194 N.L.R.B. at 1109-10).

58. *Don Mendenhall*, 194 N.L.R.B. at 1109-10.

59. *Id.* at 1110.

60. *Id.* It should be noted that the Petition for Rulemaking, discussed *infra* note 73 and accompanying text, at 56-61, takes significant issue with the General Counsel's interpretation and use of the *Don Mendenhall* decision in the Division of Advice Memorandum. The critical difference between *Dick's* and *Don Mendenhall* is that *Dick's* is a MONMU whereas *Don Mendenhall* was a false majority case—a case where a union did not have a majority but sought to act as a majority representative.

61. Advice Memorandum, *supra* note 40, at 13-14 (citing *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969) (bargaining based upon majority status from authorization cards)).

“ascertainable employee free choice.”⁶² Similarly, the Board does not require employers to recognize and bargain with a minority group of unrepresented employees.⁶³ Essentially, an employer may choose to deal with employee grievances on an individual basis, absent a collective bargaining agreement with an exclusive bargaining representative that requires the employer to do otherwise.⁶⁴ Even where a union loses its majority support, no obligation to discuss grievances with the union remains, and no bargaining order will ensue.⁶⁵

The Division of Advice Memorandum concluded that it would make no sense to *require* an employer to bargain with a union that represents a minority of employees when the Supreme Court has held that even where a union represents a majority based upon authorization cards, the employer need not recognize or bargain with that union. Instead, the employer may insist upon an NLRB election with the burden on the union to petition the Board.⁶⁶ Ultimately, “the essence of industrial democracy, as contemplated and enforced by the Act, is fundamentally based on majoritarian principles.”⁶⁷ Non-majority unions are simply not entitled to the same rights as those that represent a majority under the NLRA in light of this result. As the Office of the General Counsel summarized in its Report on Case Developments for the period, the *Dick’s* case was a significant one, yet the Board did not view the issue as an open one.⁶⁸ The General Counsel reported that they found that there was no section 8(a)(1) or (5) violation since there is no statutory obligation to recognize or bargain with a members-only union that does not represent a majority.⁶⁹ While in the early days of enforcement of the Act, the Board *allowed* an employer to recognize and bargain with a members-only minority union, it did not recognize a *duty* to do so.⁷⁰ The General Counsel’s Summary confirmed

62. Advice Memorandum, *supra* note 40, at 14 (quoting *Gissel*, 395 U.S. at 614).

63. Advice Memorandum, *supra* note 40, at 15.

64. *Id.* (citations omitted).

65. *Id.* at 16.

66. *Id.* at 17-18 (citing *Linden Lumber Div. v. N.L.R.B.*, 419 U.S. 301 (1974)).

67. Advice Memorandum, *supra* note 40, at 18.

68. See N.L.R.B. Gen. Counsel Ronald Meisburg, Memorandum 07-02, Report on Case Developments April through August 2006, at 25, 29 (Dec. 15, 2006). The Division of Advice Memorandum in *Dick’s* similarly noted:

We conclude that the Employer did not violate Section 8(a)(1) or (5) because the Employer in these circumstances had no obligation under the Act to recognize the Charging Party in the absence of a Board election establishing that it represented a majority of the Employer’s employees. This principle is well-settled and is not an open issue.

Advice Memorandum, *supra* note 40, at 1.

69. General Counsel Memorandum, *supra* note 68, at 25, 29.

70. *Id.* at 28.

that the Board will not issue a bargaining order absent a union's majority status.⁷¹

In response to the Board's failure to issue a complaint in the *Dick's Sporting Goods* case, a group of law professors circulated a letter to the chairman and members of the National Labor Relations Board.⁷² The letter

71. *Id.* at 29.

72. See Morris, Craver Circulate Proposed NLRB Rule, http://lawprofessors.typepad.com/laborprof_blog/2007/03/morris_craver_c.html (last visited March 2, 2008).

To the Honorable Chairman and Members of the National Labor Relations Board:

Re: Petition by the Steelworkers Union et al for issuance of a rule regarding members-only minority-union collective bargaining

We, the undersigned, are law professors who specialize in the field of labor law, including the law of the National Labor Relations Act. The purpose of this letter is to acquaint the members of the Board with our considered opinion concerning the pending petition for issuance of a substantive rule regarding members-only minority-union collective bargaining.

It is our view that this rule should be promulgated for the following reasons:

- (1) The plain and unambiguous language of the Act guarantees that in workplaces where there is not currently a Section 9(a) majority-exclusive representative in an appropriate bargaining unit, employees have an enforceable right to bargain collectively through minority unions of their own choosing, but for their employee members only.
- (2) Such reading of the statute is supported by clear and consistent legislative history.
- (3) In his Advice Memorandum and Letter of Dismissal, the General Counsel did not refute the foregoing reading of the Act nor did he contest the foregoing reading of its legislative history.
- (4) The Board has not heretofore decided this issue.
- (5) By refusing to issue a complaint, the General Counsel failed to carry out his proper role of placing unresolved legal issues before the Board for its decision, for it is the function of the Board, not the General Counsel, to resolve issues of pure statutory construction.
- (6) By dismissing the charge in *Dick's* case, the General Counsel deprived the Board of the opportunity to resolve this issue by adjudication, which would have been in accord with its normal customary practice.

Pursuant to the substantive rulemaking procedures of Section 6 of the National Labor Relations Act and Section 5 of the Administrative Procedure Act (5 U.S.C. § 553), it is now appropriate for the Board to issue the rule proposed by petitioner Steelworkers Union and its co-petitioners, and we urge the Board to do so.

Adoption of this rule will clarify the bargaining requirements of the Act and help to implement the intent of Congress that was declared in the Wagner Act of

alleges that the General Counsel erred in refusing to issue a complaint because minority union members also have the right to bargain collectively under the Act, that this right is supported by the language of the statute and legislative history, and that it is the Board's responsibility to resolve the legal issue that has yet to be decided by it. The professors' letter recommends adoption of a rule clarifying employees' right to organize and bargain through minority unions on a members-only basis as a stepping stone to majority-based bargaining. The Steelworkers, represented by Professor Morris, and six other unions with their own counsel, have now filed a petition at the NLRB seeking rulemaking on the issue of members-only minority union collective bargaining, including the letter in support.⁷³

1935 (§ 1) and re-affirmed in the Taft-Hartley Act of 1947 (§ 201(a)), to wit, that it is the policy of the United States to encourage the practice and procedure of collective bargaining. It is our view that protecting the employees' right to organize and bargain through minority unions on a members-only basis where there is not currently a majority-exclusivity bargaining agent provides a useful and often-needed steppingstone to majority-based Section 9(a) collective bargaining, such as was commonly practiced during the first decade of the Act. And it is our further view that the resulting enhancement of the collective bargaining process will inure to the benefit of both employees and employers and contribute to a healthier economy.

Respectfully submitted on behalf of the undersigned in our individual capacities, not as spokespersons for any institution with whom we may be affiliated.

[Signatures with identifying positions and affiliations]

Id. The letter was signed by twenty-five law professors and appended to the Rulemaking Petition. See Labor Law Professors Endorsing Members-Only Non-Majority Collective Bargaining Under The N.L.R.A., Aug. 14, 2007, available at <http://efcaupdate.squarespace.com/document-repository/2007-08-14 Labor Law Professors Letter.pdf>.

73. See Susan J. McGolrick, *Unions File Rulemaking Petition With N.L.R.B. on Minority-Union Members-Only Bargaining*, DAILY LAB. REP. (BNA), No. 157, Aug. 15, 2007, at A-1; In the Matter of Rulemaking Regarding Members-Only Minority-Union Collective Bargaining, Petition of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, (Steelworkers Union) and other labor organizations as interested parties, Seeking Rulemaking before the National Labor Relations Board (Aug. 14, 2007) [hereinafter, Petition for Rulemaking], available at <http://www.nlr.gov/nlr/about/foia/documents/PetitionRequestingRulemaking.pdf>; see also Steven Greenhouse, *Seven Unions Ask Labor Board to Order Employers to Bargain*, N.Y. TIMES, Aug. 15, 2007, at A14 (discussing basis for petition and that twenty-five professors signed the letter of support; noting union officials admit that it is unlikely that the current Board dominated by Bush appointees would adopt rule, yet they hope that future Democratic President may appoint members who will look favorably on unions' argument in favor of bargaining with minority unions in absence of an exclusive majority union). The rule proposed provides:

Pursuant to Sections 7, 8(a)(1), and 8(a)(5) of the Act, in workplaces where employees are not currently represented by a certified or recognized Section

The Change to Win (CTW) labor federation, representing seven additional unions, recently filed a similar petition asking the NLRB to issue a rule that federal labor law requires employers to bargain with a union representing a minority in the absence of a union representing a majority.⁷⁴ The CTW petition agreed with and adopted the reasoning of the Steelworkers' August 2007 rulemaking petition and joined in proposing the same rule.⁷⁵ The Petition also noted that the Advice Memorandum in *Dick's Sporting Goods* relied upon "commentary and materials drawn from a very different context—i.e., that of a union seeking or exercising exclusive representation status," and that this context is not relevant to the Petitioner's claims.⁷⁶ CTW criticized the Advice Memorandum's inappropriate evaluation of "serious arguments—that rest on clear and unchallenged statutory language and history."⁷⁷ Quoting language of Justice Scalia, CTW noted that the *Dick's* Advice Memorandum "contains much that is obviously true, and much that is relevant; unfortunately, what is obviously true is not relevant, and what is relevant is not obviously true."⁷⁸

III. THE RIGHT TO REPRESENTATION IN MONMUS—THE PROSPECT ON WEINGARTEN RIGHTS

As far as the representational rights of employees in a MONMU are concerned, the *Dick's Sporting Goods* Advice Memorandum has made clear that there is presently no obligation for an employer to recognize or bargain with a union that does not represent a majority of employees in a bargaining unit. Thus, an employer may insist upon meeting with individuals rather than any collective group if there is no exclusive majority representative. What does this portend for other representational rights of

9(a) majority/exclusive collective-bargaining representative in an appropriate bargaining unit, the employer, upon request, has a duty to bargain collectively with a labor organization that represents less than an employee-majority with regard to the employees who are its members, but not for any other employees.

Petition for Rulemaking, *supra* at 6.

74. N.L.R.A., *Change to Win Joins Other Unions Seeking Rule on Minority-Union Bargaining*, DAILY LAB. REP. (BNA), No. 4, Jan. 8, 2008., at A-1. Change to Win represents the International Brotherhood of Teamsters, the Laborers' International Union, the Service Employees International Union, the Carpenters and Joiners of America, the United Farm Workers, the United Food and Commercial Workers, and UNITE HERE. *Id.*

75. *Id.*

76. Petition of Change to Win, Rulemaking Regarding Members-Only Minority Union Collective Bargaining, *7 (N.L.R.B. 2008), available at <http://op.bna.com/dlrcases.nsf/r?Open=sngk-7amt9z>.

77. *Id.* at *8.

78. *Id.* at *7-8 (citing *National Treasury Employees v. Von Raab*, 489 U.S. 656, 713 (1989) (Scalia, J., dissenting)).

union members in a MONMU? Are they entitled to *Weingarten* rights under current law? Three pieces of evidence are of considerable predictive value: analysis of the language used in the various opinions in the *IBM* decision regarding *Weingarten* rights, the precedents cited therein, and the Supreme Court's original *Weingarten* decision itself.

A. *The National Labor Relations Board's View—IBM Corp.*

The 2004 *IBM* decision limited the right to have a *Weingarten* representative at an investigatory interview that might reasonably result in disciplining nonunion employees. The *IBM* decision may be read to limit entitlement to *Weingarten* rights to majority union members or to union members in general, depending upon which opinion one reads and how the opinions of the various board members are interpreted. The issue is important because if the distinction between union and nonunion hinges upon section 9(a) exclusive majority status, then non-majority union members will fall under the nonunion rule of *IBM* and not have *Weingarten* rights. This is because MONMUs, by their very definition, do not have 9(a) majority status. Whether it makes sense to distinguish between majority and non-majority union members for purposes of extending or denying *Weingarten* rights is a different matter. The board did not address this issue in *IBM* because the employees in question were nonunion, not members of a MONMU.

The three members forming the majority of the board that withdrew *Weingarten* rights from nonunion members in the *IBM* decision seemed to reach that decision, at least in part, because of the absence of a section 9(a) representative.⁷⁹ The three members produced two opinions. Chairman Battista and Member Meisburg joined in a plurality opinion, with which Member Schaumber concurred. Member Schaumber's concurrence explicitly stated that the better construction of the Act is "that the *Weingarten* right is unique to employees represented by a [s]ection 9(a) bargaining representative."⁸⁰ While Member Schaumber agreed that the *Weingarten* right is grounded in section 7, he specified that it was limited to the unionized workplace.⁸¹ He noted further that "it is the presence of a collective bargaining agreement and the right of access to a 9(a) representative that establish the 'strong foundation' of the section 7 right to

79. *IBM Corp.*, 341 N.L.R.B. 1288, 1295 (2004). Those members were Chairman Battista, and Members Schaumber and Meisburg. Member Schaumber wrote a concurring opinion with Chairman Battista and Member Meisburg. Members Liebman and Walsh joined in a dissent. *Id.*

80. *Id.* at 1295 (Schaumber, concurring).

81. *Id.* at 1295 n.4.

representation at an investigatory interview.”⁸² Schaumber quoted from the Supreme Court’s decision in *Emporium Capwell* that “[c]entral to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule.”⁸³ Schaumber’s view would not lend itself to extension of the *Weingarten* right to MONMU members because he connects the right to a section 9(a) representative, which a MONMU, by its very nature as a non-majority representative, is not.

The *IBM* plurality opinion is lengthy. In some places it refers to section 9(a), but in others simply to a *nonunion* setting. In the analysis and conclusions section, the authors of the plurality state that they are “[r]eturning to the earlier precedent of *DuPont*, which holds that *Weingarten* rights do not apply in a *nonunion* setting.”⁸⁴ That opinion goes on to describe that “[t]he issue of whether to hold that *Weingarten* rights apply or do not apply in a *nonunionized* workplace requires the Board to choose between two permissible interpretations of the Act.”⁸⁵ The plurality opinion, in choosing between its two permissible interpretations, repeatedly referred to the *nonunion*, not the *non-majority* union context. That, however is largely because it was deciding a *nonunion* and not a *non-majority* case. In the ordinary use of language, it is somewhat difficult to equate the term nonunion with non-majority union. And yet the general understanding or presumption in labor law today is that a unionized environment refers to one where there is an exclusive majority representative.⁸⁶ Nonetheless, it may be argued that as far as section 9(a) restricting the *Weingarten* right is concerned, the actual language of section 9(a) refers to exclusive majority representation in the collective bargaining and grievance contexts.⁸⁷ In no way does section 9(a) speak to the right to representation at an investigatory interview, a situation where even a majority union does not have the right to bargain with the employer. In fact, the employer may insist on silence from the union representative while the investigatory interview proceeds. The employer also has a clear

82. *Id.* at 1303.

83. *Id.* (citing *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1975)).

84. *IBM*, 341 N.L.R.B. at 1289 (plurality opinion) (emphasis added).

85. *Id.* (emphasis added).

86. See *IBM*, 341 N.L.R.B. at 1299 (Schaumber, concurring) (equating nonunion with no section 9(a) representative through the following language: “employee in a nonunion setting, that is, in the absence of a collective bargaining agreement and a 9(a) representative”).

87. See *supra* note 10 (citing text of section 9); see also *supra* notes 23-25 and accompanying text (discussing section 9).

right to forego the interview altogether if the union member requests the presence of his representative.⁸⁸

The *IBM* plurality opinion discusses the Supreme Court's decision in *Weingarten*, the genesis of the right, and its subsequent development.⁸⁹ The plurality noted that the *Weingarten* Court "derived [the right] from section 7 of the Act giving employees the right to engage in concerted activities for mutual aid or protection."⁹⁰ *Weingarten* itself "did not address the situation in which an employee of a nonunionized employer asks for a co-worker to be present as his representative."⁹¹ However, when the Board first considered the case of a non-unionized employee asking for a co-worker, the Board found that a *Weingarten* right existed in a nonunion setting because it was based upon section 7 of the Act.⁹² Three years later, the Board abandoned that position in *Sears Roebuck & Co.*, where it determined that the *Weingarten* right required a certified or recognized union.⁹³ The *Sears* board found that the employer's right to deal with its employees on an individual basis prevailed "in the absence of a union."⁹⁴

The *IBM* plurality then outlined how the *Sears* decision was modified upon remand from the Court of Appeals for the Third Circuit, noting that "unrepresented employees do not possess a section 7 right to the presence of a fellow employee in an investigatory interview."⁹⁵ When the Board overruled *DuPont* in *Epilepsy Foundation*, it emphasized that the "right to representation is grounded in section 7 of the Act which protects the right of employees to engage in concerted activities for mutual aid or protection . . . and that 'section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation.'"⁹⁶

88. N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251, 258 (1975) ("The employer is free to . . . leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one.").

89. *IBM*, 341 N.L.R.B. at 1290.

90. *Id.*

91. *Id.*

92. *Id.* (citing *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982)).

93. *Id.* (citing *Sears, Roebuck and Co.*, 274 N.L.R.B. 230 (1985)).

94. *Id.* at 1291.

95. *Id.* (citing *DuPont*, 289 N.L.R.B. 627, 629-30 (1988)) (emphasis added). The *IBM* decision noted that the three reasons the Board outlined in *DuPont* were that an employee representative in a nonunion setting has no obligation to represent the entire workforce unlike a union representative, is less likely to have the skills necessary than a union representative, and that a nonunion employee would likely lose his only chance to present his defense since no grievance procedure would supply a second chance. It should be noted that all except the second of these reasons would apply equally to a union member in a MONMU as to a nonunion employee.

96. *Id.* (quoting *Epilepsy Found.*, 331 N.L.R.B. 676, 678 (2000), *aff'd in relevant part*, 268 F.3d 1095 (D.C.Cir. 2001), and *Glomac Plastics, Inc.*, 234 N.L.R.B. 1309, 1311 (1978)).

The *IBM* plurality noted that the *Epilepsy* decision rejected the three policy concerns expressed in *DuPont* when it revoked *Weingarten* rights for nonunion employees.⁹⁷ The *IBM* plurality returned to the result and rationale of *DuPont*, specifically holding that “the *Weingarten* right does not extend to the *nonunion* workplace.”⁹⁸ The first concern from *DuPont*, that of coworkers not representing the interests of the entire work force, could be said to apply equally to union representatives in a MONMU since the union representative would not be obligated to represent nonunion members. However, the members-only representative would represent the interests of all of its *members* equally, and unlike the concern expressed in *DuPont*, and repeated in *IBM*, there would be a group to represent, and a designated representative. Additionally, the representative would be a union representative, not a mere coworker, thus removing some of the concern expressed in these earlier nonunion context cases such as *DuPont* and *IBM*.⁹⁹

The second concern, that coworkers cannot redress the imbalance of power between employers and employees, is ameliorated somewhat by the presence of a union representative instead of a coworker. Particularly because, as the *IBM* plurality noted, “a union representative has a different status in his relationship with an employer than does a coworker.”¹⁰⁰ While the power of a non-majority union representative is not equivalent to that of a majority representative who has the full bargaining unit behind him, the representative does have “knowledge of the workplace and its politics” and an “official status.”¹⁰¹

The third concern in *DuPont*, reiterated in *IBM*, is the lack of skills that coworkers have in comparison to a union representative. This concern is clearly ameliorated in the non-majority union context because of the presence of a skilled union representative. In *IBM*, the plurality noted the “critical difference between a unionized work force and a nonunion work force is that the employer in the latter situation can deal directly with employees on an individual basis.”¹⁰² The doctrine prior to *Epilepsy*, where a nonunion employer could have contacts with individual employees, was preferable to the *IBM* plurality.¹⁰³

97. *IBM*, 341 N.L.R.B. at 1291. See *supra* note 95 (citing the three concerns expressed by the Board in *DuPont*).

98. *Id.* (emphasis added).

99. *Id.* at 1291-92.

100. *Id.* at 1292.

101. See *id.* Because a MONMU does not represent a majority of the bargaining unit, it is not equivalent in power or legal status to a section 9(a) representative.

102. *Id.*

103. *Id.*

The *IBM* plurality discussed additional concerns to those expressed in *DuPont*. Their fourth concern with coworkers was confidentiality.¹⁰⁴ Though they recognized that confidentiality is a concern even in a unionized setting, the plurality noted in *IBM* that “the dangers are far less when the assisting person is an experienced union representative with fiduciary obligations and a continuing interest in having an amicable relationship with the employer.”¹⁰⁵ The plurality in *IBM* sought to defend itself from the allegations of the dissent. The plurality wrote that they were “not saying that a nonunion employee lacks a Section 7 right to seek mutual aid and assistance from a fellow employee Our only holding is that the nonunion employer has no obligation to accede to the request, i.e., to deal collectively with the employees.”¹⁰⁶ They saw their view as distinguishing nonunion from unionized employers on the basis that the unionized employer is not free to deal with the employees individually regarding employment related matters of potential discipline, whereas the nonunion employer *is* free to deal with individuals.¹⁰⁷

The conclusion of the plurality opinion in *IBM* stated that “in a unionized setting, the employees have a Section 9 representative, and this consideration outweighs the employer’s need for private inquiry.”¹⁰⁸ The plurality’s reference to the presence of a section 9(a) representative refers to the employer’s duty to deal with the statutory representative rather than directly with the employees as they would be free to do in the absence of the representative. Since the Board was not faced with a MONMU in *IBM*, that was not the issue before it. Thus, it seems premature to construe the statement of the plurality as precluding *Weingarten* rights for union members in a MONMU. Nonetheless, there is certainly room for caution in light of the plurality’s reference to section 9(a) and the limitations it places on employers’ ability to deal directly. Because the Board’s Division of Advice refused to find a duty to bargain with a MONMU in *Dick’s Sporting Goods*, they might also find that an employer has no obligation to allow a union representative to accompany a MONMU member in the *Weingarten* context, or in the alternative, forego the interview altogether.

One of the three Board members who voted to restrict *Weingarten* rights to a union setting in the *IBM* case, Member Meisburg, was later replaced, and Meisburg is now the General Counsel of the Board.¹⁰⁹ The

104. *Id.* at 1114.

105. *IBM*, 341 N.L.R.B. at 1114.

106. *Id.* at 1115 (emphasis in original).

107. *Id.* at 1115-16.

108. *Id.* at 1116.

109. Ronald Meisburg is now serving as General Counsel for the N.L.R.B. See N.L.R.B., Board, Member Biographies, http://nlrb.gov/About_Us/Overview/board/ and N.L.R.B., General Counsel, <http://www.nlrb.gov/About%5FUs/Overview/general%5Fcounsel/>, (last visited March 2,

Board entered 2008 with three vacancies; the two remaining members are Liebman and Schaumber.¹¹⁰ The Presidential nomination of former Chairman Battista, whose term expired December 16th, former Member Walsh, whose term expired December 31st, and Gerard Morales, a management attorney, have not yet been confirmed by the Senate.¹¹¹ Members whose backgrounds lie in representing management would seem more likely than Members Liebman and Walsh to agree with the reasoning of the majority in *IBM*, that is, to limiting the *Weingarten* right to situations where there is a union or a section 9(a) representative.

The two members who would have retained *Weingarten* rights for nonunion members in the *IBM* case, Members Liebman and Walsh, relied upon section 7 rather than section 9(a). They relied upon the language of the statute itself which provides employees with the right to engage in concerted activities for the purpose of mutual aid or protection, as well as on the reasoning in the *Epilepsy Foundation* case.¹¹² Members Liebman and Walsh stated their position clearly: “We believe . . . that the Supreme Court’s decision in *Weingarten* supports the right to representation, even in nonunion settings, because that right is grounded in Section 7”¹¹³ The use of a coworker representative as opposed to a union one makes no difference in terms of section 7 rights, and thus the concerns raised by the majority that echo those raised in *DuPont*—representing the entire workforce, redressing the imbalance of power, and having the requisite skills to be effective—are not relevant.¹¹⁴ Essentially, “requiring a nonunion employer to permit coworker representation (if it chooses to

2008). It is interesting that former Board Member Meisburg, now General Counsel, has been in the news because of picketing by N.L.R.B. employees asking him to resign due to his failure to bargain with a combined unit of employees, a bargaining unit determination made by the Federal Labor Relations Authority. See N.L.R.B., *N.L.R.B. Employees Picket D.C. Headquarters Over General Counsel’s Refusal to Bargain*, DAILY LAB. REP. (BNA), No. 158, Aug. 16, 2007, at A-4.

110. Susan J. McGolrick, *N.L.R.B. Enters New Year With Three Vacancies, Two Members Issuing Decisions*, DAILY LAB. REP. (BNA), No. 19, Jan. 30, 2008, at S-9.

111. *Id.* The Board delegated its decision-making authority to a panel of three members so that the two remaining members would constitute a quorum with decision-making authority. General Counsel Meisburg has been “temporarily delegated litigation authority . . . to defend board decisions and initiate injunction proceedings.” *Id.* It is uncertain whether the Senate will confirm the President’s nominations, as Sen. Edward M. Kennedy, chair of the Health, Education, Labor, and Pensions Committee, spoke strongly against the re-nomination of Battista. Susan J. McGolrick, *N.L.R.B., President Renominates Battista, Walsh, Nominates Morales to Fill Board Vacancies*, DAILY LAB. REP. (BNA), No. 17, Jan. 28, 2008, at A-7.

112. *IBM Corp.*, 341 N.L.R.B. 1288, 1305-1310 (citing *Epilepsy Found. v. N.L.R.B.*, 268 F.3d 1095, 1102 (D.C. Cir. 2001)); see also *Epilepsy Found.*, 331 N.L.R.B. 676 (2000) (Members Liebman and Walsh, dissenting).

113. *IBM*, 341 N.L.R.B. at 1306.

114. *Id.* at 1308.

conduct an investigatory interview) is not the equivalent of requiring the employer to bargain with, or deal with, the representative.”¹¹⁵ Member Liebman continues on as a Board member at this time, but clearly it would take more members with this view to change the precedent set in *IBM*. It seems clear that the *IBM* dissenters would support *Weingarten* rights for MONMU members based upon section 7 and also that the concerns expressed by the majority regarding the status and skills of the representative are somewhat assuaged if the employee’s requested *Weingarten* representative is a MONMU steward.

B. The United States Supreme Court in N.L.R.B. v. Weingarten

What did the United States Supreme Court state in the *Weingarten* decision that is relevant to the question of whether MONMU members have *Weingarten* rights or not? The majority opinion, authored by Justice Brennan, ruled that the Board’s finding was a permissible interpretation of the Act, namely that an employer’s failure to grant the right of union representation at an investigatory interview that reasonably might lead to discipline “interfered with, restrained, and coerced the individual right of the employee, protected by § 7 [of the Act], ‘to engage in . . . concerted activities for . . . mutual aid or protection’”¹¹⁶ Thus, the Court concluded that when an employer denied an employee his statutory representative in this context, a section 8(a)(1) violation occurred.¹¹⁷ Limits were placed on the right, but it was clearly grounded in section 7 according to the Board and this construction was upheld by a majority of the Supreme Court.¹¹⁸ In fact, the Court was clear that the Board’s construction “in no wise exceeds the reach of § 7, but falls well within the scope of the rights created by that section.”¹¹⁹ This was so “even though the employee alone may have an immediate stake in the outcome; he seeks ‘aid or protection’ against a perceived threat to his employment security.”¹²⁰ As the majority noted, “[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident”¹²¹ The right that the Board construed and a majority of the Supreme Court confirmed was “in full harmony with actual industrial practice” and

115. *Id.* at 1308.

116. *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 252 (1975).

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

118. *See Weingarten*, 420 U.S. at 260.

119. *Id.* at 265.

120. *Id.* at 260.

121. *Id.* at 263.

is a right that is accorded employees in many collective bargaining agreements and by arbitrators.¹²²

Three Justices dissented in the *Weingarten* case.¹²³ Chief Justice Burger wrote a separate opinion in which he objected not to the Board's new rule but to its lack of explanation or reasoning.¹²⁴ Thus he would have remanded to the Board for it to explain the reasoning behind its change in policy.¹²⁵ Justice Powell, joined by Justice Stewart, also dissented.¹²⁶ Justice Powell wrote that he did not see the "right to have a union representative or another employee present at an investigatory interview" as grounded in section 7, and, in fact, thought that the right to representation should be left to the bargaining process.¹²⁷ It is interesting from the perspective of MONMU members that the dissenters explicitly referred to the *Weingarten* right being available to employees in the absence of a union representative. "While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the § 7 right today recognized, affording employees the right to act 'in concert' in employer interviews, also exists in the absence of a recognized union."¹²⁸ Further, the dissenters criticized the efficacy of the representative in this process because the Board reflected that these were not bargaining sessions and that the employer could insist on hearing only the employee's version of the facts.¹²⁹ Thus, "[a]bsent employer invitation, it would appear that the employee's § 7 right does not encompass the right to insist on the participation of the person he brings with him to the investigatory meeting. The new right thus appears restricted to the privilege to insist on the mute and inactive presence of a fellow employee or a union representative . . ."¹³⁰ The dissenters concluded that the type of "personalized interview" involved in these cases was not "concerted activity."¹³¹

The Supreme Court upheld the Board's construction of section 7's concerted activities for mutual aid or protection as including the *Weingarten* right to representation.¹³² Because the case involved a section

122. *Id.* at 267.

123. *Id.* at 268-75. Chief Justice Burger wrote a separate dissenting opinion; Justice Powell wrote a dissent in which Justice Stewart joined.

124. *Id.* at 268 (Burger, C.J., dissenting).

125. *Id.* at 269.

126. *Id.* at 270 (Powell, J., dissenting).

127. *Id.*

128. *Id.* at 270 n.1 (citing *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (emphasis added)).

129. *Id.* at 273.

130. *Id.* at 273 n.5 (emphasis added).

131. *Id.* at 275.

132. *Id.* at 260.

9(a) representative, the Court referred to a statutory representative in numerous instances. However, the dissenters also thought that the right as grounded in section 7 would be construed to apply even in a nonunion context. The majority noted that the NLRA was designed to eliminate the inequality of bargaining power inherent in the employer-employee relationship, and noted the advantages of the “more experienced kind of counsel which their union steward might represent.”¹³³ Arguably, a union steward in a MONMU would be able to offer experienced counsel as well as assist somewhat with equalizing the power imbalance.

IV. THE NLRA’S PROTECTION OF EMPLOYEES AT INVESTIGATORY INTERVIEWS: THE CONTOURS OF THE *WEINGARTEN* RIGHT

It is clear that there is a *Weingarten* right available to employees who request representation where they have a section 9(a) majority union. It is not clear from current precedent, however, that union members in a MONMU have a correlative right. In general, a *Weingarten* right is not unduly intrusive upon management rights. In fact, the right is somewhat limited. First, the right is limited to instances where an employee reasonably fears that the investigatory interview may lead to discipline, and does not apply to interviews where an employee is merely informed of an already-determined disciplinary decision.¹³⁴ Second, even where a union member requests to have a union representative at an investigatory interview that may reasonably lead to disciplinary action, the employer need not acquiesce to the union member’s request. Instead, an employer may decide to eliminate the interview and proceed with alternative investigation and/or discipline. Since the *IBM* decision, the Board has maintained its position that an employee’s request for a *Weingarten* representative is protected activity, even in a nonunion environment, and that the request should not be the basis for retaliation.¹³⁵ Finally, if the

133. *Id.* at 262 n.7 (quoting *Indep. Lock Co.*, 30 Lab. Arb. Rep. 744, 746 (1958)).

134. *See LIR-USA Mfg. Co.*, 306 N.L.R.B. 298, 305 (1992) (finding union representation unnecessary in a meeting solely to impose previously-decided discipline); *see also El Paso Elec. Co.*, 2007 WL 674333, at *9 (N.L.R.B. Div. of Judges Mar. 1, 2007) (“[W]here an employer informs an employee of a disciplinary action and then questions the employee to seek information to bolster that decision, the employee’s right to representation applies.”) (quoting *Titanium Metals Corp.*, 340 N.L.R.B. 766 (2003)).

135. *Wal-Mart Stores, Inc.*, 343 N.L.R.B. 1287, 1288 (2004) (citing *IBM Corp.*, 341 N.L.R.B. 1288 (2004)). On remand, *Wal-Mart Stores, Inc.*, 2005 WL 2874750, at *3 n.6 (N.L.R.B. Div. of Judges Oct. 25, 2005), the Administrative Law Judge applied *IBM* retroactively and upheld the legality of the discharge, finding that Wal-Mart was motivated equally by the employee’s request for a witness and by his refusal to participate in the interview without a witness. Subsequently, the charging party asked the Board to reconsider its decision to apply *IBM* retroactively, and a three-member panel of the Board ultimately found that the discharge violated section 8(a)(1) of the N.L.R.A. under the precedent prior to

employer acquiesces to the presence of a union representative, the employer need not bargain with the representative, and may insist on hearing only the employee's account.¹³⁶

The Board has broad discretion to interpret the NLRA to decide which interests deserve protection and in which contexts such protection applies. In the union context, two investigatory interview cases are of interest when determining the present contours of the *Weingarten* right. In one case, the Board held out for an employee's choice of union representative. This decision was affirmed by the Court of Appeals for the Fourth Circuit. In another case, the Board elevated the employer's interest in confidentiality, perhaps unduly, at the expense of the union's access to information relative to processing a grievance.

A. *The Union Employee Has the Choice of Representative*

In *Anheuser-Busch, Inc. v. NLRB*, the Court of Appeals for the Fourth Circuit enforced a decision of the Board, affirming a decision by an Administrative Law Judge that the right to representation under *Weingarten* includes an employee's request for a particular shop steward.¹³⁷ The Fourth Circuit referred to the Board's "Representation Rule" and upheld it as "rational and consistent" with the Act.¹³⁸ As the Supreme Court interpreted the Act in *Weingarten*, the Fourth Circuit found that it "generally contemplates that an employee will have his choice as to union representation The choice of a representative plainly furthers the ability of workers to seek such aid and protection."¹³⁹ The outcome of this case is positive in terms of protecting employee rights in the investigatory interview context. The Board appeared to understand that an employee generally has valid reasons for insisting upon his choice. However, the case does not provide any right to most private sector employees since it only applies to union employees and the number unionized is so small.¹⁴⁰

IBM. Wal-Mart Stores, Inc., 351 N.L.R.B. No. 17 at *9, 182 L.R.R.M. (BNA) 1474 (2007) (Members Liebman and Walsh concluded that "retroactive application of *IBM* would lead to a manifest injustice.").

136. *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 259-60 (1975); see O'Brien, *supra* note 31, at 117 n.32-35 (discussing limits of the *Weingarten* right).

137. 338 F.3d 267, 274-75 (4th Cir. 2003).

138. *Id.* at 274 n.10 (noting applicable standard and that the issue is whether the "Board's interpretation is a 'defensible construction of the statute'") (citation omitted).

139. *Id.* at 275. As the appellate court noted, "[a]bsent extenuating circumstances, an employer has no interest in selecting between available representatives. By contrast, employees *do* have an interest." *Id.* at 275 n.11 (emphasis in original). In *Anheuser-Busch*, the employee sought a steward who was familiar with the circumstances surrounding the investigation. *Id.* In other circumstances, a steward that the employee feels more comfortable with might be advantageous.

140. See *supra* note 13 (citing 2007 unionization statistics).

B. The NIPSCO Case-Confidential Notes of Investigatory Interview Need Not Be Disclosed to the Union

Northern Indiana Public Service Co. (NIPSCO), a post-*IBM* NLRB decision relating to parties' rights in investigatory interviews, involved an employer's investigation of a bargaining unit employee's complaint of threatening conduct by a supervisor.¹⁴¹ The supervisor allegedly approached the employee "and stated, 'Peace, love, and understanding, and then you empty the clip,' while pointing his finger at [the employee] as if it were a gun."¹⁴² In another incident, the supervisor reminded the employee of a pistol that the supervisor owned and stated, "[D]eath means nothing to me."¹⁴³ The employee and his union representative met with management concerning the supervisor's threatening manner. The employee ultimately filed a formal grievance in light of the employer's duty to provide a safe workplace under the collective bargaining agreement.¹⁴⁴ Meanwhile, NIPSCO's equal employment opportunity manager/labor relations coordinator proceeded to discuss the matter with the complaining employee, the supervisor, and the supervisor's supervisor. She prefaced each interview with a promise of confidentiality and her notes of the interviews were typed up on a password-protected computer.¹⁴⁵

The Board delegated its authority to a three-member panel. Two of the three members found that the employer did not violate section 8(a)(5) of the Act where it furnished the Union with names of those interviewed, but refused to furnish the interview notes because of the express promise of confidentiality.¹⁴⁶ The Board found that the employer had a "legitimate and substantial confidentiality interest in the information requested by the Union."¹⁴⁷ The majority of a Board panel ruled in favor of confidentiality and against the right of the union to have full access to information that it arguably might need in order to fully represent its member in the context of a grievance. This case is problematic in that it restricts the employer's duty to provide information to a union relative to processing a grievance. The employer was operating in a union context, but by promising confidentiality to those interviewed, it avoided the obligation to share the notes of those interviews with the statutory representative. The decision seems to flow rather unfortunately from the rationale expressed in *IBM* where the Board cited post-9/11 confidentiality concerns as part of its

141. 347 N.L.R.B. No.17, 179 L.R.R.M. (BNA) 1305 (2006).

142. *Id.* at *1.

143. *Id.* at *1 n.6.

144. *Id.* at *1.

145. *Id.*

146. *Id.* Chairman Battista and Member Schaumber formed the majority of the panel while Member Liebman dissented. *Id.* at *7-*10.

147. *Id.* at *2.

rationale for withdrawing *Weingarten* rights from nonunion employees.¹⁴⁸ Member Liebman dissented from the *NIPSCO* decision, noting among other things, that the confidentiality issue should not be a concern in light of the discretion that the union would exercise in light of its duty of fair representation to NIPSCO's employees.¹⁴⁹

V. CONCLUSION

Unions continue to decrease in power and membership in the post-industrial age. In fact, unions have declined in the private sector to the point where one wonders why we should even consider the NLRB's rulings as having a significant impact on the American workplace. Nonetheless, Board rulings do have an impact because of rights that apply to all employees—not just those represented by a union—and because the NLRB sets forth the primary model for industrial relations, however dated or anachronistic that model may seem. Even for those employees who are union members, recent NLRB rulings and administrative actions tend to favor employer rights over employee rights or non-majority collective rights. For those employees who are not union members, rights have diminished even further. This tendency is unlikely to change unless and until the composition of the Board changes pursuant to a change in appointments brought about by a new and different Presidential administration, including the appointment of a more labor-friendly General Counsel.¹⁵⁰

It seems unlikely that the present Board is ready to change its position on the representational and bargaining rights of employees who belong to non-majority unions. In a similar vein, even though we may not have heard the last word on *Weingarten* rights from the Board, if the *Weingarten* right hinges on 9(a) exclusive bargaining agent status, then members in a MONMU are unlikely to benefit from the right in the current legal and political environment. While the Board has not spoken directly to the *Weingarten* rights in MONMUs issue, it has said enough about the lack of rights of non-majority unions in general to discourage even the most optimistic believer in MONMUs as a new method or wave for organizing. Professor Morris' theories on MONMUs have energized many people to think about new alternatives to the present NLRB-sanctioned election system and the section 9(a) "imprimatur." Labor law scholars continue to debate the efficacy and the legal angles of support, while some employees

148. *Id.* at *3 (citing *IBM Corp.*, 341 N.L.R.B. at 1291-94).

149. *Id.* at *7 n.6 (Member Liebman, dissenting).

150. See *Greenhouse supra* note 73 (discussing need to appoint new N.L.R.B. members in order for rule to be adopted); see also *supra* note 109 (discussing the current General Counsel of the N.L.R.B.).

and unions have taken up the charge and worked towards testing the theories. Since the current Board does not seem to be on board with Professor Morris' train of thought on MONMUs, the naysayers of *The Blue Eagle* may be enjoying a momentary sense of superiority. But, the naysayers had better not rest on their laurels. Even if MONMUs are not going to make an immediate difference for unions, in the long run, their very existence is a symptom of the momentum building towards change.

The present statutorily-authorized and NLRB-managed system for obtaining union certification is not working well for unions. Thus, there is an incentive for them to find a better method; a way to get back on track in the twenty-first century. Perhaps if the Employee Free Choice Act is enacted, it would provide a better way for American unions to regain their strength (i.e., wherever they are able to get a majority to sign authorization cards in a bargaining unit).¹⁵¹ And perhaps if the political winds blow in a new direction, MONMUs will have their shot at reviving collective bargaining, and *The Blue Eagle* will fly high once again.

151. See Thomas A. Kochan & John Paul Ferguson, *Modernizing Labor Law*, BOSTON GLOBE, June 21, 2007, at A9 (recommending enactment of the Employee Free Choice Act with two provisos: (1) have federal agencies gather data-tracking effects of card checks and elections; and (2) have Secretary of Labor make the data available for independent evaluation and report to Congress on the assessment).