Asset Protection & Security Services, L.P. *and* Larry Dawson. Case 28–CA–108982

April 22, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On July 7, 2014, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent, Asset Protection & Security Services, L.P., filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. April 22, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Douglas Callahan, Esq. and *John Giannopoulos, Esq.,* for the General Counsel.

Keith B. Sieczkowski, Esq., for the Respondent.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. At the beginning of an interview that he reasonably believed might result in disciplinary action, Detention Officer Larry Dawson (Dawson)[1] stated that he was "self-represented" but he would like a designated employee witness at the interview. His request was denied. At the interview, Dawson received a suspension for a prior incident but thereafter he was discharged for his behavior during the interview. The issue in this case is whether Asset Protection & Security Services, L.P. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying Dawson a witness, conducting the interview after denying the request for a witness, and discharging Dawson for conduct at his "self-represented" interview.[2] No violation is found.

[1] In adopting the judge's conclusion that the Respondent did not violate employee Larry Dawson's rights under *NLRB v. J. Weingarten,* 420 U.S. 251 (1975), we rely solely on the following facts. Prior to the investigatory interview at issue here, Dawson, an experienced former union official, informed the Respondent's project manager, Guadalupe Barajas Jr., that "I will be representing myself." On the day of the interview, Dawson's coworker, Donald Zimmerman, escorted Dawson to Barajas' office. As they walked, Dawson asked Zimmerman to serve as a "witness" during the interview. Zimmerman agreed. The men further agreed that Zimmerman would not serve as a "representative" because Dawson would represent himself. When Dawson and Zimmerman arrived at Barajas' office, Dawson reminded Barajas that he would represent himself, and he asked that Zimmerman remain as a "witness." Barajas confessed his confusion at how self-representation would work, and Dawson responded that was why he wanted a "witness." Barajas said Zimmerman could not remain as a "witness." Dawson repeated his request, and Barajas again refused.

Dawson, Zimmerman, and Barajas all understood that Dawson wanted to represent himself and additionally wanted Zimmerman to remain as a mere observer. We find under these particular facts that Dawson did not effectively request a *Weingarten* representative.

[1] Dawson filed the underlying unfair labor practice charge and amended charge on July 12, 2013, and January 23, 2014, respectively. Complaint and notice of hearing issued on January 31, 2014. The hearing took place in Phoenix, Arizona, on April 2 and 3, 2014.

[2] In *NLRB v. J. Weingarten,* 420 U.S. 251, 256–258 (1975), the Court held, inter alia, that an employee may request representation at an investigatory interview which the employee reasonably believes will result in disciplinary action.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondent, the following findings of fact and conclusions of law are made.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a limited partnership located at the United States Immigration and Customs Enforcement (ICE) Detention and Transfer facility in Florence, Arizona, providing security services to the United States Government. It admits it meets the Board's jurisdictional standard for nonretail direct outflow[4] and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the International Union, Security, Police, Fire Professionals of America (SPFPA) on behalf of its Local 830 is a labor organization within the meaning of Section 2(5) of the Act.[5] Thus, this dispute affects interstate commerce and the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

II. FACTS AND ANALYSIS

Corporate and Collective-Bargaining Background

Since November 2009, Respondent has provided unarmed and armed detention and transportation guards at the Florence ICE facility. Respondent's subcontractor, Ahtna Technical Services, Inc. (Ahtna), also provides unarmed and armed detention and transportation guards at the Florence ICE facility. Respondent and Ahtna have a collective-bargaining agreement with the Union covering a unit of "All full-time and part-time Detention and Transportation Officers . . . excluding all other Employees including office clerical Employees and professional Employees as defined in the National Labor Relations Act." The collective-bargaining agreement relevant to these proceedings was in effect from November 1, 2010, through October 31, 2013.

Guadalupe Barajas Jr. (Barajas) served, at all relevant times, as project manager for Respondent and Ahtna. Although he is no longer employed with Respondent, Respondent admits that Barajas was a supervisor within the meaning of Section 2(11) of the Act. Other members of management include Jason Lewis, chief of security, and Charles Rowe, lieutenant.

Respondent maintains about 250 officers at the Florence ICE facility which operates 7 days a week, 24 hours per day. Each guard works a designated 5 days on, 2 days off shift on the morning, swing, or night shift. For instance, Dawson was working the swing shift with Wednesdays and Thursdays as his designated days off. The shifts are awarded based on seniority.

At the beginning of each shift, there is a "muster" at which all employees assemble in an open area near the property storage building. At the time of muster, employees are briefed about the current status of operations as it affects their duties.

Local 830 Political Campaigns

The General Counsel asserts that political activity in Local 830 influences the appropriateness of particular *Weingarten* representatives. In 2010, Dawson served as an appointed chief steward and later was appointed vice president. Then in September 2010, SPFPA removed the Local 830 officers and named detention officer Ronald Ochs (Ochs) as trustee and SPFPA's site representative. Local 830 elections were held in early 2011. Dawson was elected president with a term expiring in March 2012. Although not on Dawson's slate, Lyn Fulmer (Fulmer) was elected vice president and served with Dawson

Local 830 elections were held again in February 2012. The Dawson slate ran against the Ochs slate. On February 20, 2012, Dawson emailed the electorate asking that voters cast their ballots for his slate: "Do you want a Board with a track record of giving your rights away by crawling in bed with the companies or do you want a Board that will continue to push and preserve your rights as employees and Union members."

The Ochs slate found fault with the Dawson administration in lack of representation on a 32/40 overtime issue, failure to act on and process grievances in a timely manner, and in failure to negotiate a health and welfare increase to offset the increase in premium costs. In campaign literature, they stated, "The choice is simple. If you approve of what has happened in the past twelve months you will vote to keep those responsible on the Board." The email concluded that if employees wanted a change, they should vote for the Ochs slate.

These email propaganda statements from February 2012 are relied upon by the General Counsel to show animus between the parties. No literature or statements from the 2013 campaign were presented. There is no other evidence of animus apart from the fact that Ochs and Dawson had run against each other.[6]

Ultimately the Ochs slate, which included Fulmer as vice president, prevailed in the February 2012 election. Although Dawson challenged Ochs for president in the March 2013 election, Dawson was discharged by Respondent prior to the election.

Muster

On Sunday, January 13, 2013,[7] Dawson reported for work and joined about 60–70 employees at the 1:45 p.m. muster

[3] There is little dispute with regard to the facts of this case. However, when necessary, credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony, or documents, or because it was inherently incredible and unworthy of belief.

[4] *Siemons Mailing Service,* 122 NLRB 81, 85 (1958).

[5] The pleadings use the description as referenced above, that is, "International Union, Security, Police, Fire Professionals of America (SPFPA) on behalf of its Local #830." This entity is referred to as the Union. In order to distinguish between the International and the local, when SPFPA is utilized it refers to the International union. When Local 830 is utilized it refers to the local union.

[6] In early 2012, prior to the election, Dawson attempted to serve Ochs with internal charges based on "inappropriate activities, campaigning date, and so forth." Ochs did not pick up these charges so Dawson sent them to SPFPA. There is no further evidence regarding these charges nor is there evidence that Respondent was aware of these charges.

[7] All further dates are in 2013, unless otherwise specified.

conducted by Lt. Charles Rowe (Rowe). Prior to addressing the employees, Rowe asked the employees to move in closer to him. Dawson moved about 5–7 feet closer. Rowe asked Dawson two more times to move further in and on both occasions Dawson refused to move. Rowe said he would deal with Dawson later. After muster was completed, Rowe told Dawson, "When I tell you to do something, I expect you to do it." According to Dawson, both he and Rowe raised their voices during the ensuing discussion. At the end of the discussion, Rowe told Dawson to report to work.

Unpaid Administrative Leave

Although Dawson returned to work after muster, at about 3:50 p.m. Rowe told Dawson he was being escorted out of the facility. Rowe further stated that Barajas would contact Dawson the following morning. Dawson turned in his keys and his identification documents. He was then escorted from the facility.

On January 15, Barajas and Dawson spoke by phone. Barajas told Dawson he was placed on unpaid administrative leave for insubordination at the January 13 muster. Barajas told Dawson he had submitted a report of the incident to corporate. Dawson protested that Barajas had not contacted him before preparing the report. Barajas asked Dawson to submit a report.

During their discussion, Dawson complained about rumors circulating at the facility that he had taken a swing at Rowe during the January 13 muster incident and asked Barajas to stop them. Barajas asked for names and dates of the rumors and Dawson said he would provide them later.

Barajas told Dawson he would need to report for an interview regarding the muster incident. The stated purpose for the interview, as set forth by Barajas in an email to Dawson, was "to offer you the opportunity to better explain the circumstances as it relates to this [muster] incident and we in turn will explain our concerns then consider our options to best resolve the matter."

Although Respondent originally scheduled the interview on January 21, Dawson asked that it be held on January 22 at a site away from the facility. Dawson chose SPFPA International representative and organizer and former Local 830 business agent, Robert Inman (Inman), to represent him. Inman had a conflict on January 21 and, further, Inman did not wish to enter the facility. Dawson explained to Barajas that he believed there was a conflict of interest with the current officers of Local 830 representing him at an investigatory interview. Barajas refused to hold the interview away from the facility. Refusal to hold the interview offsite is not alleged as an unfair labor practice.

In the meantime, by email of January 28, Ochs told Dawson and Barajas that Local 830 Vice President Fulmer would be Dawson's representative at the interview. In fact, Fulmer served as Local 830's point of contact for disciplinary interviews.

Ultimately, through a series of email communications, Dawson and Barajas agreed to meet at the facility on January 29. Barajas told Dawson that the meeting would afford Dawson an opportunity to explain the facts surrounding the muster. Dawson informed Ochs and Barajas that he did not want Fulmer to be present at the interview stating, "I will be representing myself."

Collective-Bargaining Agreement and Oral Understanding Regarding Disciplinary Interviews

Section 1.4C of the contract states:

> If the Employee requests, the Company will call for a Union Representative prior to any disciplinary action taken, whether it be written or verbal. The supervisor will release the Union Representative as soon as possible. The Union Representative will be paid for time spent in this regard, upon receiving Supervisor approval of relief from duty.

In addition to the contract language, Respondent and Local 830 have an oral understanding regarding disciplinary interviews. When Barajas arrived in 2010, he and the Union reached an understanding that a steward would be present at all interviews. If the employee did not want the steward to be present, the employee could request that the steward be dismissed. Later, Barajas dealt with Vice President Fulmer at all disciplinary interviews. He was the "point of contact" for Barajas in dealing with disciplinary matters.

Interview

On January 29, Dawson arrived at the facility and was escorted by detention officer Donald Zimmerman (Zimmerman) to Barajas' office. Zimmerman was the vice presidential candidate on Dawson's slates in 2011 and 2012. Zimmerman resigned from the Union in March 2012. On their walk to the office, Dawson asked Zimmerman if he would act as a witness at the interview. Zimmerman agreed to do so. Both Zimmerman and Dawson agreed that Zimmerman was to be a "witness" and not a "representative" at the interview and that Dawson would act as his own representative. Dawson did not at any time on January 29 ask for a union representative.

Zimmerman and Dawson reported to Barajas' office. Dawson said he would represent himself and asked that Zimmerman remain as a witness. Barajas said he did not know how self-representation would work. Dawson said that was why he wanted a witness. Barajas stated that Zimmerman could not remain as a witness noting that he was on the clock, had work to perform, and he was not a union member or steward. When Dawson asked a second time that Zimmerman remain as a witness, Barajas told Zimmerman to go back to work. Zimmerman left and Security Chief Jason Lewis joined Dawson and Barajas in the office. Barajas asked for Dawson's report of the January 13 muster incident. Dawson gave Barajas a handwritten report.

Dawson asked what was going to be done about the rumors circulating in the facility. Barajas asked Dawson for the names and dates of the rumors. Dawson stated he would not provide the information and he stated that he did not think he should have to conduct the Company's investigation.

Barajas told Dawson that the purpose of the meeting was to issue discipline to Dawson. Barajas gave Dawson a record of disciplinary action (RDA) suspending him for 5 days for insubordination at the January 13 muster. The General Counsel does not dispute the lawfulness of this suspension. Barajas asked Dawson to review the RDA and asked if he understood that he was not to act in this manner—that insubordination would not be tolerated. Dawson did not respond at first but when asked again he said, "You're speaking the English language, aren't

you?" Barajas told Dawson that as an employee of the Company, he was expected to answer when he was asked a question. Dawson responded that he was not certain whether he was an employee of the Company anymore.

The recitation of facts of the January 13 muster in the RDA state that Dawson was asked by Rowe to move twice and refused and that Dawson acted aggressively toward Rowe, behavior that Respondent would not tolerate. Dawson was instructed in the RDA to take corrective action and follow all directives. Barajas went over the RDA with Dawson. When he concluded, Barajas crossed out the suspension dates on the RDA (which had been completed in anticipation of an earlier date for the interview) and asked Dawson what his days off were. Dawson responded that every day was a day off. Barajas asked again and Dawson told him he did not remember. Barajas left to check what Dawson's days off were and returned stating that Dawson's days off were Wednesday and Thursday. Barajas filled in the days of suspension as from Friday, February 1, to Tuesday, February 5. Dawson refused to sign the record of disciplinary action, which is not unusual.

Termination

Immediately after conclusion of the January 29 interview with Dawson, Barajas prepared a memorandum to CEO Scott Mandel (Mandel) recommending that Dawson be discharged immediately for insubordination during the interview. Barajas recounted Dawson's behavior including refusal to respond to questions, refusal to provide the names of those spreading rumors, refusal to acknowledge his employment relationship with Respondent, and refusal to state what his days off were. Mandel approved the discharge for insubordinate conduct during the January 29 interview.

Analysis: *Weingarten* Issues

The General Counsel avers that Respondent violated Section 8(a)(1) of the Act by refusing Dawson's request for an employee-witness at the interview, by conducting the interview after denying Dawson a witness, and by discharging Dawson because of his conduct during an interview in which he was denied a witness.

Respondent, on the other hand, contends that no violation occurred because the *Weingarten* right at an investigatory interview is to a union representative. Respondent contends that *Weingarten* does not provide a right to a witness. Because there was no request for a *Weingarten* representative, Respondent argues no violations may be found. Further, Respondent contends that the record does not establish a conflict between Dawson and Local 830 which would require a representative other than a member of the Local 830's board.

Weingarten establishes that "an employee has the right to union representation at an interview which the employee reasonably fears will result in discipline."[8] Dawson was told that the purpose of the interview was to discuss the circumstances and Respondent's concerns surrounding the January 13 muster and for Respondent to consider its options to resolve the matter. Thus, Dawson reasonably believed that the January 29 interview could result in discipline.

Generally, the *Weingarten* right to representation includes a right to choose a specific union representative if that representative is available.[9] Respondent denied Dawson's request that the interview be conducted offsite to accommodate International Representative Inman, whom Dawson chose to act as his specific union representative. This denial is not alleged as an unfair labor practice.

Two weeks after the January 13 muster incident, Dawson and Barajas were continuing their efforts to set up the interview. By that time, Local 830 had informed Dawson and Barajas that Fulmer would act as Dawson's representative. At this point, on January 28, Dawson announced that he would serve as his own representative. Indeed, Dawson was an articulate, intelligent witness and certainly exhibited the ability to represent himself. His acting on his own behalf is, moreover, consistent with the Court's holding in *Weingarten* that an employee may forgo the guaranteed right to representation and, if he prefers, participate in an interview unaccompanied by his union representative.[10]

Upon arriving at the scheduled January 29 interview, Dawson stated that he would be self-represented, as previously planned, and announced for the first time that he wanted an employee witness at his self-represented interview. In fact, Dawson presented Zimmerman to act as his employee witness while Dawson represented himself. Both Dawson and Zimmerman understood Zimmerman's role. It was to sit and listen and not take part in the interview.

Zimmerman was on guard duty at the time. No advance notice of the request for Zimmerman's presence had been given Respondent and, accordingly, Respondent had no opportunity to organize a replacement for Zimmerman. Thus, due to these extenuating circumstances, as well as Zimmerman not being a steward or a union member, Respondent advised Zimmerman to return to work.

Dawson's request for an employee witness at his self-represented interview is not a right specifically guaranteed in *Weingarten* as it is currently applied.[11] The right to a *Weingarten* representative is a right to a representative who is an agent of the labor organization which serves as the exclusive representative of the employees. *Weingarten,* supra, 420 U.S. at 257–258; see also, *IBM Corp.,* supra, 341 NLRB at 1291–1292 (a representative at an investigatory interview acts not only for

[8] *Postal Service,* 360 NLRB No. 79, slip op. at 1 (2014).

[9] See, e.g., *Anheuser-Busch, Inc.*, 337 NLRB 3, 8–9 (2001), enfd. 338 F.3d 267 (4th Cir. 2003), cert. denied 541 U.S. 973 (2004); *Consolidation Coal Co.,* 307 NLRB 976 fn. 1, 978 (1992).

[10] *Weingarten,* supra, 420 U.S. at 257.

[11] *Bodolay Packaging Machinery, Inc.,* 263 NLRB 320, 326 (1982), relied on by the General Counsel, is inapposite. Although the employee's request for a "witness" was treated as a request for a *Weingarten* representative, the case was decided at a time when *Weingarten* rights had been extended to unrepresented employees, thus at a time when an unrepresented employee would ask for a "witness" because no union or union representative was on the scene. See *Materials Research Corp.,* 262 NLRB 1010 (1982) (extending *Weingarten* to nonunion workplace), later reversed in *E. I. du Pont & Co.,* 289 NLRB 627 (1988), and later, *Epilepsy Foundation of Northeast Ohio,* 331 NLRB 676 (2000) (extending *Weingarten* to nonunion workplace), enfd in relevant part 268 F.3d 1095 (D.C. Cir. 2001), cert. denied 536 U.S. 904 (2002), reversed in *IBM Corp.,* 341 NLRB 1288 (2004).

the employee being interrogated but also for all other employees in the unit).

IBM Corp., supra, sets forth the Board's rationale for refusal to extend *Weingarten* rights in a nonunion setting. As Respondent notes, not only does *IBM Corp.,* supra, hold that a union representative at an investigatory interview acts for the entire bargaining unit, the Board also recognized that a coworker chosen on an "ad hoc basis" might undermine the union's ability to think beyond the immediate situation and look to set precedent.

Further, even if Dawson's request for Zimmerman's presence as a witness could be construed as a request for a *Weingarten* representative*,* Dawson was not entitled to the presence of Zimmerman because a knowledgeable union representative was available, the parties' contract obligates Respondent to provide a "Union Representative," and Respondent and Local 830 had an oral agreement to utilize Fulmer as a representative for the interview.

The General Counsel argues to the contrary asserting that if no union representative is available and nothing in the parties' contract requires a union representative at an investigatory interview nor is there an oral understanding which establishes a procedure for representation, a fellow employee with no official union status may be present at the interview as a representative.[12]

These are narrow circumstances and they are not present here. Here, the parties' contract specifically requires that a "Union Representative" be present at disciplinary interviews upon employee request. Moreover, Fulmer, a Local 830 representative, was offered to Dawson pursuant to the oral understanding between Respondent and Local 830 that Fulmer would be the point of contact at investigatory interviews and for this interview in particular. Thus, I find that the narrow circumstances for utilization of a fellow employee are not present because Fulmer was available, the contract provided for a "Union Representative" upon request, and the oral understanding between Respondent and Local 830 was that Fulmer would represent Dawson.

Finally, the General Counsel argues that because there was hostility between the current Local 830 officials and Dawson, Fulmer was an unacceptable *Weingarten* representative. Certainly, that was Dawson's stated position throughout. This was why he attempted to obtain the assistance of Inman. His selection of Inman was rejected by both Respondent and Local 830. Their rejection of Inman is not alleged as a violation of the Act. Absent Inman's assistance, Dawson rejected Fulmer's assistance because he did not want his opposition handling the investigatory interview. Dawson thus decided to represent himself. This was his choice to make. As a knowledgeable past official of Local 830, he knowingly waived his right to union representation at the investigatory interview.

Of course, where the interests of a union are adverse to those of an employee it represents in grievance procedures, the Board refuses to defer.[13] Analogizing the adversity of a *Weingarten* representative to the adversity of a union in refusal to defer to arbitration, the General Counsel argues that "the sharp conflict of interest" between the current Local 830 officers and Dawson, a former union president and current candidate for president, created a risk that Fulmer would not properly represent Dawson at the interview.[14]

The record establishes that Dawson and Ochs have run against each other three times. Once Dawson won and once Ochs won. The third election took place after Dawson's discharge. Campaign literature from the 2012 campaign indicates that Ochs found fault in Dawson's representation because of failure to process grievances in a timely manner, failure to represent employees on a 32/40 overtime issue, and failure to negotiate a health and welfare increase to offset increased premium costs. In other words, the Ochs campaign rhetoric was based on the perception that Ochs could do better than Dawson. No personal or derogatory evidence was introduced which would show animosity.

Similarly, Dawson's February 2012 campaign literature indicates that he accused Ochs of giving away employee rights and "crawling in bed" with the employer. These statements are also confined to typical campaign rhetoric. Thus, there is no specific evidence of animus. Moreover, any potential ill effects of the 2012 campaign rhetoric were attenuated due to passage of time.

At the time of the investigatory interview, Dawson was running against Ochs for president of Local 830. Fulmer was running for vice president on the Ochs slate. While this fact alone is sufficient to support a possibility that Fulmer's representation of Dawson might have been awkward, it is insufficient to warrant a finding of hostility, conflict of interest, or adverse interest. Moreover, in 2011, Fulmer and Dawson served concurrently as vice president and president respectively with no apparent antagonism that would suggest a disqualifying basis on Fulmer's part. Finally, there were nine other officers of Local 830 who might have been considered had there been specific evidence of animus between Fulmer and Dawson. Given the lack

[12] *L. A. Water Treatment,* 263 NLRB 244, 245(1982) (denial of fellow employee as representative at investigatory interview violative where no union representative or steward available, contract did not require presence of union representative at interview, and employer and union had no oral understanding establishing a procedure for representation at interviews); *Illinois Bell Telephone Co.,* 251 NLRB 932, 933 (1980), enfd in relevant part 674 F.2d 618 (7th Cir. 1982), supplemented 275 NLRB 148 (19985), enfd sub nom. *Communication Workers of America, Local 5008 v. NLRB,* 784 F.2d 847 (7th Cir. 1986*)* (same).

[13] *United Technologies Corp.,* 268 NLRB 557, 560 (1984).

[14] The General Counsel relies by analogy on *Tubari Ltd.,* 287 NLRB 1273, 1274 (1988), enfd. mem. 869 F.2d 590 (3d Cir. 1989) (in arbitration proceeding, union breached duty of fair representation to discharged employees who supported rival union); *Consolidated Edison Co.,* 280 NLRB 338, 346 (1986) (judge finds that deferral inappropriate due to sufficient doubt that dissident grievant would be adequately represented); *United Technologies Corp.,* supra, 268 NLRB at 560 (deferral appropriate despite single statement of foreman to grievant and shop steward during first step meeting that if grievance processed to next step, grievant would be disciplined); *Kansas Meat Packers,* 198 NLRB 543, 543–544 (1972) (deferral inappropriate where business agent caused discharge of shop steward/grievant who made numerous complaints to union regarding safety hazards and on the job injuries resulting in friction with business agent, resigned as union steward and terminated withholding of dues).

of evidence regarding any specific animosity[15] and the absence of any prior failure on Fulmer's part to faithfully perform any standard representational duties, it is impossible to find the "sharp conflict of interest" referred to by the General Counsel.

The General Counsel relies on *Dresser Industries,* 289 NLRB 90, 109 (1988), in which the judge found that substantial hostility of one slate of candidates for another rendered deferral to arbitration unwarranted. The hostilities included proposing an internal union rule which would have disqualified the opposing slate, strong arming a member of the opposing slate to resign as a trustee, and telling a member of the opposing slate who asked for assistance with a disciplinary warning that he could "wipe his ass" with it. No exceptions were taken to refusal to defer and the Board did not discuss the judge's findings. Thus, the decision not to defer has no binding effect. Moreover, the level of hostility in *Dresser* distinguishes it from the facts of the instant case. No such evidence of animus is present on the record in this case.

Weingarten does not specifically encompass a self-represented employee's right to an employee witness. Under the circumstances of this case, that is, where the contract requires a union representative, Local 830 and Respondent had selected a union representative, and there is insufficient evidence to find a risk that the representative would not fairly represent Dawson, extension of *Weingarten* is unwarranted. Further, Dawson waived his right to a *Weingarten* representative and determined to represent himself. Finally, utilization of an ad hoc employee witness would undermine the collective rights of the bargaining unit.

Thus, on the record as a whole, no violation of Section 8(a)(1) occurred by denial of Zimmerman's presence as a witness at the investigatory interview because the presence of an employee witness for a self-represented employee is not encompassed in *Weingarten*. Moreover, even if the request for an employee witness were encompassed in *Weingarten,* there was no violation in denying the request because a union representative was available, the parties' contract required that Respondent provide a union representative, and the parties' oral agreement was that Fulmer would handle the investigatory interview. Finally, absent specific evidence of animus, the mere fact that Fulmer and Dawson were on competing slates in the Local 830 elections, does not in and of itself create a risk that Fulmer would not fairly represent Dawson. Thus, Respondent did not violate the Act by refusing to allow Zimmerman to remain as a witness at Dawson's interview. It follows that Respondent did not violate the Act by continuing Dawson's "self-represented" interview without Zimmerman's presence. Finally, because Respondent did not unlawfully deny an employee witness at the interview, Respondent did not discharge Dawson in violation of Section 8(a)(1) of the Act.[16]

Analysis Alleged Interrogation

Dawson asked Barajas to stop false rumors that he had taken a swing at Rowe during muster on January 13. On several occasions, Dawson renewed this request to stop the rumors. On each of these occasions, Barajas asked who was spreading the rumors and when.

The General Counsel alleges that Barajas' questioning constituted interrogation in violation of Section 8(a)(1) of the Act. In his opening statement, counsel for the General Counsel's position was that by asking Dawson for the names of employees spreading the rumors, Respondent violated the Act. On brief, the General Counsel's position is subtly different. The General Counsel argues that by asking Dawson to provide the names of coworkers who alerted Dawson to the damaging rumors being spread about him, Respondent violated the Act.

This second theory might establish a violation if it had happened. But this theory is unsupported by any evidence. Rather, the evidence is that Dawson wanted the rumors stopped and Barajas, who was unaware of any rumors, asked who was spreading the rumors. He never asked Dawson for the names of his coworkers who alerted Dawson to the rumors. Under these circumstances, there is no violation.

On these findings of fact and conclusions of law and on the entire record, the following recommended Order is issued[17]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 7, 2014

[15] Specific animosity was found, for instance, where the grievant filed an unfair labor practice charge against the union alleging the business agent caused his discharge as well as evidence of strong personal hostility of the union representative for grievant, *American Medical Response of Connecticut, Inc.*, 359 NLRB No. 144, slip op. at 1, fn. 2 (2013) (currently set aside postissuance of *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), where the union threatened to discharge and caused the discharge of grievants who supported a rival union, *Warehouse Employees Local 20408 (Dubovsky & Sons),* 296 NLRB 396 (1989); where the aggrieved party was seeking to decertify the union, *Electrical Workers Local 675,* 223 NLRB 1499 (1976).

[16] See generally *YRC Freight,* 360 NLRB No. 90, slip op. at 2–4 (2014) (employee may not lawfully be subjected to retaliation for making a *Weingarten* request but assertion of *Weingarten* right does not immunize employee from potential discipline).

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order, as provided in Sec. 102.48 of the Rules, shall be adopted by the Board and all objections to them shall be deemed waived for all purposes.