No. 03-949

In the Supreme Court of the United States

ANHEUSER-BUSCH, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board reasonably concluded that petitioner committed unfair labor practices by conducting investigatory interviews of an employee after denying his request for the presence of a particular union shop steward and summoning instead a union shop steward selected by petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A37) is reported at 338 F.3d 267. The decision and order of the National Labor Relations Board (Pet. App. A38-A40), and the decision of the administrative law judge (Pet. App. A41-A88), are reported at 337 N.L.R.B. 3. The Board's order denying petitioner's motion for reconsideration in part (Pet. App. A89-A93) is reported at 337 N.L.R.B. 756.

JURISDICTION

The judgment of the court of appeals (Pet. App. A96-A97) was entered on August 1, 2003. A petition for rehearing was denied on September 29, 2003 (Pet. App. A94-A95). The petition for a writ of certiorari was filed on December 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, guarantees employees the right to engage in "concerted activities for the purpose of * * * mutual aid or protection." In *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court held, in agreement with the National Labor Relations Board (Board), that NLRA Section 7 "creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." 420 U.S. at 256. The Court therefore upheld the Board's conclusion that an employer violates NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1), by conducting such an "investigatory" interview after denying an employee's request that his union representative be present at the interview. 420 U.S. at 252.[1]

Weingarten itself involved an employee who requested that "a shop steward be called to the interview," 420 U.S. at 255, and this Court therefore did not address how the right recognized in that case would apply where the employee requests the presence of a particular union representative from among several potential representatives. The Board has explained that "[t]he selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances, and as long as the

[1] Section 8(a)(1), 29 U.S.C. 158(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 of the NLRA, 29 U.S.C. 157.

selected representative is available at the time of the [investigatory] meeting." *Barnard College*, 340 N.L.R.B. No. 106 (Oct. 21, 2003), slip op. 2 (citing Pet. App. A38-A88*; Pacific Gas & Elec. Co.*, 253 N.L.R.B. 1143 (1981)).

2. Petitioner operates a brewery in Baldwinsville, New York. Pet. App. A3, A42. The production employees at that facility are represented for purposes of collective bargaining by the International Brotherhood of Teamsters (Union). *Ibid.* On December 15, 1998, Patrick Lamirande, a production operator, allegedly obstructed work being performed in the plant by an independent contractor. *Id.* at A4, A46. The following day, December 16, at approximately 11:15 a.m., Lamirande was approached by Mark Burlingame, a supervisor in Lamirande's department, who began questioning him about the contractor's allegations. *Id.* at A4-A5, A46-A47. At that time, two Union shop stewards were on duty at the plant, Dan Finn and Fred Vogel. *Id.* at A5, A46. Lamirande asked Burlingame to summon Finn. *Id.* at A5, A47, A52. When Lamirande made that request, Finn was on lunch break, which was due to end in about 15 minutes, *i.e.*, at 11:30 a.m. (*id.* at A47, A59; see *id.* at A5) and Vogel was at work in another part of the plant. *Id.* at A5, A14, A48 & n.6; see also *id.* at A60.

Because Finn was on his lunch break, Burlingame denied Lamirande's request and summoned Vogel instead. Pet. App. A5, A47, A52, A59. At about 11:25 or 11:30 a.m., Vogel heard his name being spoken on his radio, and a supervisor appeared and escorted him to meet with Burlingame and Lamirande. *Id.* at A48 n.6; see *id.* at A5. When Vogel arrived, Lamirande told him, "No offense against you Fred, but I would like to see Dan Finn because he is aware of my situation." *Id.*

at A48. Vogel then requested Burlingame to summon Finn. *Id.* at A5, A48. Burlingame declined, stating that "Vogel was there and they were going to proceed." *Id.* at A48. When Lamirande refused to answer questions without the presence of Finn, Burlingame sent him home for the remainder of the day. *Id.* at A5, A49.

The following day Lamirande was ordered to report to Burlingame's office for a meeting with management. Pet. App. A5, A50. Before the meeting, Lamirande ran into Howard Ormsby, a Union business agent, in the plant. Lamirande informed Ormsby about his predicament and told Ormsby that he wanted Finn to be at the upcoming meeting. *Id.* at A50. Lamirande and Ormsby then went to Burlingame's office, where they met with Vogel, Burlingame, and Ken Silva (an assistant manager). *Id.* at A5, A50-A51. Ormsby requested that Finn be present at the meeting, but Silva replied that Finn "would not be called." *Id.* at A5, A51. Lamirande was questioned about the contractor's allegations; Ormsby and Vogel participated and represented Lamirande. *Ibid.* At the conclusion of the meeting, Burlingame told Lamirande that he had no defense to the contractor's allegations and that he would be disciplined. *Ibid.*

3. Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging, in relevant part, that petitioner violated NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1), by conducting investigatory interviews of Lamirande on December 16 and 17, 1998, after having denied his request for representation by Union shop steward Finn. See Pet. App. A41, A44.[2]

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[2] As a result of the contractor's allegations, petitioner (as Burlingame promised) disciplined Lamirande by suspending him for two weeks. Pet. App. A46. The General Counsel did not challenge

a. After a hearing, an administrative law judge (ALJ) sustained that allegation. Pet. App. A59-61; see *id.* at A85. Based on his examination of Board precedent, the ALJ concluded that, "in a *Weingarten* setting, an employee has the right to specify the representative he or she wants, and the employer is obligated to supply that representative absent some extenuating circumstances." *Id.* at A59. Applying that principle, the ALJ found that, on December 16, 1998, Lamirande made a request for representation by Finn at an investigatory interview with Burlingame, and that there were "no * * * extenuating circumstances" justifying Burlingame's failure to summon Finn. *Ibid.*; see *id.* at A52. The ALJ explained that "[t]he only reason advanced [by petitioner] for not calling Finn" on December 16 was that Finn was at lunch. Pet. App. A59. However, the ALJ found that when Burlingame confronted Lamirande at approximately 11:15, "Finn's lunch break only had 15 minutes to go," and that "[t]here was nothing about the [contractor's] allegations against Lamirande that demanded instant attention." *Ibid.* The ALJ further found that Finn's being on lunch break did not render him less "available" than Vogel to represent Lamirande. *Id.* at A60. Rather, the ALJ found that neither Vogel nor Finn was "present when Lamirande requested Finn," and the ALJ credited Finn's testimony that he "had been called away from breaks on previous occasions to represent employees." *Id.* at A59, A60.

As to the investigatory interview of December 17, 1998, the ALJ found that, prior to that meeting, Union business agent Ormsby "voiced" Lamirande's "clear"

Lamirande's suspension before the Board, see *ibid.*, and the legality of the suspension is not before this Court.

request for Finn from the previous day and that "[n]o special or extenuating circumstances" justified petitioner's failure to summon Finn. Pet. App. A60. The ALJ found that Finn was "clearly available" to represent Lamirande on December 17. *Id.* at A61. The ALJ rejected petitioner's contention that its refusal to summon Finn was justified because Lamirande received "adequate representation" from Vogel and Ormsby at the December 17 meeting. *Id.* at A60. The ALJ concluded, instead, that the decision as to who would represent Lamirande "was for the union officials to make." *Ibid.*[3]

b. The Board affirmed the ALJ's findings and conclusions. Pet. App. A38-A39. The Board ordered petitioner, in relevant part, to cease and desist from "[r]efusing to allow a requested steward to represent an employee absent extenuating circumstances" at the Baldwinsville plant. *Id.* at A39, A86.[4]

4. A divided panel of the court of appeals enforced the Board's order. Pet. App. A3, A25. The court upheld, as reflecting "a reasonable interpretation and application of the [NLRA]," the Board's rule that "absent extenuating circumstances, an employee subjected

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[3] Petitioner also sought to justify its failure to summon Finn on December 17 on the ground that Vogel "had represented Lamirande the previous day and was 'up to speed.'" Pet. App. A60. The ALJ rejected that argument. He found (among other things) that "nothing was developed in the first meeting [*i.e.* on December 16] that would have brought Vogel 'up to speed,'" given that Lamirande had refused to answer Burlingame's questions on December 16 in the absence of Finn. *Id.* at A60-A61.

[4] Petitioner filed a motion for reconsideration with the Board. Pet. App. A90. The Board denied that motion in pertinent part because petitioner "reiterate[d]" arguments that the Board had already "considered and rejected." *Ibid.*

to an employer's investigation has the right to specify the union representative of his choice." *Id.* at A11, A12. Guided by this Court's decision in *Weingarten*, the court of appeals explained that "the right to union representation 'plainly effectuates the most fundamental purposes of the [NLRA],' which is to enable workers to seek mutual aid and protection without undue interference by their employers." *Id.* at A12-A13 (quoting 420 U.S. at 262). The court concluded that "[t]he choice of a representative plainly furthers the ability of workers to seek such aid and protection." *Id.* at A13.

The court further explained that, "[w]hen an employee requests union representation in an investigatory interview, the employee is seeking assistance to deal with a 'confrontation with his employer.'" Pet. App. A13 (quoting *Weingarten*, 420 U.S. at 260). The court concluded that, "[i]n such a confrontation, the employee is generally at some disadvantage, and the recognition of his right to choose his representative serves, to some extent, to mitigate this inequality." *Ibid.* The court also observed that the Board's rule is consistent with the purpose of the NLRA "to protect 'the exercise by workers of full freedom of association, self-organization, and *designation of representatives of their own choosing*.'" *Id.* at A12 (quoting 29 U.S.C. 151).

The court concluded that the rule applied by the Board in this case is consistent with prior Board decisions. See Pet. App. A16-A19. The court noted that, in earlier precedent, the Board "had firmly indicated that, so long as the requested union representative is reasonably available, an employer should accommodate an employee's request for a particular representative." *Id.* at A17-A18 (discussing *GHR Energy Corp.*, 294

N.L.R.B. 1011 (1989)). The court further concluded that, in earlier precedent, "the Board had taken a firm position that, absent special circumstances * * * the choice as to who will represent an employee during an investigatory interview resides with the union and the employee, not the employer." *Id.* at A19 (discussing *New Jersey Bell Telephone Co.*, 308 N.L.R.B. 277 (1992)).

The court also concluded that, in the circumstances of this case, "the ALJ did not err in deciding that [petitioner] should have given Lamirande access to the representative of his choice," *i.e.*, Union steward Finn. Pet. App. A14-A15. In particular, the court found sufficient evidentiary support for the ALJ's finding that Finn was no less available than Vogel to represent Lamirande on December 16, 1998. *Id.* at A14-A15 & n.14; see *id.* at A20 n.19 (upholding Board's unfair labor practice finding as to the December 17, 1998 investigatory meeting).[5]

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. a. In *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court upheld the Board's view that NLRA Section 7 affords employees the general right to request the presence of a union representative at an investigatory interview. Subsequently, the Board established principles to govern the situation in which

[5] Judge Shedd dissented in relevant part. Pet. App. A25-A37. The dissent primarily argued that, in enforcing the Board's order, the panel majority "impermissibly expand[ed] the right first announced" by this Court in *Weingarten*. *Id.* at A26.

the employee under investigation requests the presence of a particular union representative from among several potential representatives. The Board has held that an employee is entitled "to specify the union representative he want[s] to assist him at the [investigatory] interview," *GHR Energy Corp.*, 294 N.L.R.B. 1011, 1042 (1989), but may not insist on the presence of a representative who is not "readily available," *Pacific Gas & Elec. Co.*, 253 N.L.R.B. 1143, 1143 (1981). Similarly, the Board has concluded that, when two union officials are "equally available" to serve as a *Weingarten* representative, "the decision as to who will serve is properly decided by the union officials," *New Jersey Bell Tel. Co.*, 308 N.L.R.B. 277, 282 (1992), but the employer may "establish special circumstances that would warrant precluding one of the two officials from serving," *ibid.*; see *Barnard College*, 340 N.L.R.B. No. 106 (Oct. 21, 2003), slip op. 2 ("The selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances, and as long as the selected representative is available at the time of the [investigatory] meeting.") (citing Pet. App. A38-A88; *Pacific Gas & Elec. Co.*, 253 N.L.R.B. 1143 (1981)).

b. This Court has "often reaffirmed" that "the task of defining the scope of [Section] 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it,' * * * and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (quoting *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 568 (1978)). Moreover, the task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the work place

is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957). See *Weingarten*, 420 U.S. at 266-267.

In this case, the court of appeals properly afforded deference to the Board's determination that, under Section 7, an employee who is subjected to an investigatory interview is entitled to select from among equally available union representatives absent extenuating circumstances. Pet. App. A11-A15; see Pet. App. A59-A60; *New Jersey Bell Telephone Co.*, 308 N.L.R.B. at 282. That determination is a reasonable interpretation of Section 7 because it strikes a fair balance among the competing interests with respect to investigatory interviews. Where, as here, more than one union representative is equally available, permitting an employee to specify the union representative he wishes to have present at the investigatory interview in the absence of extenuating circumstances reasonably accommodates both the target employee's interest in acting in concert with others for "mutual aid or protection," 29 U.S.C. 157, when facing possible adverse disciplinary action, and the employer's interest in promptly investigating allegations of employee misconduct. Having concluded that the Board's interpretation is reasonable (Pet. App. A12), the court of appeals correctly deferred to the Board's view. See *id.* at A11 n.10, A15 n.15.[6]

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[6] Petitioner repeatedly characterizes the Board's interpretation in this case as constituting a "new" rule. See, *e.g.*, Pet. 7, 8, 10. As discussed pp. 8-9, *supra*, that characterization is incorrect. Rather, as the court of appeals properly concluded, the Board's decision is

The facts in this case illustrate the reasonableness of the Board's interpretation. Neither Finn nor Vogel was present when Lamirande initially requested representation by Finn: Vogel was in another part of the brewery and had to be summoned by radio, and Finn was on his lunch break. Pet. App. A14, A47. Finn, however, would have completed his lunch break within fifteen minutes (roughly the same amount of time it took Vogel to arrive on the scene) and, in any event, Finn had circumscribed his lunch break on previous occasions in order to represent employees. *Id.* at A14, A47, A48 n.6. Given these facts, and the fact that the allegations against Lamirande did not mandate immediate attention, *id.* at A14 n.14, A59, the Board reasonably determined that petitioner could not deny Lamirande the opportunity to select Finn as his representative because Finn was not "any less 'available' than Vogel." *Id.* at A14, A60.[7]

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rooted in Board precedent, see Pet. App. A16-A19, and "does not signify a substitution of new law for old law," *id.* at A20. Indeed, for those reasons, the court rejected petitioner's claim that the Board was applying a new rule "retroactive[ly]" to this case. *Id.* at A19. In this Court, petitioner does not challenge the court of appeals' ruling on the retroactivity issue.

[7] Petitioner maintains that "[t]he Board's claim that an employee who is at lunch and an employee who is on the job are 'equally available' from the perspective of a front-line supervisor suggests a disconnect between its decision and the realities of the workplace." Pet. 14 n.6. In the court of appeals, however, petitioner did not claim that "substantial evidence fails to support" the ALJ's finding that "the fact that Finn was [at lunch] for a short period of time [did not make] him any less 'available' than Vogel." Pet. App. A14-A15 n.14. In any event, insofar as petitioner now objects to this factual finding, petitioner's claim does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. In this Court, petitioner's primary contention (Pet. i (Question 1), 7-12) is that the Board's interpretation is contrary to NLRA Section 7 and *Weingarten*. That contention lacks merit.

a. Petitioner first asserts (Pet. 7) that the Board's determination that the employee's choice of a representative need not be given effect where there are extenuating circumstances constitutes an impermissible interference with "legitimate employer prerogatives," *Weingarten*, 420 U.S. at 258, because the "extenuating circumstances" exception "transform[s] every legitimate business decision to refuse a specific representative into an opportunity to litigate whether * * * the business rationale was extenuating enough." This argument is based on a mischaracterization of the approach followed by the Board, which amply accommodates the employer's legitimate prerogatives.

As the Court explained in *Weingarten*, the right of employees upheld in that case did not "interfere with legitimate employer prerogatives" because 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." 420 U.S. at 258. As the court of appeals explained, employers have the same prerogatives under the Board's interpretation at issue here: "The employer may deny an employee's request for a particular representative, forego the interview process, and render a decision based on the information it has already obtained." Pet. App. A13-A14 n.12. Moreover, as the court correctly observed, under the Board's interpretation, in the event of "extenuating circumstances," the employer "may reject the employee's request and proceed accordingly." *Ibid.* In light of those considerations, the court

was satisfied that, as in *Weingarten*, the Board's construction of Section 7 does not "plac[e] an undue burden on employers." *Ibid.*

Contrary to petitioner's suggestion (Pet. 7), the fact that litigation might ensue should an employer seek to invoke the "extenuating circumstances" exception is not a basis for invalidating the Board's interpretation. The "extenuating circumstances" that permit the employer to select the employee's representative constitute a narrow exception to the general rule that the selection from among readily available representatives "belongs to the employee and the union." *Barnard College*, *supra*, 340 N.L.R.B. No. 106, slip op. 2; see Pet. App. A60. The Board does not act improperly by providing the employer with an *exemption* from an otherwise reasonable rule if the employer can prove that it is entitled to the exemption on the facts of a particular case. See *New Jersey Bell Tel. Co.*, 308 N.L.R.B. at 282 (finding that "special circumstances" existed where the employer selected one union official over another equally available official who had "exceeded the permissible role of a *Weingarten* representative" during an earlier investigatory interview).

b. Next, petitioner contends (Pet. 8-9) that the Board's construction is inconsistent with *Weingarten* because the Court in that case held that Section 7 entitles an employee only to the assistance of "[*a*] knowledgeable union representative" at an investigatory interview, whereas "having *a* 'knowledgeable' union representative, even if not preferred, is not the equivalent of being subjected to an interview without any representative." That contention, however, is based on a misreading of *Weingarten*. Nothing in *Weingarten* supports petitioner's assumption that it is the employer's prerogative to specify which of two avail-

able union representatives should act as the employee's representative. The *Weingarten* Court explained that "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the [NLRA] was designed to eliminate." 420 U.S. at 262. The Court further observed that "[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 occasioning the interview." *Id.* at 263. Contrary to petitioner's suggestion, nothing in *Weingarten* implies, much less states, that Section 7 forecloses an employee from requesting the presence of a particular "knowledgeable union representative" at the investigatory interview. And there is certainly nothing in *Weingarten* which grants the *employer* (rather than the employee and his union) general authority to decide who among several equally available candidates qualifies as "a knowledgeable union representative" with respect to a given investigatory interview.

Petitioner is also mistaken in suggesting (Pet. 8-9 n.2) that the court of appeals' decision in this case is contrary to decisions of other circuits. Petitioner asserts that some courts of appeals have held that the Board lacks authority to adopt any interpretation of Section 7 rights in the context of investigatory interviews that "expand[s] upon the *Weingarten* right." Pet. 9. However, the cases on which petitioner relies contain no such holding and do not address the scope of the Board's Section 7 authority. Rather, in the cited cases, the courts simply found that the employer did not commit an unfair labor practice under the principles

articulated by the Board and upheld by the Court in *Weingarten*.[8]

c. Nor is there any merit to petitioner's contention (Pet. 10) that the Board's rule is invalid because it "is not grounded in Section 7 of the [NLRA]." Section 7 grants employees the right to engage in "concerted activities for the purpose of * * * mutual aid or protection." 29 U.S.C. 157. An employee's effort to obtain the assistance of his union representative at a confrontation with his employer "clearly falls within the literal wording of [Section] 7." *Weingarten*, 420 U.S. at 260. That is equally true whether the employee makes a general request for a union representative, as in *Weingarten*, or a request for a specific union representative, as in this case. In either situation, the employee's request is "concerted" because he seeks to act together with his collective representative. See *Epilepsy Found.* v. *NLRB*, 268 F.3d 1095, 1100 (D.C. Cir. 2001) (noting that "an employee's request for union representation during an investigatory interview is undoubtedly concerted activity"), cert. denied, 536 U.S. 904 (2002). And, in either situation, such concerted

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[8] See *Southwestern Bell Tel. Co.* v. *NLRB*, 667 F.2d 470, 472-474 (5th Cir. 1982) (finding that, at the investigatory interview, the employer properly directed the union representative not to answer questions put to the employee); *Spartan Stores, Inc.* v. *NLRB*, 628 F.2d 953, 957-959 (6th Cir. 1980) (finding that the employer properly discharged an employee for insubordination where the employee, who had no reasonable basis for believing that the interview might result in discipline, left the room to locate a union steward); *Climax Molybdenum Co.* v. *NLRB*, 584 F.2d 360, 362-363, 365 (10th Cir. 1978) (finding that, under the circumstances, the employer properly denied the union representative's request to meet with employees on company time prior to the investigatory interview).

activity is also for the purpose of "mutual aid or protection," because "[t]he representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview." *Weingarten*, 420 U.S. at 261.

Petitioner nonetheless contends (Pet. 11) that Lamirande's request for the assistance of steward Finn in this case did not fall within the scope of Section 7 because Lamirande based his request merely on a "personal preference" for Finn. That argument, however, rests on an erroneous factual premise. Although Lamirande testified at the administrative hearing that he "personally believed Finn to be a better steward" than Vogel (Pet. App. A46), Lamirande told Vogel at the December 16, 1998 investigatory interview that he preferred to be represented by Finn on that occasion because Finn "is aware of my situation" (*id.* at A48), *i.e.*, because Finn was familiar with the facts surrounding the contractor's misconduct allegations (see *id.* at A13 n.11). Moreover, on both December 16 and 17, 1998, the Union itself (through steward Vogel and business agent Ormsby, respectively), after consulting with Lamirande, reaffirmed Lamirande's request that petitioner summon Finn, thereby manifesting the Union's judgment that Finn was best positioned to represent Lamirande. See *id.* at A5, A48, A50-A51. In any event, for the reasons we have discussed, an employee's request for the presence of a particular equally available union representative at an investigatory interview would constitute Section 7 "concerted activit[y] for the purpose of * * * mutual aid or protection" even if based on the employee's personal belief that the requested representative is the better of two stewards in the shop.

3. Finally, petitioner contends (Pet. 12-15) that the Board's decision in this case is inconsistent with its own precedent. The court of appeals properly rejected that argument. See Pet. App. A16-A19. Although petitioner relies primarily on *Pacific Gas & Electric Co.*, 253 N.L.R.B. 1143 (1981), and *Williams Pipeline Co.*, 315 N.L.R.B. 1 (1994), in support of its claim, see Pet. 12-13, 14, 15, neither case establishes a flat rule that an employer is free to disregard an employee's request for the presence of a particular *Weingarten* representative at an investigatory interview.

In *Pacific Gas & Electric*, the Board concluded only that the employer is not required to honor an employee's request for a union representative "who is not readily available and who does not normally represent employees at that location." 253 N.L.R.B. at 1143. The Board found that the employer in that case acted lawfully in providing another steward who was "ready, willing, able, and present" at the plant, rather than delaying the interview while summoning the requested steward, who worked off-site at another facility. *Id.* at 1143-1144. Given the ALJ's unchallenged finding that Finn and Vogel were equally available to represent Lamirande (Pet. App. A60), no comparable circumstances obtain in this case.[9]

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[9] Thus, Finn normally represented employees at the Baldwinsville plant, did not work at an off-site facility, and was "readily available," *Pacific Gas & Elec.*, 253 N.L.R.B. at 1143, to represent Lamirande on both December 16 and 17, 1998. With respect to December 16 in particular, Finn would have arrived on the scene of Lamirande's interview within 15 minutes, or sooner, had petitioner summoned Finn from his break by radio, as it had done in the past with respect to investigative interviews. For his part, Vogel was not "ready * * * and present," *id.* at 1144, to represent Lamirande when Burlingame initially confronted Lamirande, nor

Likewise, in *Williams Pipeline*, the Board concluded that, where the employee requested the presence of the only steward assigned to the plant, and that steward was unavailable and could not be reached by telephone, the employer acted unlawfully by forcing the employee to submit to an investigatory interview with a fellow employee (who was not a union representative) serving as a witness. 315 N.L.R.B. at 5. That holding is not inconsistent with the Board's decision in this case. In *Williams Pipeline*, the Board also stated (consistent with *Pacific Gas & Electric*) that an employer is not required to "postpone an investigatory interview with its employees because a *particular* union representative is unavailable for personal or other reasons, when another union representative is available and could have been requested by the employee." 315 N.L.R.B. at 5. Here, on December 16, 1998, Finn was not "unavailable" and Vogel "available" to represent Lamirande; rather, Finn was equally available as Vogel for that purpose. See Pet. App. A60; note 9, *supra*. Moreover, Finn was "clearly available" to represent Lamirande on December 17. Pet. App. A61.

Petitioner also cites *Coca-Cola Bottling Co.*, 227 N.L.R.B. 1276 (1977), and *LIR-USA Manufacturing Co.*, 306 N.L.R.B. 282 (1992), in support of its contention that an employer has no legal obligation to honor an employee's request for the presence of a specific union representative at an investigatory interview. Pet. 13. Those decisions, however, stand only for the

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was Vogel "ready and present" any sooner than Finn would have been. Rather, Vogel took 15 minutes to arrive at the scene of the interview because he was working in another part of the plant and had to be located by a supervisor and escorted to the interview. See Pet. App. A5, A14-A15, A46-A48, A59-A61.

proposition that an employer is not obligated to honor an employee's request for a specific union representative who is unavailable. See *Coca-Cola Bottling*, 227 N.L.R.B. at 1276 (finding unavailability where the requested union steward was on vacation and not due back for three days); *LIR-USA*, 306 N.L.R.B. at 305 (noting General Counsel's concession that "by providing Starken [a union shop steward], who was available, instead of Monahan [a union business agent], who was not readily available, [the employer] fulfilled its obligation to provide Jansen [the employee] with union representation"). See Pet. App. A19 n.18. In any event, as the court of appeals properly concluded (Pet. App. A16, A19), even if prior Board decisions "arguably support the contention that an employee is not entitled to the union representative of his choice" in the circumstances presented here, the Board subsequently "modified and reformed its standards on the basis of accumulating experience." That type of "evolutionary process" in the formulation of Board rules is, as the court noted, specifically authorized by *Weingarten* itself. *Id.* at A16 (quoting 420 U.S. at 265). See 420 U.S. at 265-266 (explaining that "[t]o hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking").[10]

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[10] Further review is not warranted in this case for the additional reason that it is unclear whether the issues presented to this Court by petitioner arise "in the context of meaningful litigation." *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). At some point after the events here, but prior to the administrative hearing before the ALJ, petitioner and the Union reached a "mutual agreement" in which (as described by the ALJ) petitioner "will honor an employee's request for a specific [Union] representative if that person is available" with respect to future

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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investigatory interviews. Pet. App. A45; see *id.* at A15 n.15, A53. Although the parties were unwilling to settle the instant case (*id.* at A45), their agreement suggests that this case is of "isolated significance" and therefore inappropriate for certiorari. *Rice* v. *Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 76 (1955).