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ON HONORING PICKET LINES: A REVISIONIST VIEW

PAUL N. COX*

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INTRODUCTION

The picket line is a time-honored economic weapon employed by unions in a variety of contexts to achieve equally time honored union objectives. Its efficacy as a weapon is, however, a matter of the respect shown for it by employees—its signal effect¹ upon employees who encounter it.

This article examines the employee's act of honoring the picket line in terms of two issues: (1) The question of the protection afforded that act by Section 7 of the Labor Act,² and (2) the question of the derivative effect of the illegality of a particular picket line upon that protection. The article examines these questions as a vehicle for criticizing prevailing understandings of the meaning of Section 7 and of the appropriate analysis to be employed in interpreting Sections

1. See *NLRB v. Retail Store Employees Union Local 1001*, 447 U.S. 607, 619 (1980) (Stevens, J. concurring); *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776-77 (1942) (Douglas, J. concurring).

2. 29 U.S.C. § 157 (1976). By "Labor Act" I mean the National Labor Relations Act, as amended by the Taft-Hartley and Landrum Griffin Acts.

7 and 8(a)(1)³ of the Act. Because it raises most starkly the difficulties here perceived in those understandings, the analysis concentrates most particularly upon a common factual context in which the honoring employee, an employee of employer A, encounters a picket line established by employer B's employees over a dispute between B's employees and B. The critique of prevailing understandings proceeds from the proposition that they reflect a failure to identify precisely who possesses Section 7 rights in any given context—an individual employee, the group of fellow employees of a common employer, a group of employees of some other employer, or employees writ large—and, consequently, a failure to recognize that Section 7 may grant distinct types of rights to distinct possessors of those rights.⁴

I. BACKGROUND: SOME "RULES"

The legal issues presented by an employer's discharge or discipline of an employee for honoring a picket line are generally⁵ two: Was the employee's refusal to cross the picket line "protected concerted activity" within the meaning of Section 7⁶ of the Labor Act,

3. 29 U.S.C. § 158(a)(1) (1976).

4. Although I make no claim to the consistency of my conclusions with Professor Brousseau's recent criticism of Labor Law, the distinction he draws between group and individual rights has significantly influenced what follows. See generally Brousseau, *Toward A Theory of Rights for the Employment Relation*, 56 WASH. L. REV. 1 (1981). For an earlier effort at analysis from the distinction, see Blumrosen, *Group Interests in Labor Law*, 13 RUT. L. REV. 432 (1959).

5. In some instances, an employer who discharges an employee for honoring a picket line may find himself running afoul of Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1976). In particular, an 8(a)(3) violation occurs where the discharge is shown to have been motivated by an employer's desire to punish the employee for prior union activity or adherence or where the employer would not have discharged the employee for refusing to work under non-union induced circumstances. See, e.g., *NLRB v. Alamo Express, Inc.*, 430 F.2d 1032 (5th Cir. 1970), cert. denied, 400 U.S. 1021 (1971). On occasion, however, the Board frames the 8(a)(1) issue as an 8(a)(3) issue—that is, as whether the employer acted without business justification. See *Congoleum Ind., Inc.*, 197 NLRB 534 n.1 (1972). Cf. *NLRB v. William S. Carroll, Inc.*, 578 F.2d 1, 4 (1st Cir. 1978) (application of 8(a)(3) proof scheme to 8(a)(1) issue). With respect to the scope of Section 8(a)(3) and its relationship to Section 8(a)(1), see generally P. Cox., *A Reexamination of the Role of Employer Motive Under Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act*, 5 U. PUGET SOUND L. REV. 161 (1982).

6. 29 U.S.C. § 157 (1976):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement re-

and did the discharge or discipline constitute "interference, restraint, and coercion", and therefore an unfair labor practice, within the meaning of Section 8(a)(1)⁷ of the Labor Act?

Those issues arise in a variety of complex factual circumstances, and distinctions in circumstances have, at least in the commentary on the refusal-to-cross question,⁸ been thought to warrant distinct resolutions of those issues. Material distinctions may be catalogued in the form of the following questions: (1) What is the relationship between the honoring employee and the persons engaged in the picketing? (2) What is the relationship between the honoring employee and the picketed employer? (3) What is the relationship between the honoring employee and the dispute giving rise to the picket line? In the usual terminology, these relationship questions are framed as whether the honoring employee honored a fellow-employee or "stranger" picket line,⁹ but the terminology masks substantial complexity. The term "stranger" may be taken to refer to a picketed employer who is not the honoring employee's employer;¹⁰ to pickets

quiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

7. 29 U.S.C. § 158(a)(1): "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7".

8. See Haggard, *Picket Line Observance as a Protected Concerted Activity*, 53 N. CAR. L. REV. 43, 46-48 (1974). See also Axelrod, *The Statutory Right to Respect a Picket Line*, 83 DICK. L. REV. 617, 621-27 (1979); Carney & Florsheim, *The Treatment of Refusals to Cross Picket Lines: "By-Paths and Indirect Crookt Ways"*, 55 CORNELL L. REV. 940, 943 (1970). For further commentary on the question of refusals to cross picket lines, see generally R. GORMAN, *BASIC TEXT ON LABOR LAW* 322-25 (1976); Connolly, *Section 7 and Sympathy Strikes: The Respective Rights of Employers and Employees*, 25 LAB. L.J. 760 (1974); Connolly & Connolly, *Employers Rights Relative to Sympathy Strikes*, 14 DUQ. L. REV. 121 (1976); Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1205-11, 1222-30 (1967); Haggard, *Picket Line and Strike Violence as Grounds for Discharge*, 18 HOUS. L. REV. 423 (1981); Harper, *Union Waiver of Employee Rights Under the NLRA: Part I*, 4 INDUS. REL. L.J. 335, 372-80 (1981); Kennedy, *The "Right" to Refuse to Cross a Picket Line: Limitations Imposed by Courts and Legislation*, 2 ST. LOUIS L. REV. 66 (1952); Rubin, *To Cross or Not to Cross: Picket Lines and Employee Rights*, 4 INDUS. REL. L.J. 419 (1981); Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TX. L. REV. 378, 393-95 (1969); Thatcher & Finley, *Respect for Picket Lines*, 32 NEB. L. REV. 25 (1952); Note, *Picket Line Observance: The Board and the Balance of Interests*, 79 YALE L.J. 1369 (1970); Note, *Respect for Picket Lines*, 42 IND. L.J. 536 (1967).

9. See *NLRB v. Gould, Inc.*, 638 F.2d 159 (10th Cir. 1980), cert. denied, 452 U.S. 930 (1981); *NLRB v. William S. Carroll, Inc.*, 578 F.2d 1, 3 (1st Cir. 1978).

10. See *NLRB v. Alamo Express, Inc.*, 430 F.2d 1032 (5th Cir. 1970), cert. denied, 400 U.S. 1021 (1971).

who are not the honoring employee's fellow employees;¹¹ to a dispute which does not, at least directly, affect the honoring employee;¹² or to the geographical premises upon which picketing occurs where such premises are not owned or controlled by the honoring employee's employer.¹³

For present purposes, it is nevertheless useful to adopt a rather well-worn analytical scheme¹⁴ and to describe the "rules" governing judicial and Board treatment of the refusal-to-cross question in terms of distinct but recurring factual patterns giving rise to the fellow employee or stranger picket line distinction.

A. *Fellow Employee Picket Lines Directed
At A Common Employer*

The paradigm case of a fellow employee picket line is a case in which the honoring employee, in his capacity as an employee,¹⁵ honors a picket line established at his employer's premises by employees of that employer. There are, however, two variations: (1) The picket line may be established by employees (or the union representing employees) in the honoror's bargaining unit over a dispute with the honoror's employer; or (2) The picket line may be established by employees (or the union representing employees) not in the honoror's bargaining unit (but nevertheless employees of the honoror's employer) over a dispute with the honoror's employer.

It is possible to characterize a fellow employee represented by a union (even the honoror's union) in a bargaining unit distinct from the honoror's unit as a "stranger." The dispute giving rise to the picket line is not likely to be a dispute in which the honoring employee has a direct interest precisely because it is a dispute between the employer and a bargaining representative which is not the honoring employee's bargaining representative.¹⁶ The Board and the courts have nevertheless held that there is no Section 7 distinction, absent contractual

11. See *NLRB v. Gould, Inc.*, 638 F.2d 159 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981).

12. See *NLRB v. Southern Greyhound Lines, Inc.*, 426 F.2d 1299 (5th Cir. 1970).

13. See *NLRB v. William S. Carroll, Inc.*, 578 F.2d 1 (1st Cir. 1978).

14. See Axelrod, *supra* note 8, at 621-28; Carney & Florsheim, *supra* note 8, at 943; Haggard, *Observance*, *supra* note 8, at 46-48.

15. The employee might refuse to cross a picket line in his capacity, e.g., as a consumer, when not engaged in his employer's business. Discharge for such a refusal would presumably constitute a Section 8(a)(3) violation.

16. See Haggard, *Observance*, *supra* note 8, at 97-103.

limitations upon employee conduct,¹⁷ between the "same" and "different" bargaining unit cases,¹⁸ and both categories of cases may therefore be said to entail in the contemplation of current law, concerted activity by fellow employees. In both instances, the honoring employee's refusal to cross the picket line is "protected" by Section 7, and his "discharge" is a Section 8(a)(1) unfair labor practice.¹⁹ The honoring employee is treated as a participant in the picketing employee's strike,²⁰ and, as a striker, is subject to the usual Board rules governing permissible employer response to strikes.²¹ Specifically, the honoring employee may be permanently or temporarily "replaced" (not discharged),²² but retains reinstatement rights.²³

B. *Stranger Employee Picket Lines Encountered
At a Stranger Employer's Premises*

The most common example of a case raising the stranger picket line problem is that of a deliveryman encountering a picket line at the place of delivery, that place being the premises of an employer not the employer of the deliveryman.²⁴ There are three variations on the pattern: (1) The picket line may be established by employees of the picketed stranger employer over a dispute with the stranger employer;²⁵ (2) The line may be established by persons not employees

17. The honoring employee may be subject to a no-strike or more specific clause in the collective bargaining agreement governing his unit. *See infra* notes 55-57 and accompanying text.

18. *See, e.g.*, NLRB v. C.K. Smith & Co., 569 F.2d 162 (1st Cir. 1977); Newspaper Production Co. v. NLRB, 503 F.2d 821 (5th Cir. 1974); NLRB v. Union Carbide Corp., 440 F.2d 54 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971); NLRB v. Southern Greyhound Lines, Inc., 426 F.2d 1299 (5th Cir. 1970). *See also* Houston Insulation Contractors Ass'n v. NLRB, 386 U.S. 664, 668-69 (1967) (dicta). *But see* NLRB v. Illinois Bell Tel. Co., 189 F.2d 124 (7th Cir.), *cert. denied*, 342 U.S. 885 (1951).

19. *See, e.g.*, NLRB v. C.K. Smith & Co., 569 F.2d 162 (1st Cir. 1977); NLRB v. Union Carbide Corp., 440 F.2d 54 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971); NLRB v. Difco Laboratories, Inc., 427 F.2d 170 (6th Cir.), *cert. denied*, 400 U.S. 833 (1970); NLRB v. Southern Greyhound Lines, Inc., 426 F.2d 1299 (5th Cir. 1970).

20. *See, e.g.*, NLRB v. Union Carbide Corp., 440 F.2d 54 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971); Pilot Freight Carriers, Inc., 224 NLRB 341 (1976).

21. Hoffman Beverage Co., 163 NLRB 981, 982f (1967). *See* Laidlaw Corp., 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

22. NLRB v. International Van Lines, 409 U.S. 48 (1972); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

23. NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); Laidlaw Corp., 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

24. *See* NLRB v. Alamo Express, Inc., 430 F.2d 1032 (5th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).

25. *See, e.g.*, NLRB v. Southern Cal. Edison Co., 646 F.2d 1352 (9th Cir. 1981);

of the picketed stranger employer over a dispute with the stranger employer;²⁶ (3) The line may be established by persons not employees of the picketed employer over a dispute with some third party, neither the picketed employer nor the honoring employee's employer.²⁷

Two general, but competing rules may be identified as controlling this category of cases—at least absent illegality of the picket line—in different forums²⁸ or in the same forum at different times.²⁹ The first such rule is that an employee's refusal to cross a stranger picket line established in a dispute with a stranger employer is protected activity under Section 7. An employer's discharge of the honoring employee is therefore a violation of Section 8(a)(1) *unless* the employer had, at the time and under the particular circumstances, an overriding business justification for the discharge.³⁰ The business interests of the employer (*e.g.*, in making a delivery) and the Section 7 interests of the employee in honoring the picket line are therefore "balanced" on a case by case basis.³¹ One factor in determining the weight assigned (and credibility of) the employer's business interest is whether the employer hired a replacement for the discharged honoring employee upon or shortly following the discharge.³²

The second, competing, rule is that a refusal to cross is protected under Section 7 and that the honoring employee may not be discharged but may be "replaced."³³ The honoring employee is, in short, to be

NLRB v. William S. Carroll, Inc., 578 F.2d 1 (1st Cir. 1978); Teamsters Local 657 v. NLRB, 429 F.2d 204 (D.C. Cir. 1970).

26. *Cf.* Giant Food Markets, Inc., v. NLRB, 633 F.2d 18 (6th Cir. 1980) (area standards picketing and threat of trespass action as 8(a)(1) violation).

27. *See* Montana-Dakota Utils. Co., 189 NLRB 879 (1971), *enforcement denied*, 455 F.2d 1088 (9th Cir. 1972).

28. *Compare* NLRB v. Gould, Inc., 638 F.2d 159, 163 n.3 (10th Cir. 1980) *with* Gould, Inc., 238 NLRB 618 n.3 (1978) *enforced* 638 F.2d 159 (10th Cir. 1980).

29. *Compare* Torrington Constr. Co., Inc., 235 NLRB 1540 (1978) *with* Redwing Carriers, Inc., 137 NLRB 1545 (1962), *enforced sub. nom.*, Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

30. *See* Overnite Transport Co., 154 NLRB 1271 (1965), *enforced in part sub nom.*, Truck Drivers Local 728 v. NLRB, 364 F.2d 682 (D.C. Cir. 1966). *See also, e.g.*, NLRB v. William S. Carroll, Inc., 578 F.2d 1 (1st Cir. 1978); NLRB v. Alamo Express, Inc., 430 F.2d 1032 (5th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); Teamsters Local 657 v. NLRB, 429 F.2d 204 (D.C. Cir. 1970).

31. Haggard, *Observance*, *supra* note 8, at 83-93. *See* NLRB v. William S. Carroll, Inc., 578 F.2d 1, 3 (1st Cir. 1978).

32. *See* Overnite Transport Co., 154 NLRB 1271 (1965), *enforced in part sub nom.*, Truck Drivers Local 728 v. NLRB, 364 F.2d 682 (D.C. Cir. 1966); Redwing Carriers, Inc., 137 NLRB 1545 (1972), *enforced sub nom.*, Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1966).

33. Torrington Constr. Co., Inc., 235 NLRB 1540 (1978). *See also* Rockaway

treated as a sympathy striker under the rules that would be applied to his "participation" (through honoring a fellow employee picket line) in a strike against his employer.³⁴

The distinction between these competing rules is that the latter rather clearly applies the "strike-replacement-reinstatement"³⁵ analogy, while the former permits "discharge" (and therefore presumably imposes no duty of reinstatement³⁶) upon an individual showing of business necessity. Whether there is a real distinction between the rules is, however, dependent upon whether the Board will apply a presumption that replacement is lawful under the replacement rule.³⁷ If replacement is conditioned upon proof of business necessity in particular cases,³⁸ the replacement rule imposes a burden of justification upon the employer which can be expected to deter replacement. If replacement is presumptively lawful without proof of business necessity, the replacement rule provides the employer far more flexibility than would be the case in a mere grant of a discharge privilege conditioned upon proof of business necessity.³⁹

C. *Stranger Picket Lines Encountered At the Premises of The Honoring Employee's Employer*

A case falling within this category may involve (1) a picket line established by persons not fellow employees of the honoror at the premises of the honoror's employer and over a dispute with the honoror's employer⁴⁰ or (2) a picket line established by persons not fellow

News Supply Co., 95 NLRB 336 (1951), *enforcement denied*, 197 F.2d 111 (2d Cir. 1952), *aff'd on other grounds*, 345 U.S. 71 (1953).

34. Torrington Constr. Co., Inc., 235 NLRB 1540, 1541 n.11 (1978).

35. *Id.*

36. See NLRB v. William S. Carroll, Inc., 578 F.2d 1, 3 n.2 (1st Cir. 1978); Swain & Morris Constr. Co., 168 NLRB 1064 (1967). *But see* Thurston Motor Lines, Inc., 166 NLRB 862 (1967) ("The employer's right to replace is no greater than its proven need to carry on its business. It is not a punitive right."). Compare NLRB v. L.G. Everist, Inc., 334 F.2d 312 (8th Cir. 1964), with NLRB v. Southern Greyhound Lines, Inc., 426 F.2d 1299 (5th Cir. 1970).

37. Compare NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (in effect creating a presumption that replacement of economic strikers is lawful) with Southern Cal. Edison Co., 243 NLRB 372 (1979) (in effect requiring case by case proof of business necessity as a justification for replacement of an honoring employee), *enforced*, 646 F.2d 1352 (9th Cir. 1981).

38. See Southern Cal. Edison Co., 243 NLRB 372 (1979), *enforced*, 646 F.2d 1352 (9th Cir. 1981).

39. See Haggard, *Observance*, *supra* note 8, at 88-93.

40. See the facts in *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978).

employees of the honoror at the premises of the honoror's employer and over a dispute with some third party.⁴¹ In the latter variation, the third party is typically a stranger employer present on the premises or on a "common situs" and doing business with or in conjunction with the honoror's employer.⁴²

Upon the assumption that the picket line in question is lawful (most particularly, that it is a "primary" and not a "secondary" picket line⁴³), and upon the further assumption that no union may be characterized as having otherwise induced the employee action,⁴⁴ the rule generally applied is that the honoring employee is a sympathy striker who may be replaced but not discharged.⁴⁵ It should be clear, however, that, at least in a case falling within the second variation, the "stranger dispute" would appear to make the case more closely analogous to the case involving a picket line at a stranger employer's premises than a case involving fellow employees, and this is so despite geography.⁴⁶

D. *Fellow Employee Pickets Encountered At Stranger Premises*

This category of case essentially involves a Section 8(b)(4)(i)(B)⁴⁷

41. *NLRB v. Gould, Inc.*, 638 F.2d 159 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981).

42. *Id.*; *Congoleum Ind., Inc.*, 197 NLRB 534 (1972).

43. *See Houston Insulation Contractors Ass'n. v. NLRB*, 386 U.S. 664 (1967); *Local 761, Int'l Union of Electrical Radio & Machine Workers v. NLRB*, 366 U.S. 667 (1961); *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951); *Truck Drivers Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964).

44. *See Grain Elevator, Flour & Feed Mill Workers, Local 418 (Continental Grain Co.)*, 155 NLRB 402 (1965), *enforced*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967).

45. *Newbery Energy Corp.*, 227 NLRB 436, 437 (1976). *See NLRB v. Gould, Inc.*, 638 F.2d 159 (10th Cir. 1980) *enforcing* 238 NLRB 618 (1978); *Congoleum Ind., Inc.*, 197 NLRB 534 (1972). *But cf. NLRB v. C.K. Smith & Co.*, 569 F.2d 162 (1st Cir. 1977) (sympathy strike protected on assumption of common employer; § 8(b)(4) issue); *Newspaper Prod. Co. v. NLRB*, 503 F.2d 821 (5th Cir. 1974) (same).

46. Although picket line cases are often discussed and distinguished in terms of the location of the picket line, location appears at best only marginally relevant. *Cf. United Steelworkers of America v. NLRB*, 376 U.S. 492 (1964) (secondary boycott issue). It is, rather, the coincidence that location will often affect the relationship of the pickets, the honoring employee and the picketed employer that gives location its descriptive utility. Location is, in short, something of a shorthand for assuming that these relationships are not, in a particular case, the relationships between a fellow employee picket line, the honoring employee, and a common employer.

47. 29 U.S.C. § 158(b)(4)(i)(B) (1976):

(b) It shall be an unfair labor practice for a labor organization or its agents—

"ambulatory situs" issue, but is useful for descriptive purposes to illustrate the irrelevance, at least in principle, of geography to the issue under discussion. An example is the deliveryman who encounters fellow employee pickets at a delivery site where the pickets' appeal is essentially that the deliveryman join a strike against their common employer.⁴⁸ The location of the appeal (and, if successful, the act of honoring the picket line) is an element in a description of the context, but the question of the protected nature of the refusal to cross in this context is indistinguishable from that question in the context of a fellow employee appeal at a common employer's premises.

E. *The Unlawful Picket Line*

It is generally said that the honoring employee, because he derives the Section 7 protection afforded his refusal from the protected character of the picket line he honors, enjoys no protection for his refusal to cross an unlawful picket line.⁴⁹ The employee's derivative "right" is therefore limited by the possibilities that the picket line is secondary,⁵⁰ is established in violation of organizational

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where . . . an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of employees under the provisions of section 9[.]; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

48. See *Sailors' Union of the Pacific*, 92 NLRB 547 (1950) (appeal to primary employees on secondary premises).

49. *American Tel. & Tel. Co.*, 231 NLRB 556, 561-62 (1977) (ALJ). See *Newspaper Prod. Co. v. NLRB*, 503 F.2d 821, 825 (5th Cir. 1974); *NLRB v. Louisville Chair Co.*, 385 F.2d 922, 928 n.3 (6th Cir. 1967); *United Furniture Workers v. NLRB*, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964); *Pacific Tel. & Tel.*, 107 NLRB 1547 (1954).

50. See *NLRB v. Gould, Inc.*, 638 F.2d 159, 163 n.2 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981); *NLRB v. C.K. Smith & Co.*, 569 F.2d 162 (1st Cir. 1977); *Truck Drivers Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964).

picketing prohibitions⁵¹ or is established in violation of contractual limitations, such as a no-strike clause,⁵² upon the rights of the pickets. Although courts have generally strictly applied the derivative right

But cf. NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409, 417-18 (5th Cir. 1955) (strike misconduct).

51. 29 U.S.C. § 158(b)(7) (1976): It shall be an unfair labor practice for a labor organization or its agents

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof; Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

See National Packing Co. v. NLRB, 352 F.2d 482 (10th Cir. 1965). *But see* Local Union, Highway & Local Motor Freight Drivers No. 707 (Claremont Polychemical Corp.), 196 NLRB 613 (1972). In *Claremont*, the employer lawfully discharged employees who participated in picketing in violation of Section 8(b)(7)(B), but unlawfully discharged employees who "struck for recognition" but did not themselves picket. The rationale is that striking (as distinguished from unlawful picketing) for recognition is protected under Section 7; the striking employees' protection is not, under such circumstances, derivative. A different case would presumably be presented if the objective of the strike (as well as the picket line honored by the striker) is illicit. *See* American News Co., 55 NLRB 1302 (1944). *But see* NLRB v. Local 18, International Union of Operating Engineers, 503 F.2d 780 (6th Cir. 1974). In a case in which the honoring employee encountered an unlawful (under 8(b)(7)) picket line directed at a stranger employer, the honoring employee would have difficulty in asserting an independent (*Claremont*) right to honor the picket line.

52. *See* American Tel. & Tel. Co., 231 NLRB 556 (1977).

theory,⁵³ it has been argued that an honoring employee should have notice of illegality before that illegality is used to justify a discharge.⁵⁴

F. *Contractual Limitations Upon The Honoring Employee's "Right"*

Although a picket line may itself be lawful, the honoring employee's act of refusal may violate contractual limitations upon his conduct—most particularly, a no-strike clause or a more specific provision waiving employee rights to engage in sympathy strikes or to otherwise honor a picket line.⁵⁵ The issue in a case presenting a problem of contractual waiver is contractual interpretation: most commonly, the breadth of a no-strike clause. The Board consistently requires a specific provision waiving the "right" of refusal⁵⁶; the courts of appeals tend to split on the question; sometimes finding a general no-strike clause sufficient for waiver.⁵⁷

II. A CRITIQUE OF THE ACCEPTED ANALYSIS: SECTION 7

The rules identified in the last section as governing the honoring of picket lines rest on interpretations of the scope and meaning of Section 7 of the Labor Act. The protection afforded employee activity by Section 7 is enforced by means of the unfair labor practice prohibitions of Section 8 of the Labor Act, most broadly and directly by Section 8(a)(1): it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."⁵⁸ The statutory scheme thus requires a two-step analysis: (1) was the employee activity protected by Section 7 and (2) did the employer "interfere" with that activity. Matters are not, however, this simple.

53. See *Drivers, Salesmen Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966).

54. See Axelrod, *supra* note 8, at 639 (relying on *Pac. Tel. & Tel. Co.*, 107 NLRB 1547 (1941)). *But see* *Am. Tel. & Tel. Co.*, 231 NLRB 556 (1977).

55. *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953). *Cf.* *NLRB v. Keller-Crescent Co.*, 538 F.2d 1291, 1296 (7th Cir. 1976) (employees bound to arbitrate coverage of no strike clause before engaging in sympathy strike).

56. See *Danial Constr. Co., Inc.*, 239 NLRB 1335 (1979); *Local 18, International Union of Operating Engineers*, 238 NLRB 652 (1978); *Montana-Dakota Utils. Co.*, 189 NLRB 879 (1971), *enforcement denied*, 455 F.2d 1088 (8th Cir. 1972).

57. Compare, e.g., *NLRB v. Gould, Inc.*, 638 F.2d 159, 164-65 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981); *Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975); *NLRB v. C.K. Smith & Co.*, 569 F.2d 162 (1st Cir. 1977) with *NLRB v. Keller-Crescent Co.*, 538 F.2d 1291 (7th Cir. 1976); *Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters & Butcherworkman*, 597 F.2d 1138 (8th Cir. 1979); *Montana-Dakota Utils. Co. v. NLRB*, 455 F.2d 1088 (8th Cir. 1972).

58. 29 U.S.C. § 158(a)(1) (1976).

On its face, Section 7 would seem to require a resolution of the "protection" issue solely in terms of whether employee conduct was a "concerted activity" and whether the conduct was engaged in "for the purpose of collective bargaining or other mutual aid or protection."⁵⁹ There has been in the history of litigation under the Labor Act no real dispute in either the cases or the commentary about the protected status, under Section 7, of an employee's "right" to honor a picket line established by fellow employees in a shared bargaining unit over a dispute with a common employer. The employee's refusal to cross in such a context is considered self-evidently a "concerted activity" for the "purpose of collective bargaining or other mutual aid or protection."⁶⁰ There is, however, a longstanding and continuing⁶¹ debate over the Section 7 protection afforded an honoring employee for a refusal to cross a picket line established by stranger employees over a dispute with a stranger employer.

The debate has been framed as a debate about the meaning of Section 7 terminology. One avenue of attack upon the application of Section 7 is a claim that a single employee's act of refusal is not "concerted."⁶² That avenue ignores the pickets: the refusal is an act in compliance with a signal communicated by others.⁶³ Moreover, it ignores the possibility that the honoring employee refuses to cross in behalf of and at the instance of his fellow employees or of the union representing the honoror and his fellow employees.

These responsive arguments to the attack upon concertedness are alternatives with very different implications for the content of Section 7 rights. The first response suggests that an individual employee's conduct may fall within the protection of Section 7 if that conduct responds to (and directly aids) a stranger labor dispute. The focus of such an implication is upon the individual: the individual in effect expresses his conviction in the justice of labor's cause writ large.

59. 29 U.S.C. § 157 (1976).

60. Such a refusal is in fact participation in a strike—the paradigm case of "protected concerted activity". *NLRB v. McKay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

61. See *NLRB v. William S. Carroll, Inc.*, 578 F.2d 1, 3 (1st Cir. 1978). *But cf. Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-68 (1978) (taking a view of the scope of Section 7 in another context consistent with protection in the present context).

62. See *NLRB v. Illinois Bell Tel. Co.*, 189 F.2d 124 (7th Cir. 1951). *Cf. NLRB v. International Rice Milling Co.* 341 U.S. 665 (1951) (interpreting "concerted" in the context of the Taft-Hartley version of Section 8(b)(4)).

63. *Cf. The Capital Times Co.*, 234 NLRB 309 (1978) (refusal to cross picket line established by employees who are not employees within the meaning of Section 2(3) of the Act not "concerted").

The argument that the employee acts on behalf of his fellow employees has a very different implication. Under that argument, the employee acts in concert, even where he acts alone in refusing to cross the stranger picket line, because he participates in the collective demand of his fellow employees for the benefits to be derived by those employees from the stranger dispute.

A second avenue of attack upon the application of Section 7 is the claim that such a refusal—where the picket line is a stranger picket line—is not an act engaged in for purposes of “mutual aid or protection” because there is in fact no mutual benefit to be gained from the act of honoring or because any such gain is too remote to warrant statutory protection.⁶⁴ The implications of that attack are that mutuality is a matter either of the likelihood of benefit to the honoring employee or of the utility of the act of honoring in furthering a preferred policy of labor law and that both likelihood and utility questions are to be answered after the fact by authoritative institutions of government (the Board and the reviewing courts). A further implication is of course that these institutions may conclude that in fact benefit is likely or utility is high and, therefore, that protection is warranted for these reasons. There is, however, a distinct potential response to the attack upon the mutuality of the act of honoring: mutuality of benefit is properly a question to be decided by the autonomous private actor granted rights against employer retaliation by the statute and the right is therefore not subject either to a qualification of likelihood or a limitation of utility so long as that actor may be said to be acting for a purpose related to employment. The question raised by this second response is precisely who is the autonomous actor granted rights by the statute.

These described attacks and alternative responses raise fundamental issues about the meaning of Section 7. The following sections of this article seek to flesh out the attacks and the responses and to present an argument supporting the following proposed meaning to be ascribed to the phrase “concerted activity for mutual aid or protection” in the context of the honoring of stranger picket lines: The act of honoring a stranger picket line is concerted activity under Section 7 because the honoring employee acts in behalf of his fellow employees, and this is so whether he acts alone or together with other fellow employees. The act of honoring is, moreover, for a mutual purpose because it is an act for the purpose of benefitting the honoring employee's fellow employees. The honoring employee does not derive protection

64. See Haggard, *Observance*, *supra* note 8, at 93-99.

from acting in concert with picketing stranger employees or by reason of the utility of the act of honoring in furthering the efficacy of the stranger employee's strike weapon. His protection, rather, is a function of his participation in (and the instrumental value of that participation for) the "concerted activity" of the employee group in which he is a member. His act is, in short, the act of that group, and it is the group which possesses the Section 7 right to honor. Because it is the group which is the repository of that right, the decision to honor is, for purposes of the question of Section 7 protection, properly viewed as the decision of that group, and most particularly, the decision of that group's exclusive representative.

(A) *The Relationship Between the "Concerted Activity" and "Mutual Aid or Protection" Elements of the Statute.*

It is possible to view the term "concerted" either as quite literally requiring conduct by two or more employees or as a term of legal art permitting protection of "activity" by a single employee. For the most part, the courts have adhered to a literal approach⁶⁵ by requiring either action by two or more employees or action by a single employee which "looks toward" group action in the sense that it has as its purpose the initiating of group action.⁶⁶ A more liberal view would label a single employee's effort to enforce his individual claim under a collective bargaining agreement "concerted" even where his effort constitutes an act outside the contractual grievance machinery, upon the theory that enforcement of the collective bargaining agreement preserves the product of pre-agreement concerted activity or ultimately benefits all employees subject to that agreement.⁶⁷ And the Board has gone as far as concluding that individual employee action in furtherance of that individual's personal interests is "concerted" whenever such action may ultimately benefit fellow employees.⁶⁸ Both the Board's 'ultimate benefit' theory—and its less inclusive cousin, the individual enforcement of a collective bargaining agreement as

65. See, e.g., *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973); *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964).

66. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

67. *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967). The *Interboro* test has been characterized as an inquiry into whether the individual employees' action in pursuit of his individual interests will ultimately have a "concerted" effect—in the sense of an ultimate benefit—on his fellow employees. *Anchor-tank, Inc. v. NLRB*, 618 F.2d 1153, 1161 (5th Cir. 1980); Note, *Constructive Concerted Activity and Individual Rights: The Northern Metal-Interboro Split*, 121 U. PA. L. REV. 152, 160 (1972). But see *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980).

68. *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

concerted activity theory—rely upon the speculative long-term impact of individual action upon employees as a group⁶⁹ and therefore appear grounded upon the group benefit core of the mutuality concept.⁷⁰

This apparent fusion of the concertedness and mutuality elements, and the doctrinal confusion generated by that fusion⁷¹ are both evident in and reinforced by the Supreme Court's opinion in *NLRB v. T. Weingarten, Inc.*⁷² The Court there held that an individual employee's request for union representation at an interview conducted by an employer was a request protected by Section 7 where the employee reasonably feared that the interview would result in discipline.⁷³

In *Weingarten*, an *individual* employee requested union representation to further an *individual* interest in job security where no contractual right to representation existed under a collective bargaining agreement. The Supreme Court's rationale for its result focused upon the long-term benefit conferred on the group by the individual's demand—or, perhaps more accurately, by compliance with the demand:

The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." This is true 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. The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.⁷⁴

69. See *Anchortank Inc. v. NLRB*, 618 F.2d 1153 (5th Cir. 1980).

70. Compare *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-68 (1978) with *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967).

71. Compare *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 844 (2d Cir. 1980) (treating *Weingarten* as dealing with the mutuality question) with *Anchortank Inc. v. NLRB*, 618 F.2d 1153, 1161 (5th Cir. 1980) (treating *Weingarten* as dealing with the concertedness question). But see Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 329 (1982) (apparently advocating an interpretation which would protect individual action for individual benefit).

72. 420 U.S. 276 (1975).

73. *Id.* See also *ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

74. 420 U.S. at 260-61 (citations omitted).

It should be noticed that *Weingarten* postulates an individual employee right to representation flowing from Section 7, but justifies that right, as the quoted portion of the opinion makes clear, upon the ground that the right serves the interests of employees as a group.⁷⁵ The Fifth Circuit has explained that analysis as "seemingly" adopting the liberal view of the concertedness requirement: individual action in pursuit of an individual interest is concerted if it has a beneficial effect on employees as a group.⁷⁶ The Second Circuit, in limiting the liberal view to instances in which an individual employee seeks to enforce a collective bargaining agreement, has explained *Weingarten* as concerned only with analysis of the mutuality requirement;⁷⁷ according to the Second Circuit the concertedness requirement was satisfied in *Weingarten* only because the individual employee's request for group representation was a request which sought to initiate group action.⁷⁸ The distinctions between these explanations are fundamental.

(1) The Fifth Circuit View.

The Fifth Circuit's view⁷⁹ makes concertedness turn on an assess-

75. See Brousseau, *supra* note 4, at 37 ("The statutory right which the Board and the Court have labored so mightily to create in *Weingarten* is misstated, miscategorized and thus misunderstood: it is not a right of the employee to have the union present, it is the right of the union to be present"). That the Board's view of the right is premised upon an individual conception of the right is at least partially confirmed by its position in *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1157 (5th Cir. 1980) ("[The Board] argues that the right is bottomed in section 7 . . . and [t]hus, the right to representation belongs to the employee rather than to the union")

76. *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1161 (5th Cir. 1980): "Significantly, the Court (in *Weingarten*) did not discuss whether the employer's action was designed to induce or prepare for group action or had some relation to group action in the interest of the employees. . . ." See also *Materials Research Corp.*, 262 NLRB No. 122 (1982).

77. *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 844 (2d Cir. 1980)

78. *Id.* at 844-45:

"Implicit, of course, in the Court's decision in *Weingarten* is that the action of an individual in requesting the assistance of a union steward met § 7's requirement of concertedness as well. While by definition, an individual acting alone cannot act in concert, § 7 is not limited to concerted activity per se. Instead, it protects the "right to engage in . . . concerted activities". If workers have the right to engage in concerted activities . . . employers cannot obstruct an employee's efforts to exercise those rights. *Individual activity can be protected, therefore, if it is "looking toward group action"*. [emphasis supplied]

79. The Fifth Circuit's view is in fact unclear. See *NLRB v. DataPoint Corp.*, 642 F.2d 123, 129 (5th Cir. 1982). I use that label here as a shorthand for the Board's position, occasionally accepted by the Courts of Appeal and specifically accepted in the Fifth Circuit's dictum in *Anchortank, Inc. v. NLRB*, 618 F.2d 1153 (5th Cir. 1980).

ment of the degree to which an individual's action in pursuit of individual interests furthers long-term group interests.⁸⁰ Under that view, the legal protection afforded the individual is instrumental: the individual's act has statutory value because it has the effect of serving the interests of the group as a whole. There is much in *Weingarten* to support that view; the Supreme Court's analysis in that case rests on the proposition that the "entire bargaining unit" has an interest in the "quantum of proof" the employer requires before disciplining an employee and therefore an interest in the employer's assessment of individual cases in its disciplinary interviews.⁸¹

Such an instrumental right analysis interprets the concertedness requirement not as an issue of fact but as an issue of policy: does the conduct in question serve group interests falling within the scope of the interests Congress contemplated in the Labor Act.⁸² There are two implications: (1) Concertedness is to be measured by the tendency of conduct to further "mutual aid or protection" and is therefore intimately a matter of the mutuality element of the statute; and (2) An assessment of the substantive merits of the benefit conferred—at least in the sense of an inquiry into whether an acceptable mutual benefit will be forthcoming—is a necessary part of the analysis, but the assessment is an assessment made post hoc by the Board or by a reviewing court.⁸³

80. 618 F.2d at 1162.

81. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 261 n.6 (1976) (citing Comment, *Union Presence in Disciplinary Meetings*, 41 U. CHI. L. REV. 329, 338 (1974)).

82. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 261-62 (1975) (recognizing right to representation furthers policy of equalizing bargaining power).

83. This point is illustrated by a question left open in *Weingarten*: is the employee's right to representation waivable by his union? If waivable, the Supreme Court's assessment, in *Weingarten*, of the benefit to be conferred on the group by individual demands for representation was not an assessment which removed decision making authority from the union representing the employee. Under this interpretation of *Weingarten*, an interpretation consistent with the Second Circuit's rather than Fifth Circuit's view, the assessment is an assessment only of the group or individual nature of the interest at stake. If the *Weingarten* right is not waivable, decision making authority is in the government, and the assessment, consistent with the Fifth Circuit's view, is an assessment of the substantive merits of the group benefit conferred. Note that the individual's decision making authority with respect to the issue of the substantive benefit to be conferred is not conceded under either view. If the right is waivable, the employee's choice is confined to the question whether he will or will not make claims to the group's aid; the decision to give or to not give that aid is for the union. If the right is not waivable, the individual employee has a right conferred by the government to the group's aid, but he does not exercise that right because he has decided that it will aid the group; he exercises it for his individual purposes. Indeed, the cases invoking the liberal view of the concertedness requirement involve wholly individual complaints in which the employees do not seek the aid of their union. See *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

(2) The Second Circuit's View.

The Second Circuit's view separates concertedness from mutuality. Concertedness, for the Second Circuit, requires either action by a group or incipient action by a group.⁸⁴ The right of the individual is a right to participation in a group action, but the right to action is a right exercised collectively. To protect the right to collective action, it is necessary that the first individual employee to advocate group action or to act in contemplation of group action be protected.⁸⁵ An individual's pursuit of representation in *Weingarten* or of contract enforcement generally falls within that rationale even where the pursuit is in furtherance of individual interests because it is functionally participation in group activity; the individual employee's action calls for the aid of the group or relies upon the product of group effort.⁸⁶

Concertedness under the Second Circuit's view is therefore not measured by a policy analysis of its tendency to further substantive group interests. It is measured, rather, by a factual inquiry into whether individual action makes claims upon the group. Such a claim is established either by the lending of limited individual power to the power of the group or by the invocation of the group in behalf of individual interests; both claims are claims to participation in group power. The claims are separable from the mutuality requirement because determining whether they are present in a particular case requires a factual inquiry in which the presence or absence of substantive benefit to the group is immaterial. The inquiry may be viewed as an inquiry into the employee's "purpose"⁸⁷ in the sense of a purpose to invoke the power of the group; it is not an inquiry into the likelihood of benefit to the group.

At least implicitly, however, the substantive benefit question, a matter of mutuality, is to be decided, under the Second Circuit's view, not by the individual employee or by the government but by the group itself. That is the implication precisely because the Second Circuit separates the concertedness and mutuality elements. The Fifth Circuit's fusion of those elements necessitates a government decision about the benefit of individual action for the group. And the individual's right to assert claims to participation in the Second Circuit does not necessarily imply a right to insist upon the occurrence of protected activity. If the group decides mutual benefit questions in the Second Circuit, the right to engage in concerted activity for mutual

84. *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980).

85. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

86. *See Ontario Knife Co. v. NLRB*, 637 F.2d 840, 844-45 (2d Cir. 1980).

87. *See Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1161 (5th Cir. 1980).

benefit is a group right as well as an individual right of participation. The individual is protected in his right to claim the power of the group, but it is the group which exercises the right to engage in protected activity. And in this sense, the individual is protected, even in the Second Circuit, instrumentally—that is, for the group's ends.⁸⁸

The Second Circuit's view does not necessarily require a literal approach to the concertedness requirement. The Fifth Circuit's view disposes of concertedness by fusing it with mutuality. The Second Circuit's view preserves the independence of the concertedness element by inquiry into the nature of the claim made by the individual engaged in the activity in question, not, necessarily, by counting the number of persons so engaged. Such a counting process, where two or more employees are counted, substantially eases the difficulty of that inquiry as a matter of evidence, for such a count is evidence that the group has responded to the individual's claim to participation by acting as a group. But such a count is not the exclusive means of proving that such a response has occurred.⁸⁹ In some cases, such as *Weingarten* itself, the nature of the interests at stake may justify a presumption that the individual's act is a group act—a presumption

88. Cf. *NLRB v. Hendricks County Rural Electric Membership Assoc.* ____ U.S. ____, ____, 102 S.Ct. 216, 233 (1981) (Powell, J. concurring and dissenting) (arguing on premises similar to those advocated here, that a confidential employee not includable within a bargaining unit enjoys no Section 7 protection of his participation in concerted activity).

89. In *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980), the Second Circuit did engage in a counting process and may therefore be viewed as having engaged in a literal approach. The argument in the text, however, is that *Ontario Knife* should not be so narrowly read. There are two grounds for a broader reading. First, the Second Circuit's opinion characterizes *Weingarten* as a case invoking individual action which looked toward group action. 637 F.2d at 844-45. But the only action the individual "looked toward" in *Weingarten* was the presence of a union representative at an interview. In short, the individual activity in *Weingarten* was concerted because the individual invoked the group in the person of the union representing the group and because there was no indication that the group had rejected the individual's claim. The group was in effect presumed to have responded to the individual's invocation without proof of actual response. Cf. D. LESLIE, CASES AND MATERIALS ON LABOR LAW 257 (1978) (If *Weingarten* rights are waivable, the effect of the decision is to reallocate bargaining chips—i.e., to require the employer to negotiate away the representation right.).

Second, the Second Circuit emphasized that, although the individual employee protest in question in *Ontario Knife* had been initially approved by at least one other fellow employee, that fellow employee had not "participated in or approved" the discharged employee's later walkout. 637 F.2d at 845. (emphasis supplied) The discharge occurred for the walkout. *Id.* In short, the Second Circuit recognized that individual action on behalf of or at the instance of others may constitute concerted activity. See *id.* at 846 (citing *Jim Causley Pontiac v. NLRB*, 620 F.2d 122 (6th Cir. 1980)).

rebuttable by a clear indication, such as contractual waiver, that the group has rejected the individual's call for group action.

(3) Decision Making Authority and an Application
of the Views to the Honoring of Picket Lines.

The individual's role as a decision maker is limited under both the Fifth and Second Circuit modes of analysis. Under the Fifth Circuit's view, the individual chooses to act, but Section 7 protection is available for that action only by virtue of a post hoc administrative or judicial judgment about the tendency of individual action to confer benefit on the group. Protection is not, under that view, a function either of the employee's individual or mutual purpose or of the individual or group nature of the employee's claim to protection. The employee is protected because the government (the Board or a court) decides that the group benefits from his act, not because the employee decides either to aid or to demand the aid of the group. The Board or the reviewing court, if it finds protection, confirms an individual decision on the basis of a group benefit rationale which may or may not have occurred to the individual. Under the Second Circuit's view, the individual employee chooses to act, but Section 7 protection is grounded on the nature of his claim—does the claim “look toward”, that is, invoke group action. The occurrence of group action in response to that claim is a decision to be made by the group (or the union representing the group) on the basis of the group's assessment of benefit to the group.

In the context of a case in which an honoring employee refuses to cross a stranger picket line, the employee is thought to act out of a loyalty to unions or, at least, out of “working class solidarity.” His purposes may be viewed as mutual in either of two senses: he may deem a victory in the stranger dispute as of ultimate benefit to him or he may expect reciprocal aid in the future.⁹⁰ Although his decision to honor has often been viewed as an individual decision,⁹¹

90. See Axelrod, *supra* note 8, at 633.

91. Although Board doctrine may be viewed, and is viewed here, *infra* notes 163-76 and accompanying text, as occasionally consistent with a collective characterization of the right to honor, both the Board and the courts often speak in terms suggesting that the right is both individual and “fundamental” in the sense that it is a right to engage in conduct in the nature of an expression of principle. See, e.g., *Kellogg Co. v. NLRB*, 457 F.2d 519, 526 (6th Cir. 1972) (a no-sympathy strike clause narrowly interpreted because it “relates only to sympathy strikes caused or sanctioned by the Union and makes no reference to the right of members to refrain from crossing a picket line”); *NLRB v. Southern Greyhound Lines*, 426 F.2d 1299 (5th Cir. 1970) (confidential employee who by virtue of that status was not represented in office workers

his union's power to waive his protection or to compel his action⁹² in this context belies that characterization.

If an honoring employee encountering a stranger picket line acts in concert with the pickets, the Fifth Circuit's view suggests that his protection is a function of the tendency of his action to benefit some group—the stranger pickets directly by virtue of the economic power he lends, or the group consisting of the honoror and his fellow employees by virtue of anticipated indirect gain or reciprocal obligation. The unanswered question, in terms of an application of the Fifth Circuit's view to the honoring of picket lines, is with respect to which of these groups the tendency to benefit question is to be judged.⁹³

If the honoring employee is viewed as acting in concert with the pickets, the Second Circuit's view suggests that the honoring employee's protection is instead a function of his claim to participation in the stranger picket's activity. If the honoring employee acts not in

bargaining unit had right to refuse to cross picket line established by union representing service workers in another bargaining unit where employee acted from conviction; *Keller-Crescent Co.*, 217 NLRB 685, 692 (1975), *enforcement denied*, 538 F.2d 1291 (7th Cir. 1976) (Under rule that waiver of statutory rights will not be inferred, bargaining history does not indicate that union intended to waive its member's right to honor picket line). *Cf.* *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir.) (An employee who refuses to cross from fear rather than from motivations of mutual aid or conviction is not protected), *cert. denied*, 404 U.S. 526 (1971). On occasion, the notion that the right is individual is expressly stated. *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 82 (1953) (Black, J., dissenting); *Newspaper and Mail Deliverers' Union (Interborough News Co.)*, 90 NLRB 2135, 2147 (1950) (General Counsel's argument to this effect rejected by trial examiner); *Oil, Chemical & Atomic Workers Int'l Union, Local 1-128*, 223 NLRB 757, 764 (1976) (ALJ); *Truck Drivers Union Local 413 (Patton Warehouse)*, 140 NLRB 1474, 1485 (1963), *enforced*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964). *See Harper*, *supra* note 8, at 374-75; *Schatzki*, *supra* note 8, at 393.

92. *See infra* notes 163-71 and accompanying text.

93. The mode of analysis labeled here the "Fifth Circuit's view" is applied in contexts in which an employer discharges or otherwise disciplines a single employee for conduct the employee engaged in singly. It has not, at least facially, been applied in contexts in which two or more employees engage in conduct claimed to constitute protected activity. The Fifth Circuit's view would therefore appear to be inapplicable to the honoring employee's refusal to cross if the honoring employee is viewed as acting in concert with the pickets.

The Fifth Circuit's view does, however, have relevance here. The mode of analysis implicit in that view—government assessment of the substantive merits of the mutual benefit question—is a potential basis, albeit a basis criticized here, for analyzing the Section 7 protection to be granted the honoring employee. *See Haggard, Observance*, *supra* note 8, at 93-99; *infra* notes 101-27 and accompanying text. Moreover, it is possible to view the honoring employee not as acting in concert with the pickets but as acting as the agent of his fellow employees for the benefit of his fellow employees. *See NLRB v. Illinois Bell Tel. Co.*, 189 F.2d 124 (7th Cir. 1951); *infra* notes 117-50 and accompanying text.

concert with the pickets but, rather, in concert with his fellow employees in the sense that he acts in behalf of his fellow employees, his protection is a function of his participation in fellow employee activity. The unanswered question, under the Second Circuit's view, is whether decision making authority regarding that participation is to be exercised by the stranger pickets, by virtue of the fact that they are appealing to the employee for his participation in their concerted activity, or by the group consisting of the honoring employee and his fellow employees (or to the union representing that group). The distinction between the unanswered question in the Fifth Circuit and the unanswered question in the Second Circuit is that the latter asks who decides; the former assumes that the government decides and asks on the basis of whose interests the government decides.

It may be argued that the distinction made here between government decision and union decision is unwarranted—that the Board and the courts always decide. It is the case that the Board and the courts do decide whether employee action is concerted action for mutual benefit, but the point of this discussion is that the Fifth and Second Circuits decide that question in quite different ways pointing in quite different directions. An analysis which asks whether the group will benefit from individual action and which grounds protection upon that benefit is an analysis concerned only with the problem of mutual benefit.⁹⁴ That concern permits the Board or a reviewing court to ignore the question of decision making authority and to therefore confer Section 7 protection on an individual who makes no claim to group power so long as mutual benefit is at least potentially forthcoming. And the question of potential is decided by the Board or the court not as a matter of whether there is a mutual interest some private decision maker may seek, but as a matter of whether an individually sought personal interest has some tendency to confer mutual benefit.

By contrast, an analysis which asks only whether an individual employee's action makes a claim on the group⁹⁵ leaves unresolved both the question whether the group will act on that claim and the question of mutual benefit.⁹⁶ It is true that a court employing the analysis may be called upon to resolve those questions, but it will resolve them

94. See *Oklahoma Allied Tel. Co.*, 210 NLRB 916 (1974).

95. See *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980).

96. I have argued elsewhere that the right to participate in concerted activity has a dual aspect: the individual right to participate and the group's right to the instrumental value of that participation. Employer responses to the individuals decision to participate are, under that argument, to be distinguished from employer responses to the group's use of concerted activity. See P. Cox, *supra* note 5, at 255-64.

in the context of reviewing decisions made by private actors under standards permitting those actors wide latitude in their decision making. It will resolve them on the premises (1) that an individual employee's claim to statutory protection is a function of that individual's claim to participation in group activity rather than a function of the court's view of the effect of an individual action upon group interests and (2) that the relevant actor (the actor with a claim to decision about the occurrence of concerted activity) for purposes of the court's assessment of protection is the group.

(B) *Mutual Aid or Protection: Alternative Rationales*

Section 7 requires that concerted activity be undertaken for purposes of "mutual aid or protection." The dictionary definition of "mutual" postulates two distinct understandings of the term: (1) a common thing, action, relationship or sentiment,⁹⁷ and (2) a reciprocal relationship, sentiment or action.⁹⁸ There is of course substantial danger of distortion in relying upon dictionary definitions, but these distinct understandings may be viewed as expressive of competing understandings of Section 7's protection: The "aid or protection" which is the objective of concerted activity may be viewed as protected if possessed in common—that is, if shared.⁹⁹ Or the aid or protection which is the objective of concerted activity may be viewed as protected if conferred reciprocally—that is, if the subject of an obligation, or, at least, expectation of exchange or return.¹⁰⁰

(1) *Mutuality as Shared Benefits*

The theory that an employee of employer A, by honoring a picket line established by employees of employer B in a dispute with employer B, share at least indirectly in the benefits conferred on employer B's employees (if B's employees are successful), is economic: Where A and B are competitors in a product market, benefits conferred by B on B's employees serve as a precedent for A and A's employees.¹⁰¹ Moreover, organization of both A and B, or, at least, standardization of wage levels for A and B employees¹⁰² will eliminate

97. VI OXFORD ENGLISH DICTIONARY 803 (1970).

98. *Id.* (characterizing such a usage as nevertheless incorrect).

99. See Cyril de Cardova & Bros., 91 NLRB 1121, 1135 (1950).

100. See NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 506, (2d Cir. 1942).

101. Axelrod, *supra* note 8, at 632-33.

102. See Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180, 206 N.42 (1978); Houston Building and Constr. Trades Council (Claude Everett Construction Co.), 136 NLRB 321 (1962).

competition in the labor market.¹⁰³ Even where A and B are not competitors in the same or interchangeable product market,¹⁰⁴ a rise in the compensation levels of employees generally is of indirect benefit in putting upward pressure on the compensation level of the honoring employee.¹⁰⁵

The argument that no such shared benefit phenomenon occurs¹⁰⁶ is equally economic: higher compensation levels for labor are reflected in higher prices rather than lower profits.¹⁰⁷ The precedential effect of a rise in employer A's employee's benefits is therefore ultimately flat or declining real compensation.¹⁰⁸ Moreover, as a rise in labor's compensation has the effect of reducing, where capital and labor are interchangeable, employment levels,¹⁰⁹ it is the "burden" of unemployment rather than the "benefit" of increased compensation which is "shared".¹¹⁰

103. *Compare Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) ("an elimination of price competition based on differences in labor standards is the objective of any labor organization"), with *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 310 (1925) ("[t]here was substantial evidence . . . to show that the purpose . . . was to stop production of non-union coal . . . where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines. . .").

104. By interchangeable product market, I mean a context in which products may, in the absence, at least, of union-imposed restraints, be readily substituted. See *NLRB Enterprise Ass'n of Pipefitters*, 429 U.S. 507 (1977); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967).

105. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569-70 (1978) ("The Board was entitled to note the widely recognized impact that a rise in minimum wage may have on the level of negotiated wages generally."). However, a union's wage policy with respect to particular employers is likely to be different in a context in which it has organized a competitive industry than in a context in which it has organized employers who are not in direct competition. A. REES, *THE ECONOMICS OF TRADE UNIONS*, 57-58 (2d ed. Rev. 1977).

106. The most emphatic attack upon the shared benefit theory in the present context is Professor Haggard's. Haggard, *Observance supra* note 8, at 94-99.

107. *Id.* at 94-95. Professor Haggard recognizes that real wage increases are both possible and have occurred, but argues that (1) rises in real wages are attributable to rises in marginal productivity and rises in the marginal productivity of labor are attributable to capital, *id.* at 95 n.219 (citing M. ROTHBARD, *MAN, ECONOMY AND STATE* 519 (1970)) and (2) rises in real wages will therefore occur "as surely" in non-unionized system as a unionized system. Haggard, *Observance, supra* note 8, at 95.

108. Haggard, *Observance, supra* note 8, at 95-96, relying primarily upon E. SCHMIDT, *UNION POWER AND THE PUBLIC INTEREST* (1973).

109. On the trade-off between compensation and employment generally see, e.g., C. MULVEY, *THE ECONOMIC ANALYSIS OF TRADE UNIONS* 26-30 (1978); R. POSNER, *ECONOMIC ANALYSIS OF LAW*, 244-46 (2d ed. 1977). For a specific example of the trade off in action see *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

110. Whether either burdens or benefits are in fact "shared" is a subject of far more complexity than Professor Haggard's analysis—despite his recognition of the complexity, Haggard, *Observance, supra* note 8, at 98—would indicate. In particular,

The difficulty with both arguments is that they require government—that is administrative and judicial—assessment of the substantive economic merits of employee demands and therefore subject Section 7 protection to the vagaries of whichever economic theory currently most bemuses the courts, the Board, or academics. The relevant legal question, if that question is to be framed as a matter of substantive economic policy, is what economic theory most bemused the Seventy-Fourth Congress¹¹¹—whether or not ultimately viable as substantive economic theory.¹¹² If, however, Section 7 mutuality is to

it may be that increases in real compensation and, perhaps, maintenance of employment levels are affected by demonstrations of union workers solidarity across employers—at least increases and maintenance for *some* employees. In short, solidarity may have the effect of redistributing both benefits and burdens in a manner which does make economic sense to the honoring employee. It is other employees or potential employees (including, concededly, some who are honoror's despite their self-interest) who are adversely affected. For example, the interests of more productive employees may be sacrificed to the interests of less productive employees (assuming rational managers) by uniformity of wage rates; the interests of non-union employees may be sacrificed to the interests of unionized employees by the imposition of union versus non-union wage differentials, and the interests of younger employees may be sacrificed to the interests of senior employees by reduced employment in combination with seniority principles. Redistribution of benefits and burdens, whether or not conducive to efficiency from a societal viewpoint, is not necessarily inconsistent with the self-interest of the honoring employee. See MULVEY, *supra*, note 109, at 103-118 (relative wages); POSNER, *supra* note 109, at 245 (effect of minimum wage is unemployment of marginal workers, not union workers). Cf. Isaacson, *Organizational Picketing: What is the Law? Ought The Law To Be Changed*, 8 BUFFALO L. REV. 345, 364-67 (1959) (conflict in interests between organized and unorganized workers).

It is also the case, of course, that the interests of the honoring employee and the pickets may be inconsistent. Indeed, Haggard is quite correct in suggesting that the "political slogan" of worker solidarity masks substantial conflicts of interest between workers. Haggard, *Observance*, *supra* note 8, at 98. Recognizing such conflicts is, however, responsive to the shared benefit theory only if "mutual aid or protection" is to be analyzed in substantive economic terms—and then only partially so. The legal question, in the face of economic complexity, is who will decide the substantive economic merits of the self-interest question.

111. I say the 74th Congress (the Wagner Act) rather than the 80th (Taft-Hartley) or 86th (Landrum Griffin), because the aspect of Section 7 under discussion was not modified by subsequent amendments. To the extent that employer interests were recognized in subsequent enactments; those interests—and the redressing of a perceived imbalance in economic power—were preserved by means of specific limitations upon union conduct. Amendment of Section 7 proceeded from a recognition of individual employee interests in freedom of choice, not from an overhauling of the economic theory of 1935.

112. The economic philosophy of the 74th Congress appears clearly more consistent with the views of Mr. Alexrod, *supra* note 8, than of Professor Haggard, *Observance*, *supra* note 8, whatever the economic merits of the latter. See *Hearings on H.R. 6288 Before the Committee on Labor, House of Representatives, 74th Cong., 1st Sess. 11 (1935) (statement of Senator Robert Wagner), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 2485 (1949).*

be understood in terms of benefits shared in common—and as therefore requiring that the honoring employee participate in the spoils exacted from a stranger employer by its picketing employees—the honoring employee, not the board or a reviewing court, must be granted the primary authority to assess the prospects for a participation in the spoils. It is the primary authority of the honoring employee because, *if* that employee has an individual right to engage in concerted activity,¹¹³ that right cannot be viably divorced from the right to choose between competing versions of self-interest. Judicial or administrative assessment of the economic merits effectively forecloses choice, and thus contravenes the fundamental underlying policy of the Labor Act—that the merits of labor disputes, and therefore of employee self interest, are to be decided without governmental intervention.¹¹⁴

It is not an answer to this argument that ceding primary authority for the economic merits of a mutuality decision to the honoring employee is an abrogation of judicial or administrative responsibility for determining the scope of Section 7. The present issue is only mutuality; accommodation of the interests of others—of employers or of society—are not properly addressed in analysis of that issue.¹¹⁵ Moreover, the primary authority of the honoring employee or of the union representing that employee is not without limit. The subject matter of the employee's assessment is confined by the proposition that Section 7 grants protection to employees and must therefore be understood as concerned with mutual aid or protection with respect to employment.¹¹⁶

113. See Brousseau, *supra* note 4, at 27. Brousseau views the union - the group - as the holder of the "right" to engage in concerted activity for mutual purposes. *Id.* at 26. But he views the right of non-participation as individual. *Id.* at 27. The result suggested in the text would follow equally if the individual honoror's right is placed on the ground that it is the individual's right to "assist" labor unions under Section 7. *Id.* at 26.

114. *Cf., e.g.,* NLRB v. Insurance Agent Int'l Union, 361 U.S. 477 (1960) (there is no Board authority to balance economic weapons because such an authority would involve the Board in the merits of dispute); NLRB v. American Nat'l. Ins. Co., 343 U.S. 395 (1952) (there is no Board authority to judge merits). *But cf., e.g.* First Nat'l Maint. Corp. v. NLRB 452 U.S. 666 (1981) (subjects of bargaining); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) (same).

Although Section 8(a)(1) makes it clear that the rights conferred upon employees by Section 7 are rights against employers, at least one of the purposes of Section 7 was to affirmatively declare lawful employee action historically viewed with hostility by government—*i.e.,* the courts. See International Union, UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245, 257-58 (1949). Section 7 may be viewed in part, then, as conferring rights against government.

115. See *infra* notes 391-425 and accompanying text.

116. Compare *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) with *Firestone Steel*

However, there is another and more persuasive answer to the argument. It is that neither the honoring employee nor the government has a Section 7 right to assess the prospects for a share of the spoils. Assessment of the economic merits of the prospects for a share of the spoils is a right possessed by the union representing the honoring employee, and that union may be disabled from acting on an assessment favoring participation in the stranger pickets' "protected activity" by direct statutory prohibitions limiting *its* section 7 right and to engage in "protected activity."¹¹⁷

The proposition that it is the honoring employee's union which is the repository of the right to concerted activity is not supportable by reference to direct authority—the right to engage in protected activity is generally thought to be a right possessed by individual employees.¹¹⁸ But it is a proposition¹¹⁹ supportable by reference to two accepted tenets of labor law in tension with that general understand-

Products Co., 224 NLRB 826 (1979). The Court in *Eastex* rejected the notion that the scope of "employment" for purposes of such an analysis is limited to matters over which the employee's employer has "control" and therefore disapproved of cases adopting that notion, e.g., *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811 (6th Cir. 1975); *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974). That disapproval would seem to eliminate the major theoretical basis for finding the honoring of a stranger picket line unprotected.

117. See 29 U.S.C. 158(b)(4)(B) (1976) (secondary boycott prohibitions); *Truck Drivers Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir.), cert. denied, 379 U.S. 916 (1964). With respect to the picket line proviso to Section 8(b)(4)(B), see *infra* notes 379-82 and accompanying text. The union may also be limited by contract—i.e., by a no-strike clause.

The extent to which the honoror's union is disabled from requiring the honoror to honor a stranger picket line where the picketing union does not violate 8(b)(4) by appealing to the honoror, *Local 761, Intern. Union of Electrical Radio & Machine Workers v. NLRB [General Electric]*, 366 U.S. 667 (1961), is unclear. The issue is examined *infra* notes 292-359 and accompanying text.

118. See, e.g., *Eastex Inc. v. NLRB*, 437 U.S. 556 (1978); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Recent criticism of Supreme Court interpretation of the NLRA from a more radical perspective recognizes the "incoherence" of the individualist and collectivist/institutional strands of that interpretation, but alleges that the predominant theme has been collectivist in the sense that worker rights under Section 7 have been sacrificed to union bureaucracy. See Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981); Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483 (1981); Lynd, *The Right to Engage in Concerted Activity After Union Recognition. A Study of Legislative History*, 50 IND. L.J. 720 (1975). It should be understood, however, that the "individualist" alternative is not, for such critics, individualist in traditional senses. Worker rights are, rather, viewed as communitarian rights but are also viewed as unstructured in the sense that they are not subject to externally imposed legal obligations or to utilitarian policy justifications for unions as institutions.

119. Cf. Brousseau, *supra* note 4, at 26 (right to engage in concerted activity is a group, not an individual, right).

ing: it is the group, through the union representing the group, which assesses and formulates positions regarding the economic interests of the group and therefore, of individuals within the group,¹²⁰ and it is the group, again through the union, which controls the instrument of group power—concerted activity.¹²¹

The underlying issue (who is to decide what is and is not of economic benefit) cannot be divorced from the economic issue (the share of the spoils question) because it must be decided whether there will or will not be a sharing of spoils. The honoror's union is the observed decision maker when it seeks, contractually, to either protect the honoror from the honoror's employer or to waive statutory protection¹²²—contractual protection or waiver sought, at least in part, on the basis of that union's assessment of the prospects for participation in the spoils. The honoror's union is equally the observed decision maker when it seeks to require a refusal to cross another union's picket line¹²³—on the basis of its contemporaneous assessment of the prospects for participation in the spoils. And the honoror's union is in legal contemplation the decision maker when either the contractual protection it sought or its contemporaneous efforts to force employees it represents to honor picket lines run afoul of express statutory limitations upon union, *qua* union conduct.¹²⁴

The generally accepted proposition that it is the individual employee who is the decision maker when that employee confronts a stranger picket line and where his union has not formally acted

120. *J.L. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Medo Photo Supply Co. v. NLRB*, 321 U.S. 678 (1944). See 29 U.S.C. § 159(a) (1976) (exclusivity).

121. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *NLRB v. Shop Rite Foods, Inc.*, 430 F.2d 786 (5th Cir. 1970); *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969); *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963); *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944); *United Aircraft Corp.*, 192 NLRB 382 (1971); *enforced in part sub nom.*, *I.A.M. v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). *But see* *Pabst Brewing Co.*, 236 NLRB 1543 (1978). See generally Gould, *The Status of Unauthorized and "Wildcat" Strikes Under The National Labor Relations Act*, 52 CORNELL L.Q. 672 (1967); Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 189-90 (1980). *But see* *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); A. Cox, *The Right To Engage in Concerted Activities*, 26 IND. L.J. 319, 332 (1951); Finkin, *The Truncation of Laidlaw Rights by Collective Agreement*, 3 INDUS. REL. L.J. 591 (1979).

122. See *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953); *Truck Drivers Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964).

123. See, e.g., *Adamszewski v. Local Lodge 1487 Int'l Ass'n of Machinists & Aerospace Workers*, 496 F.2d 777 (7th Cir. 1974); *Oil, Chemical and Atomic Workers*, 223 NLRB 757 (1976).

124. See *supra* note 117.

to either protect or force a refusal to cross is grounded on the unrealistic notion that the union is a nonparticipant absent formal action.¹²⁵ Given that notion however, the proposition is viable only to the extent that the employee acts from motives independent of gain through a sharing of spoils—or at least exercises a right the source of which is independent of the right to seek mutual gain. If the employee exercises a right to seek a share of the spoils, it is a right necessarily exercised on behalf of the employee group in which he is a member—for the economic consequences, good or ill, will, by the terms of the economic benefit theory, be borne by that group.¹²⁶ And the group, at least where organized, makes its assessments through the mechanism of its exclusive representative. The statutory decision maker with respect to issues of economic advantage or disadvantage is the honoring employee's union.¹²⁷

If the proposition that the honoring employee acts on behalf of his fellow employees when he acts for a share of the spoils is for the moment accepted, it follows that he derives his Section 7 protection, to the extent that that protection requires mutuality, from the

125. Cf. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 423 n.10 (1981) (Powell, J., concurring) (proof of union participation in wildcat strike may be circumstantial); *Truck Drivers Local 413 v. NLRB*, 334 F.2d 539, (D.C. Cir.), cert. denied, 379 U.S. 916 (1964) (rejecting union argument that protective picket line clause merely permits voluntary individual employee action); *United States v. UMW*, 77 F. Supp. 563, 566 (D.D.C. 1948) (tacit union approved of wildcat strikes), *aff'd*, 177 F.2d 29 (D.C. Cir.), cert. denied, 338 U.S. 871 (1949) (tacit union approval of wildcat strikes).

126. It is true that the economic consequences will be borne, as well, by others and that others do not, under the the argument, have a voice in the decision. But the question here is statutory protection of the employee from his employer, and the statutory scheme grants the union representing the employee the right to pursue the interests of the employees it represents vis-à-vis their employer without regard to the consequences for others.

127. Cf. Note, *Picket Line Observance: The Board and the Balance of Interests*, 79 YALE L.J. 1369, 1381 (1970) (arguing that protection for honoring employees should be left to collective bargaining and arbitration).

It is true that an employee's activity may be protected under Section 7 in the absence of a union, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), and that such protection would be logically compelled by the shared benefit theory even where an employee not represented by a union honors a stranger picket line. See generally Johnson, *Protected Concerted Activity in the Non-Union Context: Limitations On The Employer's Right To Discipline or Discharge Employees*, 49 MISS. L.J. 839 (1978). But cf. *NLRB v. Hendricks County Rural Electric Membership Ass'n*, ___ U.S. ___, ___, 102 S.Ct. 216, 232-33 (1981) (Powell, J. concurring) (arguing that such would not be the case with respect to confidential employees). But employee activity in the non-union context must be group activity. See, e.g. *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079 (8th Cir. 1977); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 720 (5th Cir. 1973). But see *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979).

group consisting of his fellow employees and, therefore, through the union which expresses the will of that group *whether or not the union has expressed that will*. It is true that in a case in which the union purports not to have itself acted, decision making authority is in the honoring employee, but the decision that employee makes is, at least by the terms of the shared benefit theory, about the prospects for sharing of spoils by the group in which he is a member. An individual right conception of Section 7 would suggest that the union's non-decision in such a case leaves the "right" in the employee as non-delegated. Under a collective right conception of Section 7 the union, even where it purports not to decide, has the right of decision, and has therefore in fact decided by delegation of *its* authority to the employee.

Section 7 protection afforded the employee is, under a collective conception, derivative—if there is protection, it is because the employee's union has at least implicitly, if not formally and expressly, decided that the employee's action will further the group's prospects for a share of the spoils. Section 7 protection is to be measured, under this interpretation, by reference to the union representing the honoring employee.

(2) Mutuality As Reciprocity

The best known statement of the reciprocity theory of mutuality is Judge Learned Hand's in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc.*¹²⁸ In that case, a union official was discharged after the union representing employees of Peter Cailler attacked, by means of a published union "resolution," Peter Cailler's support of one of two factions of dairy farmers engaged in a dispute over a milk boycott. The dairy farmers supported by the union were not "employees" within the meaning of the Labor Act, and a finding that the union "resolution was a 'concerted activity' for the 'mutual aid or protection' of the farmers on the one hand and the members of [the union] on the other"¹²⁹ was therefore precluded. But Judge Hand nevertheless found the resolution protected insofar as the resolution was a concerted activity for the purpose of the aid and protection of the union members themselves¹³⁰.

If [the union] thought that the resolution might help to secure for them the favor of [the farmer group], it was no

128. 130 F.2d 503 (2d Cir. 1942).

129. *Id.* at 505.

130. *Id.*

objection that [the farmer group] was not made up of "employees" . . . [The union] might well believe that the support engendered by that favor might prove as important in future disputes with the chocolate company as the support of other unions in its own craft or in other crafts.¹³¹

The attractiveness of the reciprocity theory¹³² as a justification for affording an employee who honors a stranger picket line Section 7 protection is obvious: by honoring a stranger picket line, the employee makes a deposit in the currency of economic coercion—the adverse effect of the refusal to cross on the picketed employer's ability to operate. That deposit may be withdrawn, should the occasion arise, by a draft on the coercive power of the stranger pickets. Today's picketing employee may be tomorrow's delivery person. Of course the reality does not follow a perfect model of reciprocity; the account into which these deposits are made is a joint account with many drawers, and drafts on the account often occur in the form of appeals to worker solidarity rather than in the form of references to particular past favors.¹³³ But the reciprocity notion nevertheless holds true: there is, in "worker solidarity", an element of an expectation of return on today's investment.

Is reciprocity what Section 7 contemplates? Although distinct from the shared benefit theory, both theories possess in common the notion that the honoring employee must get something for the refusal to cross. Under the reciprocity theory it is a claim to future aid the honoring employee gains; under the shared benefit theory, it is indirect participation in the spoils of a successfully resolved stranger

131. *Id.* at 506. The most widely quoted portion of Judge Hand's opinion is that postulating a context not present in the case and a context presenting a far less difficult issue:

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection", although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all of them helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.

Id. at 505-06.

132. The Supreme Court has adopted, and intermixed, both the shared benefit and reciprocity theories. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-70 (1978). The lower federal courts often rely upon *Peter Cailler* in picket line cases. See, e.g., *NLRB v. Difco Labs, Inc.*, 427 F.2d 170 (6th Cir.), cert. denied, 400 U.S. 833 (1970); *NLRB v. City Yellow Cab Co.*, 344 F.2d 575 (6th Cir. 1965).

133. See Haggard, *Observance*, *supra* note 8, at 98.

dispute. But the claim to future aid is not a claim exercisable by the honoring employee. It is a claim exercisable by the honoring employee's exclusive representative for the same reasons that it is the honoring employee's exclusive representative which has the right to assess prospects for shared, indirect benefits.¹³⁴ The group is a statutory drawer on the economic coercion account, not the individual.¹³⁵

The point may be illustrated by examining Judge Hand's analysis in the *Peter Cailler* case. Section 7 provides protection to "employees" and the dairy farmers directly aided by the union in *Peter Cailler* were not "employees" within the meaning of the Act.¹³⁶ If "mutual aid or protection" under the Section refers to aid or protection shared by both the persons engaged in the concerted activity in issue and the persons benefitted by the aid or protection, the farmers were not qualified beneficiaries, and mutuality was therefore not satisfied. Judge Hand circumvented this difficulty by suggesting that the aid or protection was conferred, by virtue of an expectation or reciprocity, upon the employees of the chocolate company.¹³⁷ Mutuality is satisfied if the benefit of future reciprocal obligation will be enjoyed by the statutory employees who engage in concerted activity. The union's purpose therefore must have been to benefit the group it represented, and not to benefit the group it did not (and could not with impunity) represent—the farmers.¹³⁸

The union had, then, no recognized claim to Section 7 protection for the exercise of union power on behalf of the farmers; its claim to protection was grounded on its exercise of union power for the ultimate benefit of the employees it represented. The discharged union official's right—that is, his right to Section 7 protection from employer retaliation—was a right grounded, first, upon the benefit derived by the union (employees of the chocolate company as a group) from that

134. See *supra* notes 117-28 and accompanying text.

135. A case such as *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974), holding that the group may not waive individual employee rights to solicit support for either an incumbent or rival representative, is distinguishable as entailing a distinct form of right—the individual employee's right of choice. See *infra* notes 183-206 and accompanying text.

136. See 29 U.S.C. § 152(3) (1976).

137. 130 F.2d at 505. But see *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-68 (1978) ("We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause.")

138. *Id.* at 505-06. The Board does not follow this rationale where a single statutory employee aids non-employees—the activity in such a case is said to be not "concerted." *The Capital Times Co.*, 234 NLRB 309 (1978).

protection and, second, upon the utility of the farmers as an instrument for achieving the union's future objectives. The individual official's right was therefore an instrumental right—a right recognition of which was necessary to further the ultimate end of the group's participation in the farmer's power.

If the union official's claim to Section 7 protection in *Peter Cailler* was a claim derived from the union's right to seek enhanced power, is an individual employee's claim to protection in refusing to cross a stranger picket line similarly grounded? That question may be answered in part by examining an analogy used by Judge Hand in support of his conclusion in *Peter Cailler*: Employees who strike in protest of their employer's discharge of a single fellow employee are engaged in concerted activity for a mutual purpose because they anticipate that employee's future aid.¹³⁹

In one sense, Hand's argument may be read as postulating reciprocal individual claims: employee X's activity in behalf of employee Y is mutual where X may anticipate Y's activity in behalf of X. But this scenario is merely a description of individual motivation for group organization. Individuals form groups to enhance individual power, thus furthering individual interests. As a description of that motivation, it tells us something about the meaning of mutuality in the statute because it suggests that the purposes for which concerted activity will be protected are purposes consistent with the reasons for the formation of unions.¹⁴⁰ But it does not tell us how such a purpose is to be formulated or by whom it is to be formulated, and because it does not do these things, it misdescribes events: X may well wish to aid Y in anticipation of reciprocal aid, but X engages in a strike to confer that aid at the instance of his union.¹⁴¹ At least in a context in which employee X is represented, he does not decide either whether to use the strike weapon in protest of a fellow employee's discharge or whether protest of such a discharge is a desirable end. The union makes that decision, either contemporaneously or by virtue of its past negotiation of a no strike clause. The union's use of the strike weapon (or, more realistically, its invocation of a contractual grievance procedure) in the context contemplated by Judge Hand's analogy is an exercise for a mutual purpose in the sense that

139. 130 F.2d at 505.

140. Cf. 29 U.S.C. § 151 (1976) ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contact, and employer's . . . substantially burdens and affects the flow of commerce. . .").

141. Where there is no union, X does so at the instance of, or as a participant in, the group. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

it is an exercise for a group purpose. The exercise may be consistent with individual reciprocity as the motivation for group formation, but the strike is undertaken for the benefit of the group in the sense of the groups' purposes as a group.¹⁴²

The union facially appears to be the repository of authority to decide issues of mutuality, because the union may choose to decline to engage in concerted activity for a purpose which would entail reciprocity and because it may effectively waive the Section 7 "rights" of employees to engage in concerted activity for such a purpose.¹⁴³ In short, the union at least generally controls the concerted activity of the employees it represents. It therefore necessarily controls decisions about reciprocity to the extent of its control of concerted activity. Moreover, so long as the reciprocity notion is defined in terms of a tacit exchange of power, the union should be characterized as the decision making authority in making the exchange. Such a characterization is factually accurate both where union A seeks to aid employees it represents in disputes with the employee's employer and where union A actively seeks to aid union B in a dispute with a stranger employer.¹⁴⁴ But it is the contention here that the characterization (for purposes of Section 7 protection, the irrebuttable presumption) is appropriate where employees represented by union A seek to aid union B without the active connivance of A.¹⁴⁵

It is appropriate because the reciprocity notion is not grounded

142. Cf. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 261 n.6 (1975) (union, in providing representation to the individual, insures employer adherence to disciplinary standards for the group).

143. See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956) (union waiver of right to strike by no strike clause); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) (substitution of grievance and arbitration procedure for the protest strike contemplated by Hand in *Peter Cailler*); *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953) (union waiver of "right" to honor a picket line). But see generally Harper, *Union Waiver*, *supra* note 8, at 335 (taking a narrower view of union authority to waive). The union may, of course, so neglect mutuality that the motivation for group formation—reciprocal obligation—disappears, but this is an internal issue or an issue of choice of representative, *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974), not an issue of definition.

144. See *NLRB v. Retail Clerks Union Local 1179*, 526 F.2d 142 (9th Cir. 1975).

145. It should be made clear here that I am not contending that the honoring employee invariably acts as his union's agent for purposes of Unfair Labor Practice provisions directed against union conduct. I am contending rather, that the employee's protection is to be measured by the union's protection, and prohibitions on union conduct which would disable the union from directing "concerted activity" equally disable the employee even where union direction of the employee's conduct is not provable. *Contra: NLRB v. Gould Inc.*, 638 F.2d 159, 163 n.2 (10th Cir.), *cert. denied*, 452 U.S. 930 (1981). See *infra* notes 364-91 and accompanying text.

upon an expectation by an individual employee that by aiding stranger employees he will be directly aided in the future by stranger employees,¹⁴⁶ but upon the notion that he will be indirectly aided in the future through the enhancement of the power of the group in which he is a member. When employee X, represented by but not instructed by union A, offers his power to union B, the offer is an offer to aid B in achieving B's objectives, but it is an offer which is for a mutual purpose, under the terms of Hand's reciprocity notion, only because made for A's future purposes.

When union A eventually calls upon B (or the employees represented by B) for aid, it is A which will control the purposes for which such power will be used and the occasions for its use. Employee X, except in extremely rare circumstances,¹⁴⁷ cannot individually control or seek B's future aid.¹⁴⁸ Because union A will control the circumstances and purposes in which and for which union B's future aid will be sought, the tacit exchange of employee X's present aid for union B's future aid is an exchange for union A's present purposes—for the purpose of enhancing A's power. Union A should not be permitted to escape that characterization by taking a neutral stance on the question whether employee X should or should not cross B's picket line. Formal neutrality may suggest present indifference to enhanced power and may suggest caution about the applicability of prohibitions upon A's conduct as union conduct, but union A's control over future circumstances and purposes makes employee X's reciprocal exchange of power A's exchange of power. One may argue that X is in fact not contemplating an exchange—that he acts from conviction or from fear rather than calculation—but so long as X's Section 7 protection is a function of reciprocity, X's subjective motivation is immaterial.¹⁴⁹

146. It is possible to conceive of an employee or employees seeking the aid of a stranger union or of stranger employees in a dispute with their employer where their own union will not seek that aid or is hostile to that aid, but it is at least unlikely that the effort will be successful in the absence of stranger union or stranger employee hostility to the union representing the employees who are parties to the dispute. The "signal effect" of pickets is a phenomenon most likely the product of a loyalty to unions as a cause. The at least tacit approval of a wildcat strike by some union with representational interests is generally a practical prerequisite to the honoring of picket lines. See *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 418 n.1 (1981) (Powell, J. concurring). But see *id.* at 422.

147. But see *Harper, Union Waiver*, *supra* note 8, at 374-75.

148. Cf. *S. Rep. No. 105*, 80th Cong., 1st Sess. 23 (1977) (proviso to Section 8(b)(4), 29 U.S.C. § 158(b)(4) (1976), does not protect persons who honor a picket line established in a wildcat strike).

149. Compare *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971) (a refusal to cross motivated by fear rather than principle

In short, because the individual employee who refuses to cross a stranger picket line is doing his union's bidding in the sense that the mutual purpose which renders that refusal protectable is enhanced group power (a power in which the employee may seek to participate but does not individually control), the employee's Section 7 protection should be judged by reference to his union.

- (3) The Competing Versions of Mutuality: Mutuality as License, Mutuality as Rationalization and Mutuality as Worker Solidarity Across Employers.

The argument thus far made here has been that the Section 7 right to engage in concerted activity for mutual purposes is a collective right. The premise of that argument is that the actor claiming Section 7 protection has no Section 7 right unless that actor has the right of decision regarding its exercise. The mutuality element of the statute is, under that premise, something more than a mere description of the ends for which concerted activity will be protected. Mutuality is instead the defining element in a grant of a license to the actor engaged in concerted activity to pursue ends the actor views as advantageous. The grant of such a license does not mean that its scope is unlimited; the license is limited both by the terms of Section 7 (activity, to be protected, must be concerted and for mutual aid or protection) and by other statutes or laws (e.g., the secondary boycott prohibition). The license does mean, however, that the actor's protection, in the absence of a prohibition limiting the license, is dependent solely upon meeting the terms of Section 7; protection is not dependent upon the Board's or a court's after-the-fact view of the desirability of the activity from the standpoint of policies independent of Section 7.¹⁵⁰ The actor therefore has the right of decision in the sense that the actor has the right to decide what mutual ends it will pursue within a broad discretion. The Board or a court's after-the-fact judgment about whether the ends fit within the scope of mutuality is rendered on the basis of an understanding of mutuality viewed from the perspective of the actor, not on the basis of an understanding of mutuality infused with the Board's or a court's view of desirable labor policy.

There are other and contrary views of the meaning of mutuality. The first of these contrary views is suggested by what was termed

renders refusal not protected) *with* *Browning-Ferris Industries*, 259 NLRB No. 9 (1979) (employee's motive for refusing to cross is immaterial).

150. *Cf.* *NLRB v. Insurance Agents Int'l. Union*, 361 U.S. 477 (1960) (Board may not balance economic weapons).

here the Fifth Circuit's position on the question of concerted activity.¹⁵¹ Under that view, mutuality's function is only descriptive; Section 7 protection is afforded concerted activity where the tendency of that activity is to further mutual ends¹⁵² or where the motivation for activity may be characterized as mutual,¹⁵³ but tendency and motivation are rationalizations for decisions favoring protection on other grounds. Those other grounds reflect substantive policy: protection is desirable because the employee activity in issue tends to further socially desirable ends which may be characterized, as a matter of rationalization, in terms of mutuality. The authority to make decisions about the desirability of ends is, under this view, the Board's or a court's authority, not the actor's authority.¹⁵⁴ Section 7 protection, under such a view, is instrumental protection in the sense that protection is afforded for substantive policy reasons independent of the terms of Section 7 itself.

This description of the first contrary view is admittedly largely caricature; it is not a description actively advocated by either the Board or the courts. It is nevertheless the contention of the present article that the view is implicit, even if not articulated, in administrative and judicial positions taken in the present context.¹⁵⁵ And whether or not that contention is accepted, the view serves as a useful point of contrast for purposes of assessing the nature of the rights conferred by Section 7. The distinction between mutuality as license and mutuality as rationalization as alternative explanations of the right to honor a picket line is that the former explains the right by identifying the actor who makes the decision to honor; the latter explains the right in terms of the usefulness of the act of honoring for labor policy—e.g., by justifying protection not on the ground that honoring a picket line advances the interests of the honoring employee and his fellow employees, but because it preserves the efficacy of the strike weapon.¹⁵⁶

151. See *supra* note 79.

152. See Gorman and Finkin, *supra* note 71, at 354-55.

153. See *NLRB v. Union Carbide Corp.*, 440 F.2d 54 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971).

154. See *supra* notes 117-27 and accompanying text.

155. See *supra* notes 79-83 and accompanying text; *infra* notes 339-41 and accompanying text.

156. See *NLRB v. Southern Cal. Edison Co.*, 646 F.2d 1352, 1363 (9th Cir. 1981); *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971); *West Coast Casket Co.*, 97 NLRB 820, 823 (1951), *enforced*, 205 F.2d 902 (9th Cir. 1953); Schatzki, *supra* note 8, at 394; *infra* notes 247-68 and accompanying text. The point is perhaps best illustrated by comparing Judge Hand's rationale in *NLRB v. Peter Cailler Swiss Chocolates*, 130 F.2d 503 (2d Cir. 1942) discussed *supra* notes 136-48 and accompanying text, with the Board's rule that a single employee who honors

The second contrary view, again something of a caricature but implicit in some decisions¹⁵⁷ and even explicit in some commentary,¹⁵⁸ is that mutuality means worker solidarity. Under this view the locus of the Section 7 right to honor is in the individual, and Section 7 protection is justified on the theory that an individual seeks individual shared benefit and reciprocal power.¹⁵⁹ But the underlying notion supporting the view is that employee activity has a mutual purpose if it reflects worker solidarity across employers; the honoring employee need not expect shared benefit or reciprocal power because the right exercised is a personal right in the nature of expression.¹⁶⁰ The distinction in result between the mutuality as license and mutuality as solidarity explanations of the right to honor is suggested by the distinct positions each view takes on the question of union waiver, by collective bargaining agreement, of the right to honor: the former explanation assumes a power of waiver while the latter explanation denies such a power.¹⁶¹

It has been said here that the two contrary views described are largely caricature. In fact all three views may be seen at work in different cases at different times.¹⁶² The purpose of the next section of this paper is to criticize both the solidarity and rationalization versions of mutuality and to advocate in more detail a preference for the license version of mutuality.

C. Some Counterarguments: Of Individual and Collective Rights

Two doctrinal developments support the notion that the honor-

a picket line established by persons not defined as employees under the Act is not protected because he does not act in concert with employees. *Capital Times Co.*, 234 NLRB 309 (1978). The latter rule treats the picket line as the concerted activity deserving of protection; the act of honoring is a mere incident of the picket line having no independent claim to protection. It is true that the *Capital Times* rule may be derived from the view that the individual honoring employee must act in concert to be protected, but Judge Hand's rationale permits the concertedness criterion to be met by focusing upon the group consisting of the honoror and his fellow employees rather than the pickets.

157. See cases cited *supra* note 91.

158. See authorities cited *infra* note 166.

159. See Harper, *supra* note 8, at 372-73.

160. See Klare, *supra* note 118, at 479. The Klare and Harper positions are distinct on this point, for Harper appears to believe that the individual worker may be accurately characterized as seeking individual mutual gain. Harper, *supra* note 8, at 372-73.

161. See *infra* notes 227-46 and accompanying text.

162. For a recent example of the conflicting themes suggested in the text compare the majority and dissenting opinions in *Materials Research Corp.*, 262 NLRB No. 122 (1982).

ing employee's Section 7 protection should be measured by reference to his exclusive representative: (1) the employee's union may contractually waive the Section 7 protection he would otherwise enjoy when confronting a stranger picket line,¹⁶³ and (2) that the union may, without violating Section 8(b)(1)(A),¹⁶⁴ discipline union members for crossing a lawful stranger picket line.¹⁶⁵

The rule that a union may waive the right to honor is necessarily premised on the view that the act of honoring is a subject matter within the statutory competence of the exclusive representative. Such a premise is consistent with the interpretation given here to Section 7's mutuality requirement: under either the shared benefit or reciprocity views of mutuality, it is the group—the honoring employee and his fellow employees—who claim both benefits and reciprocal power and group claims are made through and controlled by the exclusive representative.¹⁶⁶ But the premise is not consistent with the view that

163. *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953).

164. 29 U.S.C. § 158(b)(1)(A) (1976): "It shall be an unfair labor practice for a union or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

165. *See* International Union of Operating Engineers, Local Union 18 (Davis-McKee, Inc.), 238 NLRB 652 (1978). A union which disciplines an employee for refusing to cross a picket line directed at a stranger employer runs substantial risks that it will be found to have thereby violated Sections 8(b)(1)(A) and 8(b)(4) upon the theory that such conduct is secondary. Those risks are particularly acute under the regime imposed by Building and Construction Trades Council of New Orleans (Markwell & Hartz, Inc.), 155 NLRB 319 (1965), *enforced*, 387 F.2d 79 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968) in the construction industry. *See, e.g.*, Orange County Dist. Council of Carpenters, 242 NLRB 585 (1979); Local 153, Int. Bhd. Electrical Workers, 221 NLRB 345 (1975). Although most cases involving the question of a union authority to discipline for crossing a stranger picket line are disposed of either on the secondary boycott ground or upon the ground of waiver by contract, Local 1197 Communication Workers (Western Electric Co., Inc.), 202 NLRB 229 (1973), the union's right to discipline in the stranger employer context cannot be distinguished from the union's right to discipline in the sister local (common employer context) absent invocation of the secondary boycott ban. *See* Communications Workers Local 6222 of America, 186 NLRB 312 (1970). With respect to the question whether and to what extent the secondary boycott ban disables the union from exercising what would otherwise be its authority in the stranger employer context, *see infra* notes 270-93 and accompanying text.

166. A relevant analogy involves cases in which employees engage in concerted activity against their employer under circumstances in which the employee's right has not been waived and the activity is at least generally in support of their union's bargaining position, but the activity is not directed by or is opposed by the union. Although the Board has on occasion found employee activity in such a context protected insofar as not inconsistent with the union's position, *Draper Corp.*, 52 NLRB 1477 (1943), *enforcement denied*, 145 F.2d 199 (4th Cir. 1944), the Courts of Appeal have

the Section 7 right to honor is vested in the individual employee¹⁶⁷:

been generally unreceptive to protection in such circumstances. See *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661, 663 (7th Cir. 1963); *NLRB v. Shop Rite Foods, Inc.*, 430 F.2d 786 (5th Cir. 1970); *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969). See generally Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672 (1967); Cantor, *Dissident Worker Action, After the Emporium*, 29 RUT. L. REV. 35 (1975). But see Harper, *supra* note 8, at 368-71.

167. See *supra* note 91. The distinction between individual and collective understandings of Section 7 is an oversimplification useful for present purposes only if certain of the complexities masked by it are understood. The collective, group or union right understanding of concerted activity proposed in the principal argument (the argument that the individual honoror is the instrument of his union) is an institutional understanding. The bases for such an understanding are, alternatively, (1) Section 9(a) exclusivity, or (2) Section 7 itself, as informed by Section 1 (congressional understanding), Section 9(a) (exclusivity) and the definitional rationales for both concertedness and mutuality as previously discussed. See generally *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). Support for the understanding may be found both in the accepted proposition that an employee's Section 7 rights may be waived by the exclusive representative and in the accepted proposition that employees may not engage in concerted activity for purposes inconsistent with the authority of the exclusive representative. *Id.*

A second potential understanding of the collective or group right notion is non-institutional. It may be viewed as communal in the sense that it does not proceed from the individualistic assumption that human intercourse is a zero sum game, see Lynd, *Government Without Rights*, *supra* note 114, at 494, but is individualist in the sense that communal rights are exercisable independently of and in conflict with institutional arrangements initially designed to express communal sentiment. In statutory terms, the source of such an understanding is Section 7; Section 9 is a limitation upon Section 7, but is itself more, Lynd, *Legislative History*, *supra* note 118, or less, Harper, *supra* note 8, limited. The clearest example of a state of affairs consistent with the understanding is concerted activity by unorganized employees; Section 9(a) is not, under such circumstances, applicable.

A wholly individualist (non-communal) understanding of Section 7 rights is suggested both by the example of employee choice (e.g., choice of bargaining representative and choice in the sense of attempts to influence a bargaining representative), *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974), and by the argument that individual employees obtain individually vested and individually enforceable rights under a collective bargaining agreement through an individualistic interpretation of the proviso to Section 9(a), Summers, *The Individual Employees Rights Under the Collective Bargaining Agreement: What Constitutes Fair Representation*, 126 U. PA. L. REV. 251, 255-56 (1977)—an argument which has been extended by one commentator to infer an individual Section 7 right to employ economic coercion to achieve individual ends. See Lynd, *History* *supra* note 118, at 748-49.

It is possible to view these competing versions of rights as mutually exclusive; Section 7 adopts only one of the versions. Compare Lynd, *Legislative History*, *supra* note 118 with Lynd, *Government Without Rights*, *supra* note 118, at 484 n.11. In fact, Section 7 codifies all three. Any resulting "incoherence" (Klare, *Labor Law As Ideology*, *supra* note 118, at 469) is the product not so much of inherent incompatibility as it is of judicial failure to clearly identify distinct contexts in which one or another version is appropriately dominant. See generally Brousseau, *supra* note 4.

if the employee's union may waive his right to honor a picket line,

The communal understanding is expressly predicated by its advocates upon the example of concerted activity in the non-union context. See Lynd, *Legislative History*, *supra* note 118, at 724-25 n.19, 748-49 and n.120. Section 9(a) exclusivity is not an issue in such a context, and the institutional version of collective right is clearly inappropriate: There is in such a context no institution. There is, however, a group—the necessity of such a group is ensured by the concertedness requirement. It is quite true that the relevant group may be substantially less than employees of a particular employer as a whole, but the mutual purpose requirement as previously interpreted here may be as easily measured by reference to informal group purposes as to institutionalized group purposes. In specific terms, unorganized employees who honor a stranger picket line do so no less in behalf of their fellows and are protected, if at all, no less by virtue of their fellows.

But the extension of the communal understanding to contexts in which Section 9(a) is applicable is unwarranted. The extension argument is that communal rights survive exclusivity and, therefore, that subgroups of employees may engage in concerted activity independently of their exclusive representative. See Lynd, *Legislative History*, *supra* note 118, at 748-49; Harper, *supra* note 8, at 372-80. For purposes of the present subject matter, the extension argument, if accepted, would require both evaluation of the issue of Section 7 protection for the honoring employee without reference to the exclusive representative and withdrawal of the exclusive representative's authority to both direct individual employee action with respect to stranger picket lines and to waive protection.

My difficulties with extension of the communal understanding are two. First, the argument grounded upon, and part of, a general critique of post World War II Labor Law which calls for a radical reevaluation and reorientation for that law. See generally Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503, 504 (1981); Klare, *Labor Law as Ideology*, *supra* note 118; Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978); Lynd, *Government Without Rights*, *supra* note 118; Lynd, *Legislative History*, *supra* note 118; Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 151 (1981). Although I have termed this paper "revisionist", it is not revisionist in the sense of an attack, like Lynd's or Klare's, upon the pro-institutional thrust of post-World War II Labor Law. The paper is revisionist, rather, in the sense that it seeks to identify and extend the premises of that thrust—particularly by emphasizing the institutional character of the Section 7 rights apparently recognized by that thrust.

Second, the communal theory appears rather clearly grounded upon a mistrust of labor unions—a mistrust founded on the premise that unions have been used to side-track the class struggle and have therefore perpetuated worker oppression and alienation. The desirability of reinvigorating the "class struggle" aside, it is not apparent either that reinvigoration was ever intended by Congress or, therefore, that the predominant post-war conception of worker rights—a largely institutional conceptions modified by the hope that internal union democracy will reduce the risks inherent in the conception—is unwarranted. With respect to this second reason for my disagreement see particularly *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *NLRB v. Allis Chalmers Mfg. Corp.*, 388 U.S. 175 (1967). But see Lynd's criticism of the *Emporium* case in *Legislative History*, *supra* note 118.

Lynd's criticism proceeds primarily from a critique of the Court's treatment of the proviso to Section 9(a)—a proviso which states that employees shall have the right at any time to present grievances to their employer

the union, not the employee, has the power of decision concerning exercise of the right.¹⁶⁸

The rule that a union may permissibly coerce the employees it represents with respect to the exercise of the right to honor is equally inconsistent with the individual right characterization: the rule denies individual employee choice in the matter and places that choice—the decision-making authority with respect to exercise of the right—in the collective. It is true that there is a fundamental distinction bet-

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 in then in effect.

29 U.S.C. § 159(a)(1976). The Court read the proviso as in effect conferring a right on employers to adjust grievances individually without running afoul of the unfair labor practice provisions of the Act for violating the exclusivity principle. 420 U.S. at 61 n.12. Lynd views the proviso as granting an individual right to present grievances to the extent not inconsistent with the bargaining agreement—a right he conceives of as “fundamental.” *Legislative History*, *supra* note 118. But, granting for purposes of argument Lynd’s version of the meaning of the proviso, he goes much further by contending that inherent in the right to present a grievance is the right to engage in “concerted activity”—i.e., to take reasonable economic measures against the employer to secure successful resolution of the grievance—independently of the exclusive representative. *Id.* at 724-25 n.19, 748-49. *See also* Gorman & Finkin, *supra* note 71, at 354-56. There are two difficulties with Lynd’s argument. First, he relies upon *NLRB v. Insurance Agents Int’l Union*, 361 U.S. 477 (1960), for the proposition that, because a union may engage in a slowdown without violating § 8(b)(3), individual employees are protected under § 7 for picketing over an individual grievance. The conclusion does not follow. *Insurance Agents* was concerned with Board authority to intrude upon the collective bargaining process and expressly recognized the proposition that a slowdown is protected activity subject to lawful employer response, 361 U.S. at 492-93. Lynd may mean that the lesson of *Insurance Agents*—the Board may not intrude into collective bargaining—supports the proposition that employees who engage in concerted activity in pursuit of individual objectives are protected because their activity is not subject to attack on the grounds that it makes for disorderly bargaining. *See* Getman, *supra* note 8, at 1245. That argument won’t wash: *Insurance Agents* precludes Board intrusion into the process of collective bargaining for fear that such an intrusion will result in regulation of the substantive terms of agreement; it does not purport to define the scope of protected activity. To the extent that employee activity independent of union authorization was at issue in *Insurance Agents*, that activity was viewed as unprotected. 361 U.S. at 493.

The second difficulty with the Lynd thesis is that it confuses rights to the use of economic coercion with a right to communication between employer and employee. Despite his denigration of that distinction, *Legislative History*, *supra* note 118, at 749, the distinction is quite real. *See* Harper, *supra* note 8, at 355 and *infra* notes 186-207 and accompanying text.

168. It should be noted that what the union controls is the question of protection. The union may, in effect, order employees to cross a picket line, and such an order is subject to being interpreted as a waiver of the employee’s protection. *See*

ween the source of the union's authority to waive the right to honor and the union's authority to coerce employees. The former is a function of exclusivity and the latter is a function of the union's right, as a private association, to compel its members to adhere to its internal union rules.¹⁶⁹ But that formal distinction, albeit a basis for arguing that internal union discipline is a matter independent of the meaning of Section 7, ignores the dual role in which the union acts—both as an exclusive representative and as a private membership association.

The union membership which provides a basis for union discipline is most often an incident of employment.¹⁷⁰ Although a union may discipline from institutional motivations transcending its role as the exclusive representative of particular employees in their relationship with a particular employer, it cannot wholly escape that role.¹⁷¹ A

International Bhd. of Boilermakers Local 667 (Union Boiler Co.), 245 NLRB 719 (1979). On the other hand, the union may generally not use as a means of enforcement procuring from the employer the discharge of the disobeying employee, and this is the case where the employee disobeys an order to cross, *id.* at 727-28 (ALJ). *But see* International Bhd. Electrical Workers Local 1547 (Rogers Electric), 245 NLRB 716 (1979) (Although there is a presumption that union may not use the employment relationship as a means of discipline, that presumption is rebuttable where necessary to union's effectiveness as an exclusive representative); International Bhd. of Operating Engineers, Local 18, 204 NLRB 681 (1973) (same).

169. The Supreme Court has limited Board authority to review union discipline under Section 8(b)(1)(A) on the ground that the proviso to that provision—precluding intrusion into internal union affairs—prevents such review absent discipline which either affects the employer-employee relationship or is otherwise prohibited (*i.e.* prohibited independently of Section 8(b)(1)(A)) by the Act). *See* NLRB v. Boeing Co., 412 U.S. 67 (1973)); *Scofield v. NLRB*, 394 U.S. 423 (1969); *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). The source of a union's authority to discipline is therefore the union's status as a private entity, and its authority is limited to its membership. *See* NLRB v. Granite State Joint Board, Textile Workers Local 1029, 409 U.S. 213 (1972).

170. Union security clauses in collective bargaining agreements are of course intended to ensure membership. Although such clauses are theoretically limited under federal law to preventing free riders—*i.e.*, to what are in effect agency shop agreements, *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), that limitation is rarely conveyed either by the language of such agreements or independently to employees. *See* R. GORMAN, *supra* note 8, at 686; Wellington, *Union Fines and Workers Rights*, 85 YALE L.J. 1022, 1051-64 (1976).

171. The clearest indication of this linkage appears in the Supreme Court's opinion in *NLRB v. Allis-Chalmers Mfg. Corp.*, 388 U.S. 175 (1967), where the Court justified a broad reading of the Section 8(b)(1)(A) proviso on the basis of the role of the union as an exclusive bargaining agent with control over economic weapons. *See also* *NLRB v. Shop Rite Foods Inc.*, 430 F.2d 786, 789 (5th Cir. 1970); *NLRB v. Tanner Motor Livery' Ltd.*, 419 F.2d 216 (9th Cir. 1969). *See generally* Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis*

union's motivation for discipline will be truly independent of its status as an exclusive bargaining agent for the employees it disciplines only where it acts for reasons which transcend the bargaining unit—e.g., where it acts to achieve its bargaining objectives in some other bargaining unit.¹⁷² But in such a case, the members subject to discipline derive their statutory protection against employer retaliation from Section 7, not from any right of membership in a private association. And statutory prohibitions of union conduct—and, therefore, statutory withdrawal of protection for employees—are for the most part dependent for their application upon the relationship between particular employees as employees and a particular employer as employer, not upon membership.¹⁷³ In short, a union's legal capacity to command employee action may be a function of membership rather than exclusivity, but that capacity is subject to an assessment of Section 7 protection.¹⁷⁴ To the extent that the union fails to undertake that assessment, or commands employee conduct inconsistent with Section 7, it places the employees it represents at risk, and that risk may be expected to adversely affect the employees' willingness to support their representative.

Chalmers, 1970 DUKE L.J. 1067. Much of the criticism of *Allis-Chalmers* is grounded upon the notion that Section 7 confers individual rights. See Atleson, *Union Fines and Picket Lines: The NLRA and Union Disciplinary Power*, 17 UCLA L. REV. 681 (1970); Cramer, *The Boeing Decision: A Blow To Federalism, Individual Rights and Stare Decisis*, 122 U. PA. L. REV. 556 (1974).

172. See Newspaper and Mail Deliverers' Union (Interborough News Co.), 90 NLRB 2135 (1950). Such union action raises substantial secondary boycott issues. See *infra* notes 270-391 and accompanying text.

173. Such is the case under both Sections 8(b)(7), 29 U.S.C. § 158(b)(7) (1976), and 8(b)(4), 29 U.S.C. § 158(b)(4) (1976). Moreover, Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976), is violated where a union disciplines employees for crossing an unlawful picket line. See, e.g., *NLRB v. Glaziers & Glassworkers Local 1621*, 632 F.2d 89 (9th Cir. 1980); *NLRB v. Retail Clerks Union, Local 1179*, 526 F.2d 142 (9th Cir. 1975); *International Longshoremen's Local 30*, 223 NLRB 1257 (1976), *enforced*, 549 F.2d 698 (9th Cir. 1977); *Local Union 153, Int'l Bhd. Elec. Workers*, 221 NLRB 345 (1975).

174. Two examples may serve to illustrate the point (1) Union A, the exclusive representative of Employer A's employees seeks to organize Employer B's employees by picketing B under the circumstances contemplated by Section 8(b)(7)(B). Union A disciplines two employees: X, an employee of Employer A who crossed when making a delivery to Employer B, and Y, an employee of B who crossed the line for the purpose of his employment with B. The legality, under Section 8(b)(7)(B), of the picket line is dependent upon whether a valid election had been conducted with respect to B's employees in the preceding 12 months. 29 U.S.C. § 158(b)(7)(B) (1976). Upon the assumption that such an election had been conducted, X, if X had refused to cross, would not have been protected under Section 7 from employer A's discharge. As X did cross an unlawful picket line, union A's fine is a violation of Section 8(b)(1)(A). See *NLRB v. Retail Clerks Union Local 1179*, 526 F.2d 142 (9th Cir. 1975).

Employee Y's status is more complex. To the extent that a refusal to cross,

It is, then, myopic to view the prerogatives of a private membership association as independent of the problem of the character of Section 7 rights. That Congress exempted internal union discipline from a prohibition of union interference with Section 7 rights¹⁷⁵ in a proviso to Section 8(b)(1)(A) suggests precisely that Congress viewed collective control over concerted activity, albeit control subject to a theoretical individual option to withdraw from membership, sufficiently consistent with Section 7 to warrant a proviso authorizing that control. Such is the suggestion implicit in the Supreme Court's interpretation of that proviso, for the interpretation, although grounded on the union's character as a private association for purposes of distinguishing between employees and union members, rests on the Court's view that the policy of the proviso is preservation of the union's statutory function as an exclusive representative.¹⁷⁶

Although both the doctrine of waiver and the doctrine of per-

had he refused, would merely constitute strike activity, he would have arguably been protected from discharge under Section 7. *See* *Claremont Polychemical Corp.*, 196 NLRB 613 (1972) ("economic strikers" in § 8(b)(7)(B) context). *See also* *NLRB v. National Packing Co.*, 377 F.2d 800, 804 (10th Cir. 1967) (employees "had the right to strike but they did not have the right to picket in violations of the Act."). As Y did cross the picket line, the question of the legality of the fine under Section 8(b)(1)(A) turns on whether the "fines otherwise prohibited by the Act" exception to the Section 8(b)(1)(A) proviso, *NLRB v. Boeing Co.*, 412 U.S. 67 (1973), makes Section 8(b)(1)(A) a mere ancillary enforcement mechanism for other statutory prohibitions or was intended by the Court to preclude union fines which coerce unprotected activity. If the former is the case, Y's fine violates the policy of 8(b)(7)(B). If the latter is the case, Y's fine arguably does not coerce unprotected activity. The 9th Circuit has adopted the former view. *NLRB v. Retail Clerks Union Local 1179*, 526 F.2d 142 (9th Cir. 1975).

(2) Union A, the exclusive representative of Employer A's employees fines X, an employee of Employer A, for crossing a picket line established by Union A over an economic dispute with Employer B at Employer B's premises. Union A is also the exclusive representative of Employer B's employees. If X had refused to cross the picket line, his protection from discharge by Employer A would have been dependent upon (1) The provisions of the collective bargaining agreement between Union A and Employer A governing strikes and picket lines; (2) Section 7 mutuality, and (3) the legality of the picket line. As X crossed the picket line, the legality of Union A's fine is dependent upon (1) X's membership in A; (2) the relationship between Employer A and Employer B under the Ally doctrine, *e.g.*, *Newspaper Production Co. v. NLRB*, 503 F.2d 821 (5th Cir. 1974); *NLRB v. Business Machine & Office Appliance Mechanics Conference Board, Local 459*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956); (3) the relationship between X's work and B's business, *Local 761, Int'l Union of Elec. Radio & Machine Workers v. NLRB*, 366 U.S. 667 (1961), and (4) the provisions of the Collective Bargaining Agreement between Employer A and Union A.

175. 29 U.S.C. § 158(b)(1)(A) (1976).

176. *See* *NLRB v. Boeing Co.*, 412 U.S. 67 (1973); *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

missible union discipline support the collective right characterization of the right to honor, there are two grounds for counterargument. First, it has been argued that a union should not be permitted to waive the honoring employee's right because the statutory source of waiver authority—Section 9(a) exclusivity¹⁷⁷—is not so broad as to encompass that power.¹⁷⁸ That argument proceeds from the view that Section 7 rights are both individual and only partially vested in an exclusive representative by delegation.¹⁷⁹ It is at least arguably supported by the Board's reluctance to find contractual waiver in picket line cases—no strike clauses are narrowly construed when an employer seeks to apply them in a refusal-to-cross case.¹⁸⁰

Second, the doctrine that an honoring employee's refusal to cross a stranger picket line is not protected under Section 7 where the picket line is unlawful¹⁸¹ is facially inconsistent with the argument that the employee's right is his union's right. The employee's protection in an unlawful picket line case is measured by reference to the pickets, not the honoring employee's union. That reference implies that the honoring employee's right is individual or that his right is collective but vested in stranger employees or their union.¹⁸²

(1) The Exclusivity Principle, The Problem of Economic Coercion and Restrictive Interpretation of No Strike Clauses.

The argument that the exclusivity principle is not so broad as

177. 29 U.S.C. § 159(a) (1976):

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 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. (emphasis supplied).

178. Harper, *supra* note 8, at 372-80.

179. *Id.* at 373.

180. *Id.* at 375-76. See, e.g., *W-I Canteen Serv. Inc. v. NLRB*, 606 F.2d 738 (7th Cir. 1979); *Gary Hobart Water Corp.*, 210 NLRB 742 (1974), *enforced*, 511 F.2d 284 (7th Cir.), *cert. denied*, 423 U.S. 925 (1975).

181. *Drivers Local Union No. 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966); *Chevron U.S.A., Inc.*, 244 NLRB 1081 (1979); *Pacific Tel & Tel Co.*, 107 NLRB 1547 (1954).

182. See *infra* notes 248-69 and accompanying text.

to permit union waiver of the right to honor a picket line proceeds from two premises. First, some Section 7 rights have been treated, as well as merely labelled, individual rights because individual employees have been held to be protected in the exercise of those rights despite union waiver.¹⁸³ If at least some Section 7 rights are exercisable independently of a union, the instrumental explanation of Section 7 protection for individual employees is not a complete explanation. Second, the exclusive representative's authority is a bargaining authority exercisable with respect to a particular bargaining unit; it is not an authority coextensive with all employment issues of concern to employees¹⁸⁴. If the exclusive representative's authority is so limited, it is arguably not present in the stranger picket line context precisely because that context does not involve the honoring employee's bargaining unit.¹⁸⁵

(a) Exclusivity and Coercion

It may be conceded that Section 7 grants individual rights and grants rights occasionally exercisable independently of an exclusive representative without impairing the collective right explanation of the honoring employee's Section 7 protection.

Section 7 grants rights of individual choice, association and expression,¹⁸⁶ but those rights are not rights to concerted activity in the sense of economic coercion. They are rights to organization and

183. Harper, *supra* note 8, at 342-502.

184. *Id.* at 373-74.

185. *Id.* at 374.

186. See Brosseau, *supra* note 4, at 26-27; P. Cox, *supra* note 5, at 251-64.

There is an independent basis for finding an individual right in Section 7 which does not encounter the difficulties I have expressed here with the concerted activity for mutual aid or protection basis for such a right. Section 7 provides, in addition to the concerted activity clause, that "employees shall have the right . . . to form, join or assist labor organizations." 29 U.S.C. § 157 (1976). See Cyril de Cordova Bros., 91 NLRB 1121, 1135 (1950); Axelrod, *supra* note 8, at 632. That right may be viewed as individual, and the view is strengthened by one's suspicion that the effort to critically explain the honoring employee's motivation (as distinguished from the reason for the law's protection) in terms of mutuality is fictional; the employee more probably acts from personal conviction—that is, loyalty to labor's cause without reference to shared benefit or reciprocal power. See NLRB v. Rockaway News Supply Co., 345 U.S. 71, 73 (1953).

Moreover, the generally accepted statutory explanation for Section 7 protection in the stranger picket line situation—Section 2(3) of the Act, 29 U.S.C. § 152(3) (1976)—appears to reinforce this view. "Employee" is defined in that section to "include any employee, and [the term] shall not be limited to the employees of a particular employer. . . ." *Id.* Hence, any employee, even an employee of an employer not involved in the dispute over which a picket line is established, has a "right . . .

to participation exercisable primarily with respect to a particular employee's employer and, to the extent that they are exercisable with

to assist" the labor organization involved in the dispute. *Cf.* 29 U.S.C. § 152(9) (1976) ("The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee.").

There are, however, two difficulties with the argument: (1) The 74th Congress had in mind two problems when defining "employee" and "labor dispute." First, it wished to permit free employee choice of the "outside union"—*i.e.*, to permit employees to choose as a representative a non-employee of a particular employer. *See H.R. Rep. No. 972 (On S1958), 74th Cong., 1st Sess. 8 (1935); Hearings On S1958 Before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 603 (1935) (Statement of Robert C. Graham) (criticizing the bill on this ground); Id. at 440-41 (colloquy between Sen. Wagner and Robert T. Caldwell); Id. at 498 (Statement of Harvey Ellord) (in opposition); 79 CONG. REC. 9701 (1935) (Congressman Blanton in opposition).* Second, Congress wished, by the definitions, to make it clear that a legitimate objective of organization across employers was that of equalizing bargaining power and eliminating wage competition between employers. *H.R. Rep. No. 972 (On S1958), 74th Cong., 1st Sess. 6 (1935).* Both congressional purposes are concerned with union objectives as group objectives.

(2) The second difficulty is that Section 7 was, at the time of its original enactment, consistently thought to constitute merely a restatement of Section 7(a) of the National Recovery Act, with the prohibitory provisions of the NRA removed to Section 8 of the NLRA. *Sen. Rep. No. 573 (on S1958) 74th Cong., 1st Sess. 8-9 (1935); H.R. Rep. No. 972, 74th Cong. 1st Sess. 13 (1935); Comparison of S2926 and S1958: Memorandum of March 11, 1935 prepared for Sen. Comm. on Education and Labor Comparing S.1958 (74th Cong., 1st Sess) with S2926 (73rd Cong., 2d Sess) 25-26 (1935).*

Section 7(a) of the NRA read as follows:

Every code of fair competition, agreement and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment approved or prescribed by the President. (emphasis supplied).

What the language of Section 7(a) contemplated was an individual employee's right to assist a labor organization in its dealings with that employee's employer. The "assist" term is included in a sentence intended to preclude forced membership in employer dominated unions and appears therefore to have been intended to foster the formation of independent bargaining agents. That the use of the "assist" term in Section 7 of the NLRA was intended to serve that same end is suggested not only by the congressional understanding that Section 7 duplicated Section 7a and by the use of the term "assist" with the terms "form" and "join" in Section 7, but also by

respect to subject matters outside that employment relationship,¹⁸⁷ are rights of communication, not of economic coercion.¹⁸⁸

Senator Wagner's 1935 criticism of Section 7a of the NRA from a perspective which emphasized the group rights nature of the original bill (S2926) he advocated as a replacement for Section 7a:

Failure to meet the company-union challenge has not been the only defect of section 7(a) of the Recovery Act. This section provides that employees shall be free to choose their own representatives. It has been interpreted repeatedly to mean that any employee at any time may elect to deal individually with his employer, even if the overwhelming majority of his coworkers desire a collective agreement covering all. Such an interpretation is detrimental to the practice and contrary to the theory of collective bargaining. It permits an unscrupulous employer to divide his employees against themselves by dealing with innumerable small groups or with individuals.

78 CONG. REC. 4229 (1934) (New York Times Article of March 11, 1934, authored by Senator Wagner and printed in the Congressional Record, March 12, 1934).

What emerges from the legislative history is a congressional conceptualization of the "form, join, or assist" clause of Section 7 of the NLRA which viewed individual employees as having rights to choice and participation with respect to their bargaining representative in their economic relationship with their employer. Control of that relationship—and of the economic relationship between employees and stranger employees or employers—was viewed as firmly placed, as a matter of Senator Wagner's "theory of collective bargaining" in an exclusive representative once the individual right of choice was exercised. *But see* Gorman & Finkin, *supra* note 71, at 331-46.

187. *Eastex Inc. v. NLRB*, 437 U.S. 556 (1978).

188. Professor Harper has argued that employee activity outside the employer-employee relationship directed to improving that employee's working conditions should be protected as a non-waivable right—a conclusion he derives from *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Harper, *supra* note 8, at 355-56. *Eastex* in fact involved union-sponsored communication concerning subject matters not within employer control, but I agree with the view that *Eastex* may be read to protect individual communication. *But see* Teamsters Local 515 (Roadway Express, Inc.), 248 NLRB No. 20 (1980).

Professor Harper interprets *Eastex* as a case recognizing communication rights as distinct from rights to engage in concerted activity over economic issues, *id.* at 353, 355, but grounds his argument that an individual employee's right to concerted activity not directed to economic issues involving the employee's employer is non-waivable on the *Eastex* Court's recognition that activity outside the collective bargaining relationship may be protected. *Id.* at 353. My difficulty with this argument is that it confuses a right to communication with a right to the use of economic coercion.

The communication at issue in *Eastex* was communication about economic questions to be answered in the political process rather than in the context of the employer-employer relationship. The Court justified Section 7 protection of that communication on both the shared benefit and reciprocity theories of mutuality. 437 U.S. at 570. If the communication was successful—that is, if the government made political decisions consistent with the communication—those decisions would, under the shared benefit and reciprocity theories, eventually affect the economic relationship between the employee communicators and their employer. But these facts do not establish either

Moreover, Section 7 grants rights to engage in concerted activity in the sense of economic coercion in contexts in which there is

(1) the equivalency for Section 7 purposes of an employee's communication and an employee's refusal to cross a stranger picket line or (2) a limitation upon the scope of authority of the employees' bargaining representative grounded upon that representative's indifference to an economic issue not subject to the control of the employer with which it deals.

The "concerted activity" at issue in *Eastex* took the form of "pure speech"—the distribution in the workplace of literature advocating economic and political positions. The concerted activity at issue in a picket line case is the act of refusing to cross a stranger picket line. The immediate objective of that act is to pressure the stranger employer, and the act is coercive both in intent and in effect. The act also has, however, a repercussion treated by prevailing case law as merely incidental: The honoring employee's employer is adversely affected because the honoring employee is refusing to complete his assigned task. The employee is in effect engaged in a partial work stoppage.

But the effect is not merely incidental. The mutuality justification for the partial work stoppage is that its immediate effect will have a long-term impact upon the economic relationship between the honoring employee, that employee's fellow employees and the honoring employee's employer. Although the immediate objective is the economic relationship between the stranger employer and the stranger employees, protection is afforded precisely because the long-term objective is the economic relationship between the honoring employee's employer and that employer's employees. Economic coercion directed at the stranger employer and adversely affecting the honoring employee's employer is the means to ultimate ends which concern the honoring employee's employer. Economic coercion in these circumstances is not merely directed at the stranger employer, it is directed at the honoring employee's employer, even though that employer cannot respond to it, because the rationale for legal protection of that coercion is the ultimate effect on the honoring employee's employer.

The honoring employee's exclusive representative cannot be viewed as indifferent either to the ultimate purposes of the employee's refusal to cross the picket line or to the means by which those purposes are achieved for the simple reason that it is the exclusive representative's function to control economic coercion. It is the exclusive representative's function from the point of view of employees because the exclusive representative is the statutory means by which collective power is achieved and expressed. See *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967). It is the exclusive representative's function from the standpoint of the employer because the exclusive representative is the means by which the employer avoids the chaos of multiple and potentially inconsistent employee demands. See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); Getman, *supra* note 8, at 1246; Meltzer, *The National Labor Relations Act and Racial Discrimination, The More Remedies the Better?*, 42 U. CHI. L. REV. 1, 34 (1974).

It is not, however, the exclusive representative's function to control communication *qua* communication. Rights to communication are individual and nonwaivable both because they are essential to the internal control of the exclusive representative (unions are, or are supposed to be representatives, not tyrants), and because an effort to regulate communication either on the part of the exclusive representative or the government requires content-based distinctions neither can be trusted to make. It is true that, in *Eastex*, the communication in issue would have repercussions for the economic relationship between the employer and his employees and that the basis for legal protec-

no union and, therefore, no exclusivity principle applicable.¹⁸⁹ But the right exercised remains a group right—the concertedness requirement ensures that much.¹⁹⁰ And the collective right explanation of the honoring employee's protection is not jeopardized by such a right: an unorganized employee's refusal to cross may be explained under the mutuality principle in terms of the benefits or power to be derived by the employee's fellow employees whether or not those employees are represented.

Finally, Section 7 grants the right to engage in concerted activity independently of an exclusive representative where exclusivity is itself in issue—that is, where the exclusive representative's status is threatened either legitimately, through a rival union's organizing effort,¹⁹¹ or illegitimately, through an employer's unfair labor practices.¹⁹² But exclusivity is not at issue in this sense in the context of a stranger picket line; there is, in such a context, no threat to the honoring employee's exclusive representative's status.¹⁹³

tion of that communication was said by the Court to be those repercussions. It is therefore equally true that the legal basis for protection in *Eastex* is "like" the legal basis for protection in the picket line case. But the argument for making *Eastex* rights not subject to the control of an exclusive representative is not the representative's indifference, it is the nature of the right exercised.

189. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

190. See *supra* notes 65-97 and accompanying text.

191. See *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

192. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Arlans Dept. Stores*, 133 NLRB 802 (1961).

193. Professor Harper recognizes the individual character as well as the communication-association explanation of the rights recognized in *Magnavox*, Harper, *supra* note 8, at 344-47, but seeks to extend their substantially beyond their context. *Id.* at 362-80. For further explication of the communicational right notion, see Brosseau, *supra* note 4, at 38-39.

Neither *Magnavox* nor *Mastro Plastics* supports the proposition that an exclusive representative does not or should not always control concerted activity. In *Magnavox*, exclusivity itself was at stake, and the employee rights in issue were rights of communication, association and choice of bargaining representative—all of which are preeminently individual in nature and none of which involve economic struggle with an employer. In *Mastro Plastics*, exclusivity was again at stake—for employer unfair labor practices threaten the status of that representative. Employee action in support of that status was protected in *Mastro Plastics* because waiver of the right to engage in such action when the waiver contemplated economic struggle and therefore assumed exclusive bargaining status was simply inapplicable. What these cases demonstrate is that there are employee rights of an individual or communal nature exercisable independently of an exclusive representative where exclusivity is in issue.

194. See Getman, *supra* note 8, at 1211. Professor Getman reads *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962), as rejecting the reasonableness inquiry. But, as Professor Getman recognized, Getman, *supra* note 8, at 1211, the portion of the Court's opinion rejecting a "reasonableness" inquiry was concerned with

The preceding categorization of rights proposes two distinctions: (1) the distinction between a right to the use of economic coercion and a right to association and communication, and (2) the distinction between the appropriate decision-making authority with respect to exercise of the right to use economic coercion in contexts in which exclusivity is both present and unchallenged and the appropriate decision-making authority where exclusivity is either absent or challenged. The distinctions are supported, albeit not expressly, by two observed phenomena in the case law.

First, the protected status under Section 7 of economically coercive activity in contexts in which the employees engaged in that activity are unorganized is subject to a much-criticized¹⁹⁴ judicial insistence that it be "reasonable" in the sense that the means used are appropriate to the end sought.¹⁹⁵ The reasonableness inquiry is, with notable exceptions,¹⁹⁶ not a permissible inquiry in contexts in which

the meaning of "labor dispute", not Section 7 protection. 370 U.S. at 16. *See also* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 334 (1938). Indeed, the Court's language in *Washington Aluminum* may be read to authorize a reasonableness inquiry with respect to the Section 7 issue:

The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract. Nor can they be brought under this Court's more recent pronouncement which denied the protection of § 7 to activities characterized as "indefensible" because they were found to show a disloyalty to the workers' employer which this Court deemed *unnecessary* to carry out the workers' legitimate concerted activities [citing NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers [Jefferson Standard], 346 U.S. 464 (1953)].

370 U.S. at 17. (Emphasis supplied). Although *Jefferson Standard* involved employee activity undertaken in the course of a strike called by the employees' union, the court emphasized that the employees in issue (who had distributed leaflets disparaging their employer's product) had purported to act independently of their union: "The fortuity of the coexistence of a labor dispute affords these technicians no substantial defense. While they were also union men and leaders in the labor controversy, they took pains to separate those categories. In contrast to their claims on the picket line as to the labor controversy, their handbill . . . omitted all reference to it." *Id.* at 476.

195. *See, e.g.*, *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050 (7th Cir. 1975); *Dobbs House, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963). *But see* *NLRB v. Phaestron Instrument & Elec. Co.*, 344 F.2d 855, 858 (9th Cir. 1965); *NLRB v. Holcombe*, 325 F.2d 508 (5th Cir. 1963).

196. *See, e.g.*, *UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). The grounds for finding union induced employee activity unprotected are not, however, normally framed in terms of unreasonableness. Rather, such activity is unprotected where (1) violent, (2) unlawful by reason of labor act prohibitions, or (3) too effective, in the sense that the employer is unable to respond to it.

an exclusive representative's use of economic coercion is challenged.¹⁹⁷ This phenomenon is empirical evidence of the importance, as viewed by the courts, of industrial peace as a primary objective of the Labor Act, but the contrast between the phenomenon and the scope of permissible inquiry in contexts in which concerted activity is directed by an exclusive representative reflects the role assigned unions as institutions in achieving that objective. Industrial peace is to be achieved by means of collective bargaining with the exclusive representative of employees, not by means of leaving employees free to pursue their individual ends.

Second, to the extent that the Supreme Court has found economically coercive activity protected under Section 7 despite an exclusive representative's prior waiver of protection for that activity, protection has been afforded in cases in which an employer has challenged the status of the exclusive representative in the sense that the employer, through its unfair labor practices, has attacked the representative.¹⁹⁸ Absent such an employer attack, employee conduct inconsistent with an exclusive representative's decision has been held protected where the conduct was of an associational or communicational variety,¹⁹⁹ but has been held unprotected where in derogation of an exclusive representative's decision regarding bargaining or regarding the use of economic coercion.²⁰⁰ One explanation of this phenomenon is that Section 7 contemplates a "sliding scale" of protection dependent upon means and ends, and upon the relative disruption of means and relative importance of ends.²⁰¹ The difficulty with the sliding scale explanation is the wide latitude it permits in administrative and judicial assessments of Section 7 protection. A second explanation is that distinct rights, exercisable by distinct actors with distinct roles, are implicated in distinct contexts: individuals have

197. See *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477 (1960). The employee conduct in *Insurance Agents* was assumed to be unprotected; the Court merely precluded the Board from finding that the union had, by reason of that conduct, failed to bargain in good faith. The assumption was grounded, however, upon the traditional notion that a partial strike is unprotected activity—a notion itself based upon the difficulty of employer response rather than unreasonableness in the sense of the appropriateness of means to ends. See *First National Bank v. NLRB*, 413 F.2d 921, 923-24 (8th Cir. 1969); A. Cox, *The Right To Engage in Concerted Activities*, 26 IND. L.J. 319, 339 (1953).

198. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

199. *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

200. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975).

201. Haggard, *Picket Line Violence*, *supra* note 8, at 439 n.76, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 n.18 (1978).

Section 7 rights of association and communication; unions have Section 7 rights to the use or nonuse of economic coercion; and the right to economic coercion is exercisable by individuals only where the assumption underlying the normal allocation of that right to the union—the union's representative status—has been questioned by the employer's conduct.

As applied to the subject matter of the instant discussion, a conclusion that the right to honor is the union's right to the use or nonuse of economic coercion assumes that the act of honoring is an act of economic coercion. The superficial difficulties with that assumption are that the act is not directed at the honoring employee's employer (the effects of the act on that employer are "incidental"²⁰²) and that the act may be viewed as having something of a speech component (the employee engages in a "gesture of support"²⁰³ for stranger employees).

It is true that the honoring employee's employer is not the immediate target of the act of honoring. The immediate target is the target of the picket line itself. The honoring employee's employer is not in a position to respond to the demands either of the picketing employees or of the honoring employee because those demands may be met only by the picketed employer. And the honoring employee's employer cannot therefore be said to be "coerced" (except in the sense that it is in some degree coerced into refusing to deal with the picketed employer). But these considerations do not alter the essential character of the act of honoring; they characterize only the object of the act. The act of honoring is part and parcel of the picketing and, most often, of the primary strike which the picketing is designed to enforce. The picket line's fundamental purpose is to deny the picketed employer a work force and to deny that employer the goods and services of other employers.²⁰⁴ The act of honoring constitutes the latter denial and is therefore clearly an act of economic coercion. If the fact that the immediate target of the act is a stranger employer is relevant to the question of who engages in that act, it must be by reason of the scope of an exclusive representative's statutory function as an exclusive representative; not by reason of the nature of the act.

202. See Axelrod, *supra* note 8, at 634; Carvey & Florsheim, *supra* note 8, at 943; Getman, *supra* note 8, at 1226-27 n.133; Schatzki, *supra* note 8, at 395. But see Getman, *supra* note 8, at 1225.

203. Grain Elevator, Flour and Feed Mill Workers, Local 418 (Continental Grain Co.), 155 NLRB 402, 412 (1965), *enforced*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967).

204. See *infra* notes 289-99 and accompanying text.

The view that the act of honoring is a form of communication²⁰⁵ is erroneous for two reasons. First, it ignores the notion that the act is more than a "gesture of support"; it is an act of coercion as well. Second, the view invokes a jurisprudence of fundamental rights²⁰⁶ not properly invoked in the present context. At bottom, the question presented by the act of honoring is whether the honoring employee's employer may retaliate for the act of honoring. The government does not seek to retaliate; its role is only that of deciding whether a private employer may retaliate. The right to honor, even if viewed for purposes of argument as including a communication component, may be

205. By characterizing the notion that the right to honor is "fundamental" as a view that there is a speech component to economically coercive concerted activity, I do not mean that the view has been explicitly stated by either the Board or any particular critic of the Board. My claim, rather, is that such a notion draws specifically upon the First Amendment as either the source or analog of the statutory right to engage in such activity. See Lynd, *Legislative History*, *supra* note 118, at 734. But see Lynd, *Employee Speech in the Private and Public Workplace: Two Doctrines or One?*, 1 IND. REL. L.J. 711, 713 (1977) (making such an analog claim but limiting the claim to pure speech).

The act of honoring should be distinguished from the act of picketing. The latter more clearly involves a communication component and is more clearly the object of government regulation. See St. Antoine, *What Makes Secondary Boycotts Secondary?* SOUTHWESTERN LEGAL FOUNDATION 11TH ANN. INST. ON LABOR LAW 5, 8-15 (1965). But see NLRB v. Local 100, Retail Store Employees Union, 444 U.S. 1011 (1980) (In effect, picketing may be regulated because it constitutes a signal inducing action.).

206. See Lynd, *Legislative History*, *supra* note 118, at 726-34. Cf. Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 336-46 (1981) (reviewing aspects of the legislative history indicating that Congress had in mind the model of political liberty when it sought, as an objective of the Labor Act, industrial democracy). Professors Gorman and Finkin argue that the Act's protection of group action does not necessarily imply that individual action was not contemplated as protected as well. *Id.* at 329. They then suggest that the Act's policy of fostering industrial democracy provides a basis for concluding that protection of individual action was intended by Congress. *Id.* at 344-45. My difficulty with this analysis is that, although it is clear that industrial democracy was an objective of the legislation, and although freedom of individuals was thought an aspect of industrial democracy, the statutory means by which these objectives are to be accomplished is essentially collective. Compare *id.* at 342-43 (describing position of proponents of company unionism as one which sought the right of individuals to grieve) with note 186 *supra* (discussing Senator Wagner's distaste for the company union). Indeed, Professors Gorman and Finkin appear to recognize that a collective means was the congressionally chosen device to achieve industrial democracy by conceding that exclusivity limits the individual right they propose, *id.* at 356, and by emphasizing the right to communicate grievances to the employer (as distinguished from the right to bring economic pressure to bear on an employer). *Id.* at 343, 356. But see *id.* at 355 (discharge should not be an available employer remedy for individual employee disruption of work).

treated as “fundamental”—in a sense distinct from other statutory rights to the use of coercion—only if so conceived by the statutory scheme, and it is the statutory conception which is in issue.

(b) Waiver by the No Strike Clause

The argument that the right to honor a stranger picket line should not be waivable by the honoring employee's employer is derived from the language of Section 9(a) itself:

Representatives designated or selected for the purposes of collective bargaining by a majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit *for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.* . . .²⁰⁷

The emphasized language suggests that the exclusive representative's exclusive control is limited to the relationship between employees in the unit it represents and the employer of those employees.²⁰⁸ Because a stranger dispute does not, by definition, involve that relationship and because such a dispute is not resolvable by the action of the honoring employee's employer, the exclusive representative of the honoring employee lacks authority over that employee's conduct in his encounter with a stranger picket line.²⁰⁹ The right to honor a stranger picket line is, by this line of argument, individual rather than collective.

Although the argument from the language of Section 9(a) appears reinforced by the Board's treatment of scope of waiver issues in picket line cases²¹⁰ that treatment may also be viewed as reinforcing the collective right characterization. The issue of the breadth of a no strike clause in the picket line context may arise in cases presenting two distinct and more general issues: (1) cases in which the employer who discharges an honoring employee is charged with a violation of Sec-

207. 29 U.S.C. § 159(a) (1976) (emphasis supplied).

208. See Harper, *supra* note 8, at 373.

209. *Id.* at 374.

210. To the extent that the Board declines to give effect to contemporaneous union waiver or contemporaneous union concessions that a no strike clause constituted a waiver of the right to honor, it appears clearly to be emphasizing the individual character of the right to honor and to be deemphasizing the role of the union to the vanishing point. See *Union Boiler Co.*, 245 NLRB 719 (1979). But see *Iowa Beef Processors, Inc. v. Meat Cutters & Butcherworkmen*, 597 F.2d 1138 (8th Cir. 1979); *American Cynamid Co.*, 246 NLRB 87, 90 (1979).

tion 8(a)(1), and defends on a waiver theory²¹¹, and (2) cases in which a union is charged with violating Section 8(b)(1)(A)²¹² for disciplining an employee for crossing a picket line where the union defends on the ground that it has not waived the right to honor.²¹³ Until the Board's decision in *International Union of Operating Engineers Local 18*²¹⁴ standards for finding waiver in these cases differed—waiver being the more likely finding in cases falling within the latter category rather than cases falling within the former.²¹⁵ In *Local 18*, the Board applied its strict construction standard, previously confined to the employer as respondent case, in a case in which the union was charged under Section 8(b)(1)(A) for disciplining employees for crossing a stranger picket line. The union escaped the charge on the following grounds:

a waiver of the right to strike for the purpose of coercing an employer into granting demands with respect to wages, hours and other terms and conditions of employment is not equivalent to a requirement [Sic] that employees cross stranger picket lines. We will not infer a waiver of the protected right to engage in sympathy strikes solely from an agreement to refrain from all "stoppages of work."²¹⁶

The first matter to be noticed about this reasoning is that the "right" to engage in a sympathy strike was a right exercised in *Local 18* by the union. It is true that the union exercised that right on the formal basis of its authority as a private association over its members,²¹⁷ but the sole choice left to individual employees was whether to be a formal member of the union.²¹⁸ The member's decision to honor or not honor a stranger picket line is made, under the Board's opinion, by the union.²¹⁹ A conclusion that the union may per-

211. See, e.g., *American Cynamid Co.*, 246 NLRB 87 (1979); *Daniel Constr. Co.*, 239 NLRB 1335 (1979).

212. 29 U.S.C. § 158(b)(1)(A) (1976).

213. See, e.g., *Int'l Union of Operating Engineers Local 18*, 238 NLRB 652 (1978); *Local 12419, United Mine Workers (National Grinding Wheel Co.)* 176 NLRB 628 (1969).

214. 238 NLRB 652 (1978).

215. See *id.* at 653-54.

216. *Id.* at 652-53.

217. See *supra* notes 169-76 and accompanying text.

218. See *Booster Lodge 405, IAM v. NLRB*, 412 U.S. 84 (1973); *NLRB v. Granite State Joint Board, Textile Workers Local 1029*, 409 U.S. 213 (1972).

219. The patent fiction that court enforced union fines are non-coercive, *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967), has been abandoned by the Court in favor of a policy analysis of Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976), which emphasizes the role of the union in collective bargaining. See *NLRB v. Boeing Co.*, 412 U.S. 67 (1973).

missibly coerce employee members with respect to the exercise of the right to honor a picket line denies employee choice in the matter and is therefore inconsistent with a characterization of the right as individual.²²⁰

The second matter to be noticed is that the Board's reasoning treats the no strike clause in its application to the direct relationship between an employer and that employer's employees differently than in its application to a stranger dispute. That distinction is grounded, in the Board's opinion in *Local 18*, on the proposition that waiver of the right to honor cannot be a part of the *quid pro quo* for an arbitration clause because stranger disputes are nonarbitrable under such a clause.²²¹ That ground for decision expressly recognizes the notions that the stranger dispute is outside the relationship between the employer and that employer's honoring employees and that the stranger dispute is not subject to the control of either that employer or the union in its capacity as the representative of that employer's employees.²²² Yet recognition of those notions was not used in *Local 18* as the basis for limiting the exclusive bargaining representative's authority; it was used, rather, as the basis for confirming the representative's authority to direct, absent explicit waiver, the actions of the employees it represented with respect to the stranger dispute.

The explanation of the Board's treatment of scope of waiver in *Local 18* may be found by examining the employer. The honoring employee's employer has no control over either the merits or the occurrence of the stranger dispute and has therefore no control over the mutual gain to be had by honoring a stranger picket line. That is, the employer cannot grant its employees either the reciprocal power

220. It should be noted that the individual right which does remain under the Supreme Court's interpretations of Section 8(b)(1)(A)—the full membership decision—is a "right" which, if exercised by non-membership, substantially limits the employee's participation in the exclusive representative's policy formulation.

The distinction between the individual character of the right to make membership decisions—and the right to seek individually a change in exclusive representatives—and the right to engage in concerted activity is suggested by Board treatment of a union's choice of fines, rather than expulsion, as penalties for dissidents. Compare *Molders Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208 (1969), *enforced*, 442 F.2d 92 (7th Cir. 1971) with *Tawas Tube Products, Inc.*, 151 NLRB 46 (1965).

221. 238 NLRB at 654. The Board relied, of course, upon the Supreme Court's distinction between arbitrable and nonarbitrable disputes for purposes of federal court injunctions, under the Norris La Guardia Act, against strikes in breach of no strike clauses. Compare *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976) with *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970).

222. Compare 238 NLRB at 654 with Harper, *supra* note 8, at 375.

or the shared benefit the union seeks when the union requires employees, by threat of discipline, to honor the stranger picket line. The employer cannot grant shared benefits because its shared control over the indirect effect of the settlement of the stranger dispute is the subject matter of its future negotiations with the union representing its employees, and the employer has no power over the terms of that settlement. The employer by definition cannot grant reciprocity—control of the stranger employees' future behavior vis-à-vis the employer is in the hands of their union. On these premises, the reason for requiring a more explicit waiver of the right to honor a stranger picket line is not the lack of union authority over the conduct of the employees it represents in a stranger dispute; it is the lack of employer control over the benefit to be gained from participation in a stranger dispute. The union waives its right to strike in exchange for arbitration of disputes with respect to which the employer is a party²²³—and probably in exchange for other substantive concessions by the employer as well.²²⁴ But the right to participate in a dispute with respect to which the employer is not a party is a right to seek indirect benefit and reciprocal obligation—gains of a distinct character potentially requiring distinct employer concessions in exchange for union forbearance from pursuing those gains. This explanation implies Board allocation of bargaining chips, but the allocation is founded upon contractual interpretation: a general no strike clause is restrictively interpreted because it is viewed as contemplating a *quid pro quo* not inclusive of the stranger picket line situation.

An equivalent analysis supports the Board's restrictive view of no strike clauses where the employer is charged with a Section 8(a)(1) violation for disciplining an honoring employee. Although that view may be explained as premised upon a Board assumption that the right to honor is individual and not within the normal authority of the exclusive representative to control, it is equally explicable by reference to the distinct character of the union gains to be had by striking and, therefore, by making a no-strike concession and the union gains to be had by honoring a picket line established over a stranger dispute.²²⁵

223. See *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 248 (1970).

224. See *Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters & Butcherworkmen*, 597 F.2d 1138 (8th Cir. 1979).

225. I am not contending that any given employer concession is traceable to a given union concession. The point, rather, is that the no strike clause most clearly contemplates the primary strike and, as a matter of contractual interpretation, may be said not to contemplate a distinct subject matter absent evidence indicating that all work stoppages were contemplated by the parties. See *American Cynamid Co.*, 246 NLRB 87 (1979).

The latter explanation is the better explanation not only for reasons of symmetry with Section 8(b)(1)(A) doctrine, but because the argument that the right to honor is individual and is not within the exclusivity principle is inconsistent with both the shared benefit and reciprocal commitment rationales for mutuality.²²⁶ If the exclusive representative and the group it represents are, as a matter of statutory interpretation, treated as indifferent to the honoring employee's conduct, it is at least odd that the employee's protection is grounded upon the notions that his group will share in the benefits of stranger employee success or will gain power for its own future

226. Professor Harper argues that his position is consistent with both rationales. With respect to the shared benefit theory, his argument is that a bargaining agent has exclusive control only "over employee attempts to extract better terms of employment from their employer". Harper, *supra* note 8, at 374 n.165, and that "indirect benefits do not justify union control" of sympathy strike activity any more than they justify bargaining over permissive terms involving management's rights to direct the enterprise. *Id.* The first argument assumes its conclusion: The bargaining agent's scope of control is narrow only if it can be argued that it should be narrow. The argument in the text here is that it should *not* be narrow because the shared benefit question—the possibility of shared benefit is a question—is appropriately answered by the exclusive representative. The second argument conceives of preexisting employee rights to engage in concerted activity as "like" preexisting employer rights to direct the enterprise—both are only partially limited by the presence of an exclusive representative. But the likeness of these "rights" also requires justification. Specifically, likeness requires a conclusion, by the terms of the rationale for distinguishing mandatory and permissive subjects of bargaining, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), that the harm done employee rights by imposing union control outweighs the benefit to be gained by union control. That balance, I suggest, favors union control precisely because the question, under the shared benefit theory, is benefit to the group represented by the union. One might, of course, conclude that the harm done the "employee right" is nevertheless too great, but this requires an understanding of the employee right which views that right as having an importance and character (e.g. associational or communicational) distinct from the mere question of economic benefit. One could not otherwise justify union control of "direct" economic issues vis-à-vis the employer.

With respect to the reciprocity rationale, Professor Harper argues that the rationale directly supports the conclusion that the honoring employee's union should have no control over the act of honoring a stranger picket line. Harper *supra* note 8, at 372-73. The argument is that the right to engage in a sympathy strike in expectation of future aid is not controlled by the honoror's union because that union does not control the objectives of the sympathy strike—i.e., the objectives of the stranger pickets. *Id.* at 374. It is true that the honoring employee's union does not control the objectives of the sympathy strike, but the question, within the terms of the reciprocity rationale, is whether the honoring employee's union should control the assessment of prospects for future reciprocal assistance. As it is the honoring employee's union which will control the objectives of future strikes on behalf (directly) of the honoring employee and the occasions for use or non-use of the strike weapon, I give an affirmative answer to that question.

purposes through the employee's action. Even if the employee's mutual purpose is viewed as his wholly individual judgment that he will eventually gain from the aid he provides the stranger employees, neither the exclusive representative nor the group it represents can be indifferent in fact to that purpose, for the honoring employee's judgment, by the terms of the mutuality rationale, affects that group.

There remains, however, the language of Section 9(a) itself—language which grants a union exclusivity for the purpose of collective bargaining, not “mutual aid or protection.”²²⁷ Reconciliation of that language with the foregoing analysis may be found in legislative intent. Section 1 of The Labor Act—the congressional statement of Labor Act policy—duplicates in part the language of Section 7, but differs from the language of Section 7 in the crucial respects that Section 1 elevates the practice of collective bargaining to the primary objective of the Act and that it makes “mutual aid or protection” a purpose to be achieved by institutional means:

It is hereby declared to be the policy of the United States to eliminate the causes of certain obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.²²⁸

The three “freedoms” granted are in the nature of individual rights of choice²²⁹, but the stated congressional purpose was to protect individual choice exercised in favor of institutional arrangements—association, organization and representation. And the purposes for which those institutional arrangements are to be chosen include mutual aid or protection. By contrast, Section 7 protects rights of individual choice in clauses independent of its clause protecting concerted activity,²³⁰ and protects concerted activity undertaken for either of two independent purposes—collective bargaining or mutual aid or protection:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collec-

227. See *supra* notes 207-08 and accompanying text.

228. 29 U.S.C. § 151 (1976).

229. See Brousseau, *supra* note 4, at 26-27.

230. *Id.* at 27.

tively 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. . . .²³¹

It is the case that the language of Section 7 cannot be ignored in favor of the language of Section 1, but Section 1 may (and should) be viewed as informing judgment about the meaning of Section 7. The information Section 1 provides is that "mutual aid or protection", as an employee objective, was conceived as an objective to be achieved by associational, organizational and representative means. The question is whether this conception finds support in the Act read as a whole.

The principal statutory argument for the conclusion that the honoring of a stranger picket line is protected activity is based on the definitional sections of the Labor Act.²³² The term "employee" is defined by the Act to "include any employee, and [is further defined so that the term] shall not be limited to the employees of a particular employee. . . ."²³³ Hence, any employee, even an employee of an employer not involved in a dispute over which a picket line has been established, has a "right . . . to assist" the labor organization involved in that dispute²³⁴ and to engage in the concerted activity of honoring the picket line for a "mutual" purpose. Moreover, the term "labor dispute" is defined by the Act to "include any controversy concerning terms, tenure or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee."²³⁵ The definition of "labor dispute" is chiefly important for purposes of the definition of "employee": an employee of employer A who quits work over a labor dispute involving employer B remains, for statutory purposes, an employee of A.²³⁶

On their face, these definitions appear to confirm an individual conception of the right to honor a stranger picket line:²³⁷ the absence of an employment relationship requirement appears to confirm the

231. 29 U.S.C. § 157 (1976).

232. See Getman *supra* note 8, at 1227.

233. 29 U.S.C. § 152(3) (1976).

234. See Cyril de Cordova & Bros., 91 NLRB 1121, 1135 (1950).

235. 29 U.S.C. § 152(9).

236. 29 U.S.C. § 152(3).

237. Brousseau, *supra* note 4, at 26, 40. But cf. P. Cox, *supra* note 5, at 258 (arguing that the right to assist includes the right to participate in concerted activity). Although I view the right to participate as individual, it is a right limited to freedom from employer retaliation for an individual assertion of the claim to participation. The occurrence or nonoccurrence of concerted activity are alternatives for the union to choose between. See *supra* notes 84-89 and accompanying text.

argument that the honoring employee's representative is legally disinterested. But the legislative purposes underlying the definitions suggest a conclusion consistent with the policy bias favoring institutional arrangements in Section 1 of the Act. The first such purpose was the incorporation into the Labor Act of definitions found in the Norris LaGuardia Act.²³⁸ The latter definitions were designed to overturn the judicial doctrine²³⁹ that secondary activity was not immunized from antitrust exposure by Section 20 of the Clayton Act.²⁴⁰ The second purpose of the NLRA definitions was to permit free employee choice of the "outside union" as a representative—i.e., to permit employees to select non-employees as a representative.²⁴¹ The third purpose, related to the first, was to make it clear that a legitimate objective of organization across employers was that of equalizing bargaining power and eliminating wage competition.²⁴² What Congress contemplated in having these three purposes in mind was institutional activity—including, at the time of the Wagner Act, secondary activity. The contemplated activity was institutional both because it had historically been institutional (unions had sought by secondary activity and by organization across employers to better achieve their objectives)²⁴³ and because the objectives sought by the unions through that historical activity were institutional objectives: organization across employers, increased bargaining power for the unions as representatives, and elimination of wage competition between individual employees.

The congressional scheme disclosed by the foregoing summary was a scheme founded upon a collective conception of the activity to be protected by the Labor Act.²⁴⁴ It is true that the chief evils Con-

238. Compare 29 U.S.C. §§ 152(3), 152(9) with 29 U.S.C. § 113 (1976).

239. See *United States v. Brims*, 272 U.S. 549 (1926); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

240. *United States v. Hutcheson*, 312 U.S. 219 (1941).

241. *H.R. Rep. No. 972*, 74th Cong., 1st Sess. 8 (1935); *Hearings on S1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 603 (1935) (Statement of Robert C. Graham) (criticizing the Wagner bill on this ground); *Id.* at 440-41 (colloquy between Senator Wagner and Robert T. Caldwell); *Id.* at 498 (statement of Harvey Ellrod) (in opposition); 79 CONG. REC. 9701 (1935) (Congressman Blanton in opposition).

242. *H.R. Rep. No. 972*, 74th Cong., 1st Sess. 6 (1935).

243. See cases cited *supra* note 206. See also *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925).

244. Senator Wagner's criticism of Section 7a of the National Recovery Act, albeit criticism founded on a fear of company unions, displayed a strong pro exclusivity bias as a necessary premise to his conception of the theory and practice of collective bargaining. See 78 CONG. REC. 4229 (1934) (quoted *supra* note 186).

It should be noted that Section 4 of Sen. 2926, 73rd Cong., 2d Sess., 78 CONG. REC. 3444 (1934), a bill Senator Wagner introduced in the 73rd Congress and the

gress sought to mitigate by that conception were the twin evils of judicial and employer resistance to a collective conception and that the problem of the operation of the conception in a context in which an individual employee seeks participation in a stranger dispute was not—except to the extent that Congress recognized as legitimate secondary activity and organization across employers—explicitly considered.²⁴⁵ But the scheme does inform the meaning of “mutual aid or protection” at least to the extent that the phrase was more likely intended as a description of purposes consistent with the scheme than as a description of individual rights independent of the scheme.²⁴⁶

predecessor of Section 7 of Sen. 1958, 74th Cong., 1st Sess., 79 CONG. REC. 2368 (1935), the bill which became the Wagner Act, differed from the latter in its explicit recognition that “concerted activity” may be engaged in outside a labor organization:

Employees shall have the right to organize and join labor organizations, and to engage in concerted activities, *either in labor organizations or otherwise*, for the purpose of organizing and bargaining collectively through representatives of their own choosing or for other purposes of mutual aid or protection.

Sen. 2926, 73rd Cong., 2d Sess., 78 CONG. REC. 3444 (1934). The Senate Committee on Education and Labor, Sen. Rep. No. 1184, 73rd Cong., 2d Sess. (1934), redrafted Section 4 of Sen. 2926 as originally offered as Section 3(1) of the reported bill. Section 3(1) provided that “It shall be an unfair labor practice . . . for an employer to attempt, by interference or coercion, to impair the exercise by employees of the right to form or join labor organizations, to designate representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.” *Id.* at 27. A 74th Congress Senate Committee print declares that Section 7 of Sen. 1958 (Section 7 of the Wagner Act) “is drawn from Section 3(1) of last year’s bill, although the form has been somewhat changed.” *Memorandum Comparing S.1958, Seventy-Fourth Congress, First Session, A Bill Introduced By Senator Wagner on February 21, 1935, To Create A National Labor Relations Board, And For Other Purposes, With The Bill Reported By Senator Walsh on May 26, 1934, As A Substitute For S.2926, Seventy-Third Congress, Also Introduced By Senator Wagner 2* (Committee print 1935), reprinted in 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1322 (1949). What is noteworthy in this bit of legislative history is that the Committee redrafted the original Wagner Bill (S. 2926) so as to omit a specific recognition of a right to engage in concerted activity independently of a union, and that the portion of the second Wagner bill (Sen. 1958) which became Section 7 adopted that omission.

245. See Carney & Florsheim, *supra* note 8, at 944-45.

246. The argument that the scheme is not, however, implicated in the stranger picket line problem is that the scheme is dependent upon the bargaining unit: The exclusive bargaining agent’s authority is limited to the bargaining unit for which the union is the exclusive representative, and, because the union does not possess that authority with respect to a stranger bargaining unit, it cannot waive protection for an employee who acts in concert with stranger pickets. Harper, *supra* note 8, at 373. The difficulty with the argument is that it jeopardizes protection, not waiver. To the extent that the protected status of a refusal to cross a stranger picket line has been judicially questioned, it has been questioned on the ground that the picket

(2) Derivative Non-Protection: The Problem of the Unlawful Picket Line

The oft-repeated (by way of dictum)²⁴⁷ and occasionally enforced²⁴⁸ general rule is that an honoring employee is not protected under Section 7 where he honors a picket line which is itself "unlawful" because established in violation of the prohibitions of the Labor Act²⁴⁹ or in

line bears no relation to the interests of the honoring employee and his fellow employees. The common counterargument is a counterargument from the mutuality theories previously discussed here. But that counterargument is a counterargument consistent with a collective view of the scheme. It is true that there are limitations upon a union's authority to seek "mutual aid and benefit" by organizing and bargaining across both bargaining units and employers. *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (antitrust exposure where union agrees with an employer to impose identical terms on other employers); *Utility Workers Union (Ohio Power Co.)*, 203 NLRB 230 (1973), *enforced*, 490 F.2d 1383 (6th Cir. 1974) (alteration of bargaining unit is a permissive term). But a union effort to impose uniform wage rates, to engage in pattern bargaining, and to generally seek to eliminate competition in the labor market are accepted and permissible union objectives. *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657, 665 n.2 (1965); *U.S. Pipe & Foundry Co. v. NLRB*, 298 F.2d 873 (5th Cir.), *cert. denied*, 370 U.S. 919 (1962); *Houston Bldg. and Constr. Trades Council (Claude Everett Constr. Co.)*, 136 NLRB 321 (1962). It is the case that a union's interest (and the interests of employees in a particular bargaining unit represented by that union) are more clearly implicated where a stranger dispute involves a common employer or occurs in a common product market than where the dispute appears wholly unrelated to an honoring employee's bargaining unit, but that observation is a matter of degree. If the shared benefit and reciprocal power justifications for protection of the refusal to cross a picket line have validity, they are explanations of a given collectivity's (bargaining unit's) economic and political interests in a stranger dispute. *See Fort Wayne Corrugated Paper Co. v. NLRB*, 111 F.2d 869, 974 (7th Cir. 1940).

247. *See, e.g., NLRB v. Gould, Inc.*, 638 F.2d 159, 163 n.2 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981); *NLRB v. Louisville Chair Co.*, 385 F.2d 922, 928-29 (6th Cir. 1967). There is a distinction between the notions that an employee's conduct is unprotected under Section 7 and the notion that the Board will not (or lacks the power to) remedy a discharge where an employee has engaged in misconduct. *See* 29 U.S.C. § 160(c) (1976); A. Cox, *supra* note 121, at 324 n.24. *See also* *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942) (employee misconduct unlawful under external law); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (same). The courts and Board speak in the present context, however, both in terms of nonprotection and in terms of lack of remedial power. *See, e.g., Local Union 707, Hwy. and Local Motor Freight Drivers (Claremont Polytechnical Corp.)*, 169 NLRB 613 (1972) (no remedial power as to pickets); *Chevron USA, Inc.*, 244 NLRB 1081, 1084 (1979) (honoring employees unprotected); *National Packing Co. v. NLRB*, 377 F.2d 800 (10th Cir. 1967) (no remedy for pickets).

248. *See, e.g., Chevron USA, Inc.*, 244 NLRB 1081 (1979); *American Tel. & Tel. Co.*, 231 NLRB 556 (1977); *Pacific Tel. & Tel. Co.*, 107 NLRB 1547 (1954). *See also* *United Furniture Workers of America v. NLRB*, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 397 U.S. 838 (1964) (§ 8(d) violation). *Cf., e.g., NLRB v. Local 30, Int'l Longshoremen*, 549 F.2d 698 (9th Cir. 1977) (§ 8(b)(1)(A) violated by union discipline for crossing a picket line established in violation of § 8(b)(7)).

249. *Chevron USA, Inc.*, 244 NLRB 1081 (1979). *But cf. Local Union No. 707,*

violation of a no strike clause waiving the protected activity rights of the pickets.²⁵⁰ And the unprotected status of the refusal to cross under such circumstances is unaffected by the honoring employee's ignorance of the illicit character of the picket line.²⁵¹

The rationale for the general rule is said to be that the honoring employee "stands in the shoes" of the picketing employees—non-protection is vicarious.²⁵² If the issue of non-protection for the honoring employee is to be resolved at least in part by resolution of the issue of non-protection for the pickets, may the honoring employee's protection be viewed as derived from the picket's protection? Under such a view, the honoring employee is protected instrumentally for purposes of furthering the collective right of stranger employees as a group, not fellow employees as a group.

There is more than a conceptual (stands in the shoes) rationale for such a view. The function of a lawful (particularly non-secondary) picket line established for economic purposes is to ensure that the normal and anticipated effects of a strike on a primary employer occur in fact.²⁵³ To the extent that the picket line is an appeal to the employees of the struck employer and to potential replacements for those employees, it constitutes an effort to achieve the objective of the strike: loss of the workforce.²⁵⁴ To the extent that the picket line is an appeal to secondary employees doing related work²⁵⁵, it constitutes an effort to achieve that same end.²⁵⁶ For example, an honor-

Local Motor Freight Drivers (Claremont Polychemical Corp.), 196 NLRB 613 (1972) (Where there is a protected right to strike but picketing is prohibited by Section 8(b)(7), only employees who picket are unprotected.).

250. See American Tel. & Tel. Co., 231 NLRB 556 (1977).

251. See cases cited *supra* note 248.

252. American Tel. & Tel. Co., 231 NLRB 556, 562 (1977).

253. See *United Steelworkers of America v. NLRB*, 376 U.S. 492, 499 (1964); *Local 761, Int'l Union of Electrical Workers v. NLRB*, 366 U.S. 667, 680-81 (1961); Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1394-98 (1962). A picket line established for organizational purposes or for area standards purposes has an ultimate objective somewhat distinct from the objective of a picket line established in an economic strike, but its immediate objective (inducing loss of workforce) is likely to be the same. See *Houston Bldg. & Const. Trades Council (Claude Everett Constr. Co.)*, 136 N.L.R.B. 321 (1962). However, some forms of picketing for organizational purposes are subject to express prohibitions of appeals to secondary employees. See 29 USC § 158(b)(7)(C) (1976) (publicity proviso).

254. Cf. Lesnick, *supra* note 253, at 1412 (providing this explanation of the primary/secondary distinction in the context of the application of Section 8(b)(4), 29 U.S.C. § 158(b)(4) (1976), to appeals to secondary employees).

255. See *Local 651, Intern. Union of Electrical Workers v. NLRB*, 366 U.S. 667 (1961).

256. See Lesnick, *supra* note 253, at 1417-19.

ing (secondary) employee assigned the task of delivering materials to a struck (primary) employer would not be assigned that task if the strike against the primary had successfully deprived the primary of its workforce. The refusal to cross is, then, an effect that would constitute the normal and anticipated effect of a successful primary strike.²⁵⁷

If such is the lawful function of a picket line, the protection from employer retaliation afforded the honoring employee may be viewed as necessary because essential to the effectiveness of the picket line as a weapon in policing a primary strike—protection is afforded the honoring employee not because the honoring employee seeks “mutual benefit” either for himself or for the collective with which he is associated, but because such protection is part and parcel of the stranger employee’s strike weapon.²⁵⁸

There are two difficulties with the argument. First, stranger employees do not control the decision to honor. The most convincing rationale for protecting the act of honoring might well be the act’s utility in preserving the primary strike weapon, but the right exercised by picketing stranger employees is only a right to make an appeal. The right to respond to that appeal is either a right possessed by the honoring employee or a right possessed by that employee’s union. If exercised in favor of honoring the picket line, the honoring

257. Although the rationale for protected picketing suggested in the text was formulated in the caselaw and commentary for purposes of analysis of secondary boycott prohibitions, it finds support in some cases which deal specifically with the question of Section 7 protection for the act of honoring. See *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971); *West Coast Casket Co.*, 97 NLRB 820, 823 (1951), *enforced*, 205 F.2d 902 (9th Cir. 1953). See also Schatzki, *supra* note 8, at 394. Moreover, the rationale may be viewed as a rationale in other statutory contexts. To the extent that a strike is protected but picketing to enforce the strike is prohibited—the problem in the Section 8(b)(7) context—it is precisely the effect of organizational picket lines on secondary employees which the statute seeks to preclude. The strike conduct of primary employees is not prohibited. See *National Packing Co. v. NLRB*, 377 F.2d 800 (10th Cir. 1967); *Local Union No. 707, Local Motor Freight Drivers (Claremont Polychemical Corp.)*, 196 NLRB 613 (1972). The prohibition is, then, a prohibition against the use of the union’s most effective means of policing the strike—a means thought by Congress to coerce individual employee choice and to subject employers to repeated pressures even after employee choice had been exercised against union representation. See *NLRB v. Retail Clerks Union*, 526 F.2d 142 (9th Cir. 1975) (§ 8(b)(1)(A) violated by union’s discipline of members for crossing another union’s picket line established in violation of § 8(b)(7)).

258. This is the reason that the effect of the refusal to cross on the honoring employee’s employer may properly be viewed as merely incidental. See authorities cited *supra* note 156.

employee may be viewed as acting in concert with the pickets and therefore as participating in the stranger strike, and in this sense his Section 7 protection is difficult to separate from the strike. But the right to decide whether to respond is distinct from the right to strike if the right to decide is not exercisable by the stranger employees or their union.

The second difficulty with the argument is that derivative non-protection is not automatically a basis for concluding that protection is derivative as well. It is at best difficult to justify Section 7 protection for the act of honoring without considering its relationship to the strike weapon and the Act's protection of the strike, but an honoring employee's Section 7 protection cannot be grounded solely upon the utility of that protection for the stranger employees' strike; it must be grounded upon the language of Section 7—language requiring mutuality.

If it is nevertheless the case that Section 7 protection for the honoring employee is in part justified as a reinforcement of the efficacy of the strike weapon, is such a justification consistent with a collective characterization of the right to honor? It may be argued that, as the primary basis for protection is preservation of the strike, it is the individual honoring employee who acts in concert with the strikers, and the pickets' appeal should be viewed as directed to the individual's decision. Such an argument appears inconsistent with the power of the honoring employee's union to waive that employee's protection, but appears consistent with the doctrine that the honoring employee's protection is a function of the protected status of the picket line. These appearances may be reconciled by seeking an answer to a basic riddle inadequately answered by the conceptualistic notion that an honoring employee stands in the Section 7 shoes of the picketing employee: why is non-protection derivative?

Derivative non-protection may be explained as the means by which the honoring employee's employer is permitted the remedy of self-help.²⁵⁹ As at least secondary boycott prohibitions are primarily designed to protect secondary employers, such an employer should be permitted to act on that protection.²⁶⁰ One response to this rationale

259. See *Chevron USA, Inc.*, 244 NLRB 1081, 1087-88 (1979) (Chairman Fanning dissenting) (explaining *Pacific Tel. & Tel. Co.*, 107 NLRB 1547 (1954) as a case involving an employer's defensive lockout).

260. See *Chevron USA, Inc.*, 244 NLRB 1081, 1086-87 (1979) ("To accept Chairman Fanning's view would leave neutral employers helpless in such circumstances to discipline those who respect such illegal lines, and would, to a large degree, vitiate the protection afforded then by the statute's secondary boycott provisions.").

is that the secondary employer has statutory remedies which make self-help unnecessary²⁶¹, but there is no reason that statutory remedies should be held exclusive, particularly where there is litigation delay in making them effective. A more persuasive response is that the rationale does not explain derivative non-protection where the picket line violates a statutory provision designed to protect the picketed employer²⁶² or violates a no-strike clause equally designed to protect the picketed employer. In such instances the self-help remedy of the secondary employer is of no use to the picketed employer suffering the effects of an unlawful picket line because the discretion to exercise the self-help remedy (*e.g.*, threatened or actual discharge as a means of forcing a delivery to the picketed employer) is in the honoring employee's employer. At most, self-help explains the rule of derivative non-protection only in the sense that it provides the honoring employee's employer a means of countering the effects of an unlawful picket line on that employer. Self-help is not, under such an explanation, a direct means of enforcing statutory policy or the policy underlying the law's recognition of the no-strike clause.

Derivative non-protection may alternatively be explained as a means of deterring the unlawful picket line. The difficulty with this explanation is that it is at least doubtful that the effect of unlawfulness upon potential honoring employees will be a material influence on the pickets where the effect of unlawfulness on their own protection proves an inadequate deterrent. If the objective of derivative non-protection is instead deterrence of individual honoring employees from the act of honoring unlawful picket lines, non-protection seems an ill-conceived deterrent. In the first place, the individual employee lacks the resources to make on-the-spot assessments of the complex issues inherent in the unlawful picket line characterization.²⁶³ In the second place, the irrelevance of the honoring employee's knowledge of the illicit character of the picket line suggests that it is not that employee's decision which derivative non-protection seeks to influence; deterrence assumes the capacity to avoid the conduct one wishes deterred and capacity at an individual level of employee conduct would seem to require knowledge.²⁶⁴

261. See 29 U.S.C. §§ 158(b)(4), 187 (1976). *Cf.* Local 707, Highway and Local Motor Freight Drivers (Claremont Polychemical Corp.), 196 NLRB 613, 619 (1972) (Member Fanning dissenting) (Remedies for Section 8(b)(7)(B) violation should not include discharge of individual employee participants as both preliminary injunction and unfair labor practice processes are available); Schatzki, *supra* note 8, at 399-400 (same).

262. See, *e.g.*, 29 U.S.C. § 158(b)(7) (1976); 29 U.S.C. § 158(d) (1976).

263. Schatzki, *supra* note 8, at 399-402.

264. As an empirical matter, the picket line cases are replete with instances

Finally, derivative non-protection may be explained not solely by reference to the conduct of the pickets, but by reference to the obligations of the honoring employee's fellow employees and their exclusive representative. That is, the right to honor, if a right exercised by the collective consisting of the honoring employee and his fellow employees, implies an obligation on the part of that collective to assess the legality of the picket line honored—an obligation enforced by means of allocation of the risk of derivative non-protection to the honoring employee.²⁶⁵ The honoring union is, in short, disabled from seeking either shared benefits or reciprocal power where a picket line is unlawful. It is disabled not merely for the conceptual reason that it should not be permitted to seek gain from the unlawful conduct of others, but because its obligation to assess risks of illegality provides some protection to both the picketed employer and to the secondary employer from the effects the law seeks to preclude by declaring particular picketing unlawful.²⁶⁶

This protection is imperfect for the reason earlier suggested: the discretion to exercise self-help as a means of moderating those effects is in the honoring employee's (the secondary) employer.²⁶⁷ But it is the threat of the exercise of that discretion which is of importance for purposes of the rationale. That threat provides a measure of deterrence, but it is a deterrence of a distinct character than deterrence of individual decision. It is distinct for two reasons. First, the obligation implicit in the deterrence is one imposed on a collective represented by an institution far more likely to have the resources for assessment than the individual honoring employee. Second, the

in which individual employees sought knowledge and instructions—both from unions and employers—when faced with picket lines. *See, e.g.*, *NLRB v. Gould, Inc.*, 638 F.2d 159, 161-62 (10th Cir. 1980) (union steward advice); *Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters & Butcherworkmen*, 597 F.2d 1138 (8th Cir. 1979) (union official); *NLRB v. William S. Carroll, Inc.* 578 F.2d 1, 2 (1st Cir. 1978) (employer's agent); *Local Union 684, Int'l Bhd. Elect. Workers (Walsh & Maddox)*, 246 NLRB 549 (1979); *Torrington Constr. Co.*, 235 NLRB 1540, 1546 n.14 (1978) (union official); *Overnite Transp. Co.*, 154 NLRB 1271, 1281 (1965); *enforced in part sub. nom.*, *Truck Drivers Local 728 v. NLRB*, 364 F.2d 682 (D.C. Cir. 1966) (employer); *Rockaway News Supply Co.*, 95 NLRB 336, 343 (1951), *enforcement denied*, 197 F.2d 111 (2d Cir. 1952), *aff'd on other grounds*, 345 U.S. 71 (1953) (union vice president).

265. *Cf. Drivers, Salesmen, Warehousemen Local Union 695 v. NLRB*, 361 F.2d 547, 551 (D.C. Cir. 1966) (employee required to make decisions regarding legality of picket line he proposes to honor will generally be advised by counsel); Schatzki, *supra* note 8, at 400 (employee normally honors at instance of his union, but union itself may err or have a conflict of interest).

266. This rationale is to be distinguished from the self-help rationale. The latter rationale is remedial; the present rationale is a deterrence rationale.

267. *See supra* text following note 262.

function of the non-protection rule under this interpretation is not allocation of a risk of discharge or other discipline to the honoring employee's collective. The risk of discipline is a fortuity visited on the honoring employee and dependent upon the discretion of the honoring employee's employer and upon practical restraints upon that discretion. The risk is the internal political consequences on the union of the occurrence of that fortuity: it is hoped that employees subject to the risk of discipline at the hands of their employer will seek the guidance of their union and will, when given no guidance or erroneous guidance, politically punish those responsible.

The obvious objection to this last rationale for the role of derivative non-protection is that the immediate and most obvious risk is one of discipline at the hands of the secondary employer. That risk is visited upon the individual employee. The first level of response to that objection is conceptual and assumes premises: the individual's remedy is internal and it is the collective which is the appropriate focus. The second response is that it is the law that the individual runs the risk of discipline and the common observation²⁶⁸ that the individual lacks the resources to assess that risk. On those two premises, it becomes necessary to discover a rationale that will reconcile them. The rationale proposed is that they are reconciled if their function is to force, by internal employee pressure, responsible decision by the honoring employee's union.²⁶⁹

268. See, e.g., Axelrod, *supra* note 8, at 639; Getman, *supra* note 8, at 1230; Schatzki, *supra* note 8, at 400.

269. It is only a partially viable objection that repeated Board and judicial emphasis upon the individual character of the right to honor denies any union obligation. That emphasis clearly demonstrates the absence of an authoritative declaration of the union's obligation to assess risks of non-protection, but it also exacerbates the apparent inconsistency between the rule of derivative non-protection and the practical matter of the individual employee's inability to assess that risk. It is also only a partially viable objection that the honoring employee's union may have a conflict of interest with the honoring employee. See Schatzki, *supra* note 8, at 400. That objection is an objection from an individualist premise; the premise of the rationale is that the employee's remedy is internal.

It is not a viable objection that unions do not or will not respond to the postulated obligation. A fundamental premise of the statutory scheme, whether or not naive, is that unions should respond to internal pressure. See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975). But cf. Sigal, *Freedom of Speech and Union Discipline: The "Right" of Defamation and Disloyalty*, N.Y.U. 17TH ANNUAL CONF. ON LABOR 367 (1964) (criticizing the interpretation given to the union democracy aspects of the Landrum Griffin Act by some courts as ignoring the union's need to present a disciplined force in dealing with employers). Nor is it an objection that some unions do not in fact control the individual employee's actions—i.e., that discretion is left, purposefully or by neglect, in the individual. The obligation imposed by the threat

III. TWO IMPLICATIONS OF A COLLECTIVE CHARACTERIZATION

A. Picket Lines, Secondary Boycotts And The Section 8(b)(4) Proviso

Section 8(b)(4)—the statutory prohibition of the secondary boycott—contains the following proviso:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act. . . .²⁷⁰

The Section 7 protection granted the honoring of picket lines appears facially incongruous with the prohibition of the secondary boycott: the honoring employee engages in a partial strike against his employer one purpose of which is rather clearly to cause that employer to cease doing business²⁷¹ with the picketed employer. The proviso precludes that conclusion, but has been interpreted in a fashion which does not conform to its language. A picket line may be found secondary and therefore prohibited even where established under conditions meeting the terms of the proviso.²⁷² And a picket line may be found primary and therefore not prohibited even where established over a matter or in a fashion not meeting the terms of the proviso.²⁷³ By parity of reasoning, the Section 8(b)(4) exposure of the honoring employee's union, when it involves a refusal on the part of the employee to, *e.g.*, deliver materials to a primary employer, is not dependent upon the language of the proviso.²⁷⁴ Indeed, analysis of both the picketing union's and honoring employee's union's exposure under

of non-protection is by means of political incentive. It is quite possible that the incentive will be ineffective. An appropriate response to ineffectiveness is a new device for imposing the obligation; ineffectiveness threatens the rationale only to the extent that degree of ineffectiveness makes the rationale improbable as explanation.

270. 29 U.S.C. § 158(b)(4) (1976).

271. *See id.* § 158(b)(4)(i)(B).

272. *See Drivers, Salesmen, Warehousemen Local No. 695 v. NLRB*, 361 F.2d 547, 549-51 (D.C. Cir. 1966).

273. *See Truck Drivers Union Local 728 v. NLRB*, 334 F.2d 539, 543 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964) *See also*, *International Hod Carriers, Local 41 (Calumet Contractors Ass'n)*; 133 NLRB 512 (1961).

274. *See, e.g.*, *Orange County District Council of Carpenters*, 242 NLRB 585 (1979); *Bricklayers and Stonemasons Local No. 2*, 166 NLRB 117 (1967).

Section 8(b)(4) for inducing the honoring of real or constructive²⁷⁵ picket lines has proceeded quite independently of the proviso. Exposure is a function of the primary or secondary character of union conduct; the proviso, in short, has been read out of the statute.²⁷⁶

This phenomenon has generally been attributed to the proviso's checkered legislative history.²⁷⁷ The Ball bill²⁷⁸ of 1947 became the basis for Section 8(b)(4) in the 1947 Taft-Hartley amendments to the Wagner Act. That bill had declared the secondary boycott "unlawful" and had subjected it to civil and criminal remedies in the courts, but had also contained a limitation similar to the Section 8(b)(4) proviso.²⁷⁹ Moreover, the Ball bill exposed individual employees to liability.²⁸⁰ As enacted, Section 8(b)(4) made the secondary boycott an unfair labor practice subject to both administrative and judicial remedies,²⁸¹ subjected only unions to the prohibition²⁸² and retained the proviso. What is odd

275. By constructive picket line I mean instances in which inducements other than an actual picket line produce the result a picket line would produce. *See, e.g.,* Bricklayers and Stonemasons Union v. NLRB, 562 F.2d 775 (D.C. Cir. 1977); Grain Elevators Flour and Feed Mill Workers Local 418 v. NLRB, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967).

276. *See* Drivers, Salesmen, Warehousemen Local No. 695 v. NLRB, 361 F.2d 547, 550-51 (D.C. Cir. 1966); Lesnick, *supra* note 253, at 1406-07.

277. Lesnick, *supra* note 253, at 1403-07. *See* Tower, *The Puzzling Proviso*, 1 LAB. L.J. 1019 (1950).

278. S.55, 80th Cong., 1st Sess. (1947).

279. *Id.* § 204(a). The "proviso" read as follows:

Nothing contained in clause (1) of this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

Senator Ball's explanation of the proviso suggests his focus upon preserving from the unlawfulness characterization the conduct of the employees honoring the picket line rather than the picket line itself:

The sentence at the bottom of page 27 exempts from clause (1) the refusal of employees to cross a legitimate strike picket line. We felt that was a legitimate manifestation of the sympathy of one group of workers for another engaged in a dispute with their employer, but the exemption would apply only if the striking union represented a majority of the employees of the employer being picketed.

Hearings on S.55 and S.J. Res. 22 Before the Committee on Labor and Public Welfare of the Senate, 80th Cong., 1st Sess. 15 (1947) (statement of Senator Joseph Ball).

280. S. 55, 80th Cong., 1st Sess. § 204 (1947).

281. *See* 29 U.S.C. §§ 158(b)(4); 187 (1976).

282. *Id.*

in this legislative history is that the proviso retains the language of the Ball bill: "nothing contained in this subsection . . . shall be construed to make *unlawful* a refusal . . . to enter. . . ." ²⁸³ Section 8(b)(4) purports only to declare it an *unfair labor practice* for a union to (1) engage in or induce or encourage individuals to engage in a strike or refusal to handle goods for prohibited purposes, ²⁸⁴ or (2) to threaten, coerce or restrain persons engaged in commerce ²⁸⁵ for prohibited purposes. It does not purport to reach individual conduct, and does not itself declare any conduct "unlawful" in a civil or criminal sense. ²⁸⁶

It is possible to view the proviso as an anomaly properly relegated to oblivion, ²⁸⁷ but that relegation flies in the face of the canon of construction, grounded on the principle of limited judicial function in a democracy, that statutory language is to be given effect. ²⁸⁸ One means of giving the language effect is to suggest only that it recognizes the legitimacy of a picket line established in support of a primary dispute, ²⁸⁹ but that solution ignores both the focus of the proviso language upon the act of refusal (as distinguished from the picket line inducement to refuse) and the caveat that the underlying strike be ratified by an exclusive representative. The one bit of legislative history addressing the proviso directly is a portion of the Senate Report on Taft-Hartley which emphasizes both the focus and the caveat:

Attached to Section 8(b)(4) is a proviso clause, which makes it clear that it shall not be *unlawful* for any person to refuse to enter upon the premises of any employer (other than his own), if the employees of that employer are engaged in a strike authorized by a union entitled to exclusive recognition. In other words, refusing to cross a picket line or otherwise refusing to engage in strikebreaking activities would

283. 29 U.S.C. § 158(b)(4) (1976) (emphasis supplied) Note, however, that Section 303 of Taft-Hartley, which in 1947 repeated verbatim the proviso, properly used the term "unlawful" as that section created a private cause of action for damages against labor organization and the term "person" in Section 303 includes, as it does in the NLRB, a labor organization. See 29 U.S.C. §§ 142(3), 187 (1976).

284. 29 U.S.C. § 158(b)(4)(i) (1976).

285. 29 U.S.C. § 158(b)(4)(ii) (1976).

286. Axelrod, *supra* note 8, at 628-29; Lesnick, *supra* note 253, at 1404-05 n.206. Note, however, that the proviso refers to a refusal on the part of "any person" and that "person" is defined in the Act to include labor organization. 29 U.S.C. § 152(1) (1976).

287. Lesnick, *supra* note 253, at 1407.

288. *Id.*

289. *Id.*

not be deemed an *unfair labor practice* unless the strike is a "wildcat" strike by a minority union.²⁹⁰

The language of the Senate Report, like the proviso itself, is incongruous with both the language and policy of the Section 8(b)(4) proviso if the act of refusal is conceived as an individual act of refusal.²⁹¹ But there is no incongruity if the subject matter of the proviso is the act of honoring rather than the picket line and if the act of honoring is viewed as the act of the honoring employee's union.

There are two senses in which the act of honoring may be viewed as the act of the honoring employee's union: (1) The act of honoring may occur at the instance of the honoring employee's union in the sense that there is sufficient evidence of union complicity in the act to warrant application of the Section 8(b)(4) prohibition. (2) The act of honoring may occur under circumstances where there is not sufficient evidence of union complicity, but, by the terms of the present discussion, Section 7 protection is to be determined by reference to the union.

- (1) Secondary Union exposure under 8(b)(4) for the conduct of individual employees.

Although a finding that a labor organization or its agents²⁹² engaged in the conduct prohibited by Section 8(b)(4) is an essential element of the unfair labor practice,²⁹³ any form of union conduct which may be characterized as an inducement of individual employees is sufficient to warrant that finding.²⁹⁴ Thus, union conduct which purports

290. Sen. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947) (emphasis supplied), reprinted in 1 LEGISLATIVE HISTORY OF THE LMRA 429 (1948).

291. See Lesnick, *supra* note 253, at 1405-06 n.206 (rejecting a construction which would render the proviso an affirmation of the lawfulness or protected status of "individual refusals to enter picketed premises" on the ground that such an affirmation is "unnecessary, since individual acts, done by employees not acting as agents for a union, cannot violate § 8(b). . .").

292. The concept of agency in the Labor Act is much broader than the concept in the Norris La Guardia Act. Compare 29 U.S.C. § 152(13) (1976) with 29 U.S.C. § 106 (1976). The Labor Act definition is, however, similar to the Section 301 Taft Hartley definition, 29 U.S.C. § 185 (1976), and the latter definition has been held to require a finding of common law agency. *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979).

293. See 29 U.S.C. § 158(b)(4) (1976).

294. See, e.g., *Int'l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694 (1951); *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1378-79 (1st Cir. 1981), *aff'd*, ____ U.S. ____ (1982); *NLRB v. Local Union No. 3, Intern. Bhd. of Elec. Workers*, 477 F.2d 260 (2d Cir.), *cert. denied*, 414 U.S. 1065 (1973).

merely to advocate a work stoppage and to leave the decision whether to engage or not engage in such a stoppage to the individual may constitute an inducement which, if tied to a prohibited purpose, is a violation of the statute.²⁹⁵ But where a union purports to be wholly neutral and to leave the decision whether to engage in a work stoppage in support of a stranger dispute to individual employee decision, there is no violation.²⁹⁶

Labor organizations subject to the prohibitions of Section 8(b)(4) include both the union representing the employees of a primary employer where such a primary union seeks to induce employees of a secondary employer to engage in a work stoppage and the union representing employees of the secondary employer where such a secondary union induces a work stoppage in support of a stranger primary dispute. The most common example of the former, primary, union's exposure to the statute is the picket line established at primary premises in a dispute with a primary employer. The primary union's exposure under Section 8(b)(4) is dependent upon whether secondary employees induced to honor such a picket line are doing work for their secondary employer which is related to the normal operations of the primary.²⁹⁷ If related, the inducement is considered lawful because it is a normal incident of the primary strike.²⁹⁸ The policy conception underlying that rule is that the normal and anticipated effects of the loss of the primary's workforce in a successful strike are not the secondary effects the statute seeks to preclude.²⁹⁹

295. See, e.g., *Grain Elevator, Flour and Feed Mill Workers v. NLRB*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967); *Truck Drivers & Helpers Local Union No. 728 v. NLRB*, 332 F.2d 693 (5th Cir.), *cert. denied*, 379 U.S. 913 (1964). Cf. *Bricklayers & Stone Masons Union, Local No. 2 v. NLRB*, 562 F.2d 775 (D.C. Cir. 1977) (Section 8(e) violated by attempted application of picket line clause in secondary circumstances); *Truck Drivers Unions Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir.) (picket line clause violates 8(e) to extent it purports to protect employees in secondary circumstances; union argument that only individual rather than union induced refusals were protected by the clause rejected), *cert. denied*, 379 U.S. 916 (1964).

296. *Gould Inc., Switchgear Division*, 283 NLRB 618, 622 (1978) (interim report), *enforced*, 638 F.2d 159 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981); *Building & Const. Trades Council of Tampa*, 132 NLRB 1564 (1961). See *Newbery Energy Corp.*, 227 NLRB 436 (1976).

297. *United Steelworkers of America v. NLRB*, 376 U.S. 492 (1964); *Local 761, Int'l Union of Electrical Workers v. NLRB*, 366 U.S. 667 (1961).

298. See *Local 761, International Union of Electrical Workers v. NLRB*, 366 U.S. 667 (1961).

299. See *Lesnick*, *supra* note 253, at 1417-18. But see *Cantor, Separate Gates, Related Work and Secondary Boycotts*, 27 *RUTGERS L. REV.* 613, 633 (1974); *St. Antoine, What Makes Secondary Boycotts Secondary?* *SW. LEGAL FOUNDATION, 11TH ANN. INST. ON LABOR LAW* 5, 32-33 (1965).

The union representing employees of a secondary employer (the secondary union) might induce those employees by means of declarations of policy,³⁰⁰ threat of discipline,³⁰¹ or persuasion,³⁰² to honor a picket line established over a dispute with a stranger employer and might seek to induce equivalent action on the part of secondary employees where there is no picket line or where the secondary employees do not, as a factual matter, actually encounter a picket line.³⁰³ Where the picket line, if established, would constitute a secondary picket line under the related work doctrine—i.e., where the picket line as an appeal to secondary employees would be unlawful—the secondary union violates Section 8(b)(4) where it induces by declarations, threats of discipline or advocacy, a refusal to do work which would require a crossing of that picket line.³⁰⁴

As a matter of the logic of the policy underlying the related work doctrine, a union representing secondary employees which induced action on the part of those employees equivalent to the honoring of a stranger primary picket line would not violate the statute: The effect of such an inducement would, under the related work doctrine, constitute merely the permissible effects on a secondary employer of primary strike activity³⁰⁵ and the purpose of the inducement, given

300. See *Allied Int'l Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368 (1st Cir. 1981).

301. See, e.g., *Carpenters District Council of Southern Colorado*, 222 NLRB 613 (1976), *enforced*, 560 F.2d 1015 (10th Cir. 1977); *Bricklayers & Stonemasons Local No. 2*, 166 NLRB 117 (1967). *Cf.* *Local 30, International Longshoremen's & Warehousemen's Union*, 223 NLRB 1257 (1976) (8(b)(1)(A) violation for discipline), *enforced*, 549 F.2d 698 (9th Cir. 1977).

302. See *NLRB v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 477 F.2d 260 (2nd Cir. 1973).

303. See *Grain Elevator, Flour and Feed Mill Workers, Local 418*, 155 NLRB 462 (1965), *enforced*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967). *Cf.* *Bricklayers & Stonemasons Union v. NLRB*, 562 F.2d 775 (D.C. Cir. 1977) (§ 8(e) violation); *Oil, Chemical & Atomic Workers Int'l Union, Local 1-128*, 223 NLRB 757 (1976) (refusal to refer for employment would violate 8(b)(4), but ally doctrine applies).

304. See, e.g., *Orange County Council of Carpenters*, 242 NLRB 585 (1979); *Mississippi Gulf Coast Bldg. and Construction Trades Local Union 153, Int'l Bhd. Electrical Workers*, 221 NLRB 345 (1975); *Packinghouse Employees and Warehousemen's Union Local 616*, 203 NLRB 645 (1973); *Local 252, Sheet Metal Workers*, 166 NLRB 262 (1967), *enforced*, 429 F.2d 1244 (9th Cir. 1970); *cf.*, e.g., *NLRB v. Glaziers & Glassworkers Local 1621*, 632 F.2d 89 (9th Cir. 1980) (8(b)(1)(A) violation); *Carpenters & Joiners Local 1620*, 208 NLRB 94 (1974) (8(b)(1)(A) and 8(b)(4) violations).

305. See *Grain Elevator, Flour & Feed Mill Workers, Local 418 (Continental Grain Co.)*, 155 NLRB 402, 415-16 (1965) (dissenting opinion), *enforced*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967); *Cantor, supra* note 299, at 653 (but suggesting that a requirement that there first be an appeal by the primary union would be reasonable).

those effects, would seem legitimate. But the law, albeit in a state of some confusion,³⁰⁶ is to the contrary: the union representing secondary employees which induces a work stoppage on the part of those employees in support of a stranger dispute may violate Section 8(b)(4) even where a stranger picket line which would induce an identical work stoppage would constitute, as to secondary employees, an appeal to refuse to perform related work.³⁰⁷

The explanation of this anomaly is in part a matter of the Board's insistence upon adhering to the notions that the situs of a dispute³⁰⁸ and the subjective intent of the labor organization³⁰⁹ are to control analysis. In particular, the Board's notion, despite the related work doctrine, that direct appeals to secondary employees (as distinguished from appeals to primary employees which incidentally affect secondary employees) are illicit³¹⁰ continues to influence Board decision making under the rubric of a finding of an illicit objective "under all the facts and circumstances."³¹¹

306. See *Newspaper and Mail Deliverers' Union* (Interborough News Co., 90 NLRB 2135 (1950); *Oil Workers Int'l Union, Local 346* (Pure Oil Co.), 84 NLRB 315 (1949). Cf. *Anchortank, Inc. v. NLRB*, 601 F.2d 233, 240 (5th Cir. 1979) (primary union may make off-situs appeals to secondary employees to honor primary's picket line).

307. *Grain Elevator, Flour & Feed Mill Workers, Local 418* (Continental Grain Co.), 155 NLRB 402 (1965), *enforced*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967). See *NLRB v. Local Union No. 3, Int'l Bhd. of Electrical Workers*, 477 F.2d 260, 268 n.2 (2d Cir.), *cert. denied*, 414 U.S. 1065 (1973); *Oil, Chemical & Atomic Workers Local 1-128*, 223 NLRB (1976). Cf. *Harrah's Club v. NLRB*, 446 F.2d 471 (9th Cir.), (union inducement by telegram appeal to members to not cross a primary picket line was threat within meaning of section 8(b)(4)(ii) where members were also secondary employers), *cert. denied*, 404 U.S. 912 (1971). But cf. *Houston Insulation Contractors Ass'n v. NLRB*, 386 U.S. 664, 668 (1967) ("Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union" quoting *United Ass'n of Journeymen, Local 106* (Columbia-Southern Chemical Corp.), 110 NLRB 206, 109 (1954)).

308. See *Building and Constr. Trades Council of New Orleans* (Markwell & Hartz, Inc.) 155 NLRB 319 (1965), *enforced*, 387 F.2d 79 (5th Cir. 1967) *cert. denied* 391 U.S. 918 (1968).

309. See *Chevron USA, Inc.*, 244 NLRB 1081, 1086 (1979) (although picket line complied with *Moore Dry Dock*, union official's statements indicate unlawful objective),

310. See *Local 761, Int'l Union of Electrical Workers*, 123 NLRB 1547 (1959), *enforced*, 278 F.2d 282 (D.C. Cir. 1960), *rev'd*, 366 U.S. 667 (1961); *Sailors' Union of the Pacific* (*Moore Dry Dock Co.*) 92 NLRB 547 (1950).

311. See, e.g., *Chevron USA, Inc.*, 244 NLRB 1081, 1085 (1979); *Local No. 441, Int'l Bhd. of Elec. Workers*, 222 NLRB 99 (1976); *United Ass'n of Journeymen & Apprentices, Local 60* (Circle Inc.), 202 NLRB 99 n.1 (1973); *Millwrights Local Union No. 1102* (Dobson Heavy Haul, Inc.), 155 NLRB 1305 (1965); *International Bhd. of Elec. Workers, Local Union No. 11* (L.G. Electric Contractors, Inc.), 154 NLRB 766 (1965).

A somewhat related problem is the application of the related work doctrine to picketing appeals to secondary employees at a secondary situs. To the extent that

But there is another explanation for the anomaly: the underlying conception³¹² that a secondary employer's refusal to cross a picket line is an individual exercise of an individual Section 7 right. The point is illustrated by two cases: *Newspaper and Mail Deliverers' Union (Interborough News Co.)*³¹³ and *Grain Elevator, Flour and Feed Mill Workers, Local 418 (Continental Grain Co.)*.³¹⁴

In *Interborough News*, newspaper publishers delivered newspaper to newsstands operated by Interborough. Interborough employees were engaged in a primary economic strike and were represented by a union which also represented the delivery employees of the publishers. Although the union had placed pickets at some of Interborough's stands, it had also made appeals, by direct oral contact with publisher employees at locations other than Interborough's stands, to

a case raising such a problem does not involve an ambulatory primary situs to which *Moore Dry Dock* standards may be applied, *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950), the Board has been reluctant to apply the related work doctrine in such a context. See, e.g., *San Francisco Typographical Union No. 21 (California Newspaper, Inc.)*, 187 NLRB 542 (1970); *General Truck Drivers Local 315 (Insured Transporters Inc.)*, 195 NLRB 56 (1972). But those contexts involve both the substantial risk that secondary situs picketing will produce a total work stoppage on the part of secondary employees (rather than a stoppage of related work), *Cantor*, *supra* note 299, at 647, and the problem that such picketing constitutes an appeal to not handle "hot goods"—an appeal not immunized by the related work doctrine. See *Lesnick*, *supra* note 253, at 1412-14. The present criticism is only a criticism of the Board's apparent insistence that union appeals must be primarily directed to primary employees. The related work doctrine makes it clear that appeals primarily directed to secondary employees are permissible to the extent consistent with the policy of the statute. See *Lesnick*, *supra* note 253, at 1417-18. Consistency cannot be resolved by reference to the union's objective or to foreseeable consequences as a test of that objective because the union's objective will invariably be one within the literal language of the statute. Consistency must instead be measured by reference to probable secondary effect, degree of secondary effect, and risks of greater than to be expected secondary effect. See *NLRB v. Retail Store Employers Union Local 1001*, 447 U.S. 607, 614 n.8 (1980).

Upon the assumption, for purposes of argument, that *Building and Constr. Trades Council of New Orleans (Markwell & Hartz, Inc.)*, 155 NLRB 319 (1965), *enforced*, 387 F.2d 79 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968), was correctly decided under *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667 (1961), Board decisions finding 8(b)(4) violations for union discipline of secondary employees for working behind otherwise lawful picket lines cannot be criticized on the ground suggested here. On that assumption, the discipline seeks to enmesh neutrals not engaged in related work. See, e.g., *Carpenters District Council of Southern Colorado*, 222 NLRB 613 (1976), *enforced*, 560 F.2d 1015 (10th Cir. 1977); *Orange County District of Carpenters*, 242 NLRB 585 (1979); *Local Union No. 153, Int'l Bhd. of Elec. Workers*, 221 NLRB 345 (1975).

312. See *Oil, Chemical and Atomic Workers Int'l Union, Local 1-128*, 223 NLRB 757, 767 (1976) (ALJ).

313. 90 NLRB 2135 (1950).

314. 155 NLRB 402 (1965), *enforced*, 376 F.2d 774 (D.C. Cir. 1967).

refuse to make deliveries to the stands. These oral appeals had successfully stopped deliveries at both picketed and not picketed Interborough newsstands. The trial examiner in *Interborough* concluded that the union's oral appeals did not violate Section 8(b)(4) on two grounds: as the oral appeals requested that publisher employees refuse to perform services only at the Interborough premises, there was no prohibited secondary activity.³¹⁵ And the union's appeals were specifically exempted from Section 8(b)(4) by proviso.³¹⁶ The Board, adhering to its consistent refusal to interpret or rely upon the proviso, affirmed on the first ground cited by the trial examiner.³¹⁷

The interesting aspect of *Interborough* for present purposes is³¹⁸ that the General Counsel's interpretation of the 8(b)(4) proviso in its argument on that point rested upon an individual characterization of the conduct exempted by the proviso: Congress intended only "to reaffirm the right of an employee as an individual to refuse to enter."³¹⁹ By use of the term "unlawful" in the proviso, Congress presumably meant the concept of unprotected concerted activity.³²⁰ On individualist premises, the proviso insures that an individual refusal remains protected, but it has no application to a union's inducement of that refusal.

The trial examiner's rejection of this argument was based on two grounds: (1) As the Act defines "person" to include labor organizations, and the proviso explicitly refers to the refusal of persons to enter primary premises, the proviso applies to the conduct of labor organizations.³²¹ (2) The term "unlawful" in the proviso is properly equated with "unfair labor practice."³²² The proviso therefore precludes

315. 90 NLRB at 2149-50.

316. *Id.* at 2146-49.

317. *Id.* at 2135-36.

318. Note that the Board's decision was grounded upon a geographical view of § 8(b)(4). *Id.* at 2135.

319. *Id.* at 2147.

320. *Id.* at 2148. Professor Lesnick argues against the General Counsel's interpretation on the ground that the proviso would be "unnecessary". Lesnick, *supra* note 253, at 1404-05 n.206. Although I am in agreement with Professor Lesnick's argument that the proviso, if it is to be given any operative effect, must be read as a limitation on union exposure under Section 8(b)(4), *id.*, I am not in agreement with his ultimate conclusion that the proviso should not be given operative effect. *Id.* at 1406-07. At the same time, disagreement with that conclusion does not imply agreement with the position the conclusion seeks to rebut—that the proviso is the exclusive limitation on the breadth of Section 8(b)(4). Compare Lesnick, *supra* note 253, at 1404 with Comment, "Primary" and "Secondary" Labor Action: The Case of the Neglected Proviso, 1 LAB. L.J. 339, 341 (1950).

321. 90 NLRB at 2147.

322. *Id.* at 2147 n.20, relying upon Senator Taft's equating of "unlawful" with

a finding of an unfair labor practice where its terms are met.³²³ The conception underlying the Trial Examiner's view of the proviso is a collective conception of the conduct the proviso immunizes from Section 8(b)(4). A labor organization (including a labor organization representing both primary and secondary employees in separate bargaining units) may refuse to enter the premises of a primary employer engaged in a primary labor dispute.³²⁴ The General Counsel's argument was grounded on an expressly individualist conception—the conduct immunized from any inference of unlawfulness is individual conduct.

In *Grain Elevator Workers*, the Board, although it purported to distinguish *Interborough News* and although it ignored the Section 8(b)(4) proviso,³²⁵ in effect adopted the General Counsel's argument

"unfair labor practice" in the context of Section 303 of Taft Hartley, 29 U.S.C. § 187 (1976), in the legislative debates. See 93 CONG. REC. 5060 (1947) reprinted in 2 LEG. HIST. LMRA 1371 (1948).

323. 90 NLRB at 2147.

324. Although the trial examiner's opinion may be read as supporting the view that the proviso is an exclusive limitation upon 8(b)(4) exposure, Lesnick, *supra* note 253, at 1404 n.203, that reading is not necessary. It is the case that the proviso contains conditions difficult to give effect if the proviso is read as contemplating conduct on the part of union in its capacity as the representative of primary employees. In that event, the primary union's appeal to secondary employees at secondary premises (in the absence of an ambulatory situs) fails to meet the proviso, and a primary picket line established for organizational or area standards purposes fails to meet the proviso. If the proviso is read instead to contemplate conduct by a secondary union in its capacity as the representative of secondary employees which seeks to cause a partial work stoppage by secondary employees, the conditions may be given effect without addressing the question of the "lawfulness", under Section 8(b)(4), of conduct on the part of a union which is a party to a labor dispute acting in its capacity as a party. The question of the primary union's exposure may be answered by an analysis of statutory policy independent of the proviso. See 29 U.S.C. § 158 (b)(4)(B) (1976) ("nothing contained in the clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . .").

It should be noted that the conduct of a union in its capacity as the representative of secondary employees in inducing a refusal on the part of secondary employees to, e.g., unload a primary's ambulatory situs fits the proviso if the ambulatory situs is viewed as the premises of the primary employer. Compare NLRB v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 477 F.2d 260, 268 (2d Cir. 1973) (secondary employer premises are not the premises of the primary) with *id.* at 268 n.2 (if a common situs, *Grain Elevator Workers* applies). Nor is there anything odd in such a characterization—the characterization is precisely the basis for the Board's treatment of appeals to secondary employees at secondary premises. See *Sailors' Union of the Pacific* (Moore Dry Dock Co.) 92 NLRB 547 (1950).

325. Moreover, the Court of Appeals, in enforcing the Board's order, declined to reach the question "whether or in what circumstances a secondary union has the right to appeal to its members to exercise the right assured by [the] proviso." 376

made in *Interborough. Grain Elevator Workers* involved a primary strike called by the Seafarer's Union against a Canadian employer engaged in the shipping of grain by means of Great Lakes grain ships. Continental used the Canadian firm to ship its grain, and Continental employees were represented by the Grain Elevators Workers. Although the Seafarer's established no picket line at or near the Canadian employer's ships when those ships were located at Continental's premises to be loaded, Continental employees refused to load the ships. The Board concluded that this refusal was induced by the Grain Elevator Workers³²⁶ and that the inducement violated Section 8(b)(4) even though it was conceded that a Seafarer's union picket line, had it been established, could have lawfully generated precisely the same secondary employee partial work stoppage.³²⁷

The Board's conclusion was grounded upon two propositions: First, cases, such as *Interborough News*, permitting secondary union inducements of employee action of a nature which could lawfully be induced by a primary union's picket line actually involved such a picket line, and the secondary union's inducement in such cases therefore amounted to no more than an inducement to honor a picket line.³²⁸ Second:

[T]here must be some clear and contemporaneous notice given by the primary union to the employees appealed to, and to the neutral employer at whose premises the dispute becomes active, that the labor dispute involved is between it and the primary employer. Unless such notice is given, the dispute takes on the appearance and character of a dispute between the "inducing" union and the neutral

F.2d at 781 n.17. *But cf.* *NLRB v. Difco Laboratories, Inc.*, 427 F.2d 170, 172 (6th Cir.) (It is immaterial whether primary union wished employees to engage in a sympathy strike if the employees acted in what they viewed as their own best interests.), *cert. denied*, 400 U.S. 833 (1970).

326. See 155 NLRB at 424 (Interim Report). Note that the basis for this conclusion was the wholly circumstantial fact that Continental's employees acted unanimously. The union therefore must have induced their action. *Id.* at 424. What is interesting in this use of circumstantial evidence is that the Board will at least on occasion recognize that employee conduct is union induced conduct in this context even where no union official is so incautious as to make a statement later produceable in evidence. Unfortunately, the Board does not always recognize the reality, and analysis therefore tends to be grounded upon which verbal formulation a well advised or poorly advised union official adopts. See *Gould, Inc.*, 238 NLRB 618 (1978), *enforced*, 638 F.2d 110 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981).

327. 155 NLRB at 409. See *Sailors' Union of the Pacific (Moore Dry Dock Co.)* 92 NLRB 547 (1950).

328. 155 NLRB at 411.

employer over the latter's dealings with the primary employer rather than of a dispute between the primary union and a primary employer.³²⁹

The initial difficulty with the Board's analysis is that *Interborough* is not distinguishable on the grounds cited by the Board: only a few of the newsstands involved in *Interborough* were picketed.³³⁰ It is possible to distinguish *Interborough* on the ground that the same union represented both primary and secondary employees, but that basis for distinction, albeit not a distinction employed by the Board in *Grain Elevators*, forms the more fundamental difficulty with the Board's analysis in the latter case: the requirement of "clear and contemporaneous notice given by the primary union" rejects the notion that the secondary union (or any union acting in its secondary capacity) has a legitimate role to play in the present context.

It is true that the notice requirement may be viewed as serving functions other than such a rejection. Notice identifying the parties to a dispute may avoid job action by employees of third-party employers who encounter the secondary employee's partial work stoppage, and notice may limit the secondary employee's work stoppage to work which furthers the normal operations of the primary.³³¹ But these explanations won't wash. There was no danger of either third-party work stoppages or of total secondary employee work stoppages in the *Grain Elevators* case itself;³³² the danger of third-party work stoppages is greater in the case of picketing by a primary union than it is in the case of oral inducement by a secondary union;³³³ and a total work stoppage directed at the secondary is possible only if one starts with the premise that secondary employees act individually as a matter of individual conscience rather than from the sort of carefully tailored instructions of their union evident in *Grain Elevator*.³³⁴

329. *Id.*

330. See 90 NLRB at 2141.

331. See 376 F.2d at 780.

332. *Id.*

333. 155 NLRB at 415-16 (dissenting opinion).

334. Professor Cantor, while criticizing *Grain Elevators*, suggests that some primary union notice as a prerequisite to secondary union action is reasonable because it "insures that the secondary union is responding to a primary appeal, and is not initiating purely secondary action." Cantor, *supra* note 299, at 653. The difficulty with that argument is that the "purely secondary" character of the action induced by the secondary union is not a function of the primary union's appeal unless one assumes that only the primary union has a right to make related work appeals. As Professor Cantor recognizes, the secondary union's appeal in *Grain Elevator Workers* was an inducement of primary action under the related work doctrine. *Id.* The prior notice

What is wrong with the Board's analysis is precisely that it started with such a premise, for the Board clearly viewed the appropriate union actor as the primary union. At most, the secondary union's legitimate role is only that of "taking up" the primary union's cause³³⁵—presumably only at the direction of the primary. And the legitimate role of both unions which is protected by the primary-secondary distinction is only that of "appeal[ing] to employees approaching struck "ambulatory" premises to refrain from entering those premises"³³⁶. In short, secondary employees are conceived in the Board's opinion in *Grain Elevator* as diverse legal entities distinct from their union. Legitimate inducements ("appeals") are, under that conception, made by the primary union (or the secondary union to the extent deputized by the primary union) and directed to individual secondary employees rather than to the secondary union as an actor exercising the right of refusal.³³⁷ In terms of the General Counsel's argument in *Interborough News*, the Board's failure to reach the question of the application of the proviso was warranted because the proviso protects individuals; it has no application to secondary unions.³³⁸ And the absence of "notice" by the primary union makes the secondary union's inducement "take on the appearance"³³⁹ of illicit secondary activity not because the effect of that inducement is illicit—the effect was conceded by the Board to be within permissible limits—but because the secondary union was at least inferentially conceived by the Board to have no Section 7 interest in that effect—only individual employees have Section 7 interests.

The implications of *Grain Elevator* are clarified by focusing upon the Board's specific holding. The Board held that a primary union must

requirement is reasonable if one views it as the functional equivalent of a primary union picket line in the sense that the primary union has the sole right to initiate concerted activity against the primary employer, but reasonableness is then a function of the scope of the secondary union's Section 7 right, not of the primary-secondary distinction.

335. 155 NLRB at 413.

336. *Id.*

337. See *Id.* at 412: "[The *Moore Dry Dock tests*] protect [the primary union's] right and the right of other unions who could aid its cause, to appeal to all employees approaching the picket line to extend the union member's traditional gesture of support to the primary union. . . ." See also *Oil, Chemical and Atomic Workers Int'l Union, Local 1-128*, 223 NLRB 757, 767 (1976) (interim report): "Neither the collective bargaining agreement [picket line clause] nor the National Labor Relations Act confers any collective right on the Respondent to decide for its members that they should not cross a bona fide picket line."

338. See 90 NLRB at 2147.

339. 155 NLRB at 411.

give "clear and contemporaneous notice" of its appeal to secondary employees before a secondary union may induce sympathetic action by those employees. Note carefully that the Board did not impose the more limited requirement suggested by the Section 8(b)(4) proviso that there be a strike authorized by the union representing the strikers. The Board's required that the primary union authorize sympathetic activity by providing notice that it desires such activity. Under the Board's ruling, the primary union controls sympathetic action on the part of secondary employees in the sense that only the primary union may seek that action either directly or by deputizing the secondary union. That control implies that the secondary union may not independently seek shared benefits and reciprocal power as a matter of its authority to make decisions about the pursuit of such ends. It implies as well that the Section 7 protection afforded secondary employees in a case in which the primary union directly authorizes sympathetic activity by means of a picket line is Section 7 protection afforded for reasons of preserving the efficacy of the strike weapon rather than for reasons of the shared benefits and reciprocal power to be gained by secondary employees.

These implications of the Board's ruling in *Grain Elevator* reflect what was termed here earlier the rationalization view of Section 7³⁴⁰ as much as they reflect a particular view of Section 8(b)(4). Under the rationalization view, mutuality in the sense of the motivation for or the tendency of concerted activity is a requisite element of protection, but protection does not turn on mutuality. Protection turns, rather, on a government decision about the desirability of that activity: A sympathetic work stoppage is desirable to the extent that it ensures the efficacy of the primary strike and the stoppage will therefore be protected on the purported grounds that it is either motivated by or tends to further an honoring employee's desire for shared benefits or reciprocal power. Such a stoppage is undesirable when the efficacy of the primary strike is not available as an underlying rationale for protection—and the absence of primary pickets indicates that absence. More importantly, the secondary union's claim to shared benefit or reciprocal power is not a claim which will be recognized under the rationalization view even, as in *Grain Elevator*, where the policy of protecting neutral employers from secondary activity does not appear implicated by such a claim.³⁴¹ The claim will not be recogni-

340. See *supra* notes 151-56 and accompanying text.

341. One need not attack the Board's "purpose" analysis to come to the conclusion that protection of neutrals as a policy was not threatened in *Grain Elevator*. One must recognize, however, that a union's primary and secondary purposes are almost

ed because it is a claim grounded upon a distinct view of mutuality—that mutuality grants a license to pursue mutual ends without reference to the immediate substantive policy question of the desirability of those ends. In short, the Board will recognize a claim to shared benefits and reciprocal power as a rationalization for protection of individual honoring employees who aid a primary union in a primary strike at the instance of that union, but it will not recognize that rationale where the rationale is asserted by the secondary union and where the secondary seeks to use the rationale as a sword.

As a practical matter, one suspects that the primary effect of the *Grain Elevators* doctrine has been to drive secondary union inducements underground and to encourage the manufacturing of a “record” of secondary union neutrality through union official declarations to that effect³⁴² in any circumstance in which the doctrine might conceivably be applied. On a collective right premise,³⁴³ the appropriate means of approaching cases such as *Interborough News* and *Grain Elevator Workers* is through the trial examiner’s premise in his interpretation of the Section 8(b)(4) proviso in *Interboro* and through a non-literal reading of that proviso.

always “mixed”, and that this is so despite some Supreme Court indications to the contrary. Compare *National Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 644 n.38 (1967) (purpose a function of circumstances and, implicitly, is therefore mixed) with *NLRB v. Enterprise Ass’n of Pipefitters*, 429 U.S. 507, 530 n.17 (1977) (it is sufficient if a purpose was secondary); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689 (1951) (same). On the premise that purpose is always mixed and that effect is a relevant circumstance in testing purpose, my point in the text is that the Board was simply wrong in finding an unlawful purpose.

342. Compare *NLRB v. Local Union No. 3, Int’l Bhd. of Elec. Workers*, 477 F.2d 260, 265 (2d Cir. 1973) (secondary union official’s statement “I can’t tell you anything. You do as you please. You don’t have to handle no scab freight” held inducement) with *Gould, Inc., Switchgear Division*, 238 NLRB 618, 622 (1976) (ALJ) (union officials advice that decision to take action would be the individual employee’s choice not an inducement), *enforced*, 638 F.2d 159 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981).

343. The closest the Board or courts have come to recognizing a collective characterization as a premise in the secondary boycott context is their treatment of picket line clauses in collective bargaining agreements under Section 8(e), 29 U.S.C. § 158(e) (1976). The union argument in such a context is that the picket line clause merely protects individual employees in the exercise of their individual consciences. The response has been that such a clause is an agreement by a labor organization (i.e., a secondary union) and employer which is unlawful to the extent that it may be applied in secondary circumstances. See *Drivers, Salesmen, Warehousemen Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966); *Truck Drivers Union Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964). But see *Truck Drivers Union Local 413*, 140 NLRB 1474, 1485 (1963) (dictum to the effect that waiver of employer rights in a picket line clause is a waiver for the benefit of individual employees), *modified*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964).

The trial examiner's premise was that the proviso refers to union conduct and conceives of a refusal to enter the premises of an employer subjected to a strike authorized by the exclusive representative of that employer's employees as a union refusal.³⁴⁴ A non-literal interpretation of the proviso is necessary not because a literal reading on the trial examiner's premise would make the Section 8(b)(4) prohibition too broad,³⁴⁵ but because a literal reading on that premise would make the prohibition too narrow by ignoring the primary-secondary distinction and, therefore, the related work doctrine.³⁴⁶ It would destroy that doctrine because a secondary union which induced secondary employees to refuse to enter the premises of a struck employer could meet the terms of the proviso whether or not the work to be done on those premises by secondary employees was related to the normal operations of the struck employer and whether or not the strike, albeit authorized by the exclusive representative of the striking employees, was called in a primary dispute with the struck employer.³⁴⁷ The non-literal interpretation of the proviso is that it was intended to distinguish between secondary union conduct falling on the licit side of the primary-secondary distinction from secondary union conduct falling on the illicit side of that distinction.

The non-literal interpretation is preferable to reading the proviso out of the statute³⁴⁸ and is justified both by its consistency with the policies of the statute and by the evident concern of the Taft-Hartley Congress to preserve the traditional strike authorized by an exclusive representative.³⁴⁹ It is, moreover, the apparent intent of the language of the proviso itself. On its face, it is difficult to conceive of a clearer case of primary activity than a refusal to enter struck premises where the strike is authorized by the exclusive representative of striking employees. It is only when one hypothesizes a common situs³⁵⁰ that the meaning of struck premises seems in doubt, and

344. 90 NLRB 2148-49. See *supra* notes 320-24 and accompanying text.

345. See *Drivers, Salesmen, Warehousemen Local 695 v. NLRB*, 361 F.2d 547, 550 n.10 (D.C. Cir. 1966); Lesnick, *supra* note 253, at 1402 n.203. The too broad a prohibition fear would seem obviated, at least as of 1959, by the picket line proviso to Section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976). See *Truck Drivers Union Local 413 v. NLRB*, 334 F.2d 539, 542-46 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964).

346. See *Local 651, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667 (1961).

347. See *Drivers, Salesmen, Warehousemen Local 695 v. NLRB*, 361 F.2d 547, 549-50 (D.C. Cir. 1966) (applying hot cargo clause meeting the proviso to Section 8(b)(4)).

348. Reading the proviso out of the statute was Professor Lesnick's prescription, a prescription adopted by the D.C. Circuit in *Drivers, Salesmen, Warehousemen Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966). See Lesnick, *supra* note 253, at 1407.

349. See *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672-73 (1951).

350. See *Building & Constr. Trades Council of New Orleans (Markwell & Hartz,*

it is only when one hypothesizes a strike authorized by an exclusive representative for secondary purposes that the literal language of the statute seems inadequate.³⁵¹ What Congress evidently had in mind was therefore a refusal to enter struck premises where the strike is itself primary and where the refusal is reasonably related to the operations of the struck employer.

Does the incorporation of the primary-secondary distinction into the proviso render the proviso redundant? If the trial examiner's premise in *Interborough News*—that the proviso refer to unions acting in their capacities as secondary unions—is accepted, the proviso is not redundant. It is not redundant because the proviso does not merely seek to declare the protected status of individual employee refusals unaffected by the Section 8(b)(4) prohibition, but also seeks to declare the secondary union's refusal (a refusal made through inducements of the employees it represents) not prohibited by Section 8(b)(4). Nor is the proviso made redundant by the Landrum Griffin Act's addition of the Section 8(b)(4)(B) primary picketing proviso.³⁵² Although that proviso explicitly incorporates the primary-secondary distinction, and although its legislative history indicates that Congress sought to avoid any inference that a refusal to cross a primary picket line is rendered unprotected by Section 8(b)(4)(B), the focus of the picketing proviso is on the strike and picketing conduct of the primary union, not upon the conduct of a secondary union.³⁵³ The picketing proviso's negation of an inference of non-protection is a negation of derivative non-protection; it does not address the question of secondary union inducements.³⁵⁴

Inc.), 155 NLRB 319 (1965), *enforced*, 387 F.2d 79 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968).

351. The D.C. Circuit's failure to recognize this possibility in *Truck Driver's Union Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964) and its overruling of its *Truck Driver's* dictum in *Drivers, Salesmen, Warehousemen Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966) suggests the point made in the text.

352. 29 U.S.C. § 158(b)(4)(B) (1976): "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

353. See H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959) (proviso preserves present rules "permitting picketing at the site of a primary labor dispute"); 105 Cong. Rec. 15222 (1959) (Kennedy-Thompson Memorandum) (criticizing original House bill before addition of the picketing proviso because it "destroys the right to picket a plant and to honor a picket line"); A. Cox, *The Landrum Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271-73 (1959).

354. Derivative non-protection is to be distinguished from the problem of impermissible secondary union conduct even though the reasons for the latter, under a non-literal interpretation of the Section 8(b)(4) proviso are similar to the reasons for the former under the Section 8(b)(4)(B) picketing proviso. A refusal to cross a second-

The major impact of the suggested approach would be to focus inquiry on the conduct of the secondary union in circumstances, such as *Grain Elevator Workers* and *Interborough News*³⁵⁵ where that union refuses—by acts of inducement—to perform related work and to provide as a premise for that inquiry an assumption that a secondary union acts legitimately if it acts within the bounds of the proviso even where it acts independently of a primary union's picket line. The proviso requires explicit consideration of the situs of a dispute, and the presence of primary employer premises therefore may be crucial,³⁵⁶ but there is no reason—other than the literal approach—that the term “premises” cannot be given an interpretation inclusive of ambulatory premises.³⁵⁷ The scant legislative history of the proviso suggests not a literal interpretation, but an interpretation consistent with the policies of the statute as a whole. Under the proposed interpretation, the secondary union does not control the occasion on which it may seek mutual gain from a stranger dispute, for there must be a strike called by the primary union.³⁵⁸ The secondary union does, however, control

dary picket line is unprotected because the picket line violates the Act. A secondary union's “refusal” by inducement to enter struck premises to do unrelated work is also a violation of the Act.

355. *Interborough* involved the conduct of a union which represented both primary and secondary employees. It is quite true that its inducement of secondary employees occurred for the purpose of furthering the interests of primary employees, but that circumstance is immaterial if it is accepted that unions may permissibly act across employers. See *supra* notes 186, 244. What is material for present purposes is that the union satisfied two conditions for application of the proviso: (1) it was a union representing secondary employees and (2) it induced secondary employees to cease related work.

356. Compare the proviso's emphasis upon premises with *United Steelworkers of America v. NLRB*, 376 U.S. 492 (1964) (geographical location of a dispute in only one factor in applying related work doctrine).

357. *Contra*: Lesnick, *supra* note 253, at 1404. Professor Lesnick provides no direct reason for his conclusion that the proviso would preclude “secondary site picketing”—a phrase I take to include the ambulatory situs problem. He does suggest at another point, however, that the Ball bill, which included the predecessor of the proviso, focused upon situs rather than objective in banning the secondary boycott. *Id.* at 1407 n.217. Accepting, for the present purposes, Professor Lesnick's characterization of the legislative history, see *supra* note 277 and accompanying text, the enacted statute read as a whole does not reflect an emphasis upon situs, and the argument made in the above text is that the proviso should be read as consistent with the statute as a whole whatever its legislative origins. That conclusion is preferable both because it gives the proviso content rather than reading it out of the statute and because it gives the benefit of the doubt to a Congress which may be properly thought to have intended internally consistent legislation.

358. Although a congressional concern in enacting the proviso was the problem of minority union authorized strikes, See *Sen. Rep. No. 105*, 80th Cong., 1st Sess. 23 (1947) reprinted in 1 *LEGISLATIVE HISTORY OF THE LMRA* 429 (1948). proponents of

the seeking of such gain. Shared benefit and reciprocal power are not under the interpretation mere rationalizations for conferring protection; they are objectives which define the license granted the secondary union once a stranger dispute occurs.

(2) Employee Exposure To Discipline For Conduct
Inconsistent With Section 8(b)(4).

An employee who honors a picket line which is established in violation of Section 8(b)(4)—*i.e.* a secondary picket line—engages in unprotected activity.³⁵⁹ His employer may discharge or discipline that employee for the refusal to cross without running afoul of Section 8(a)(1).³⁶⁰ The employer therefore has available a potential defense when charged with a violation of Section 8(a)(1) for disciplining the honoring employee,³⁶¹ and a secondary union which disciplines its member for crossing a secondary picket line risks both Section 8(b)(1)(A) and Section 8(b)(4) exposure.

Although it has been held in some contexts that individual employee conduct is unprotected where that conduct would, if engaged in by a union, amount to a union unfair labor practice,³⁶² an employer's Section 8(b)(4) defense to a Section 8(a)(1) allegation is dependent upon

a ban on minority picketing were unsuccessful in 1947, *Lesnick, supra* note 253, at 1405. In terms of the present analysis, the proviso would not preclude secondary union exposure under Section 8(b)(4) where it seeks to induce action in support of organizational picketing or area standards picketing. The Section 8(b)(4)(B) picketing proviso might, however, preclude exposure under such circumstances. *See supra* note 324.

359. *Chevron USA, Inc.*, 244 NLRB 1081, 1086 (1979).

360. *Id.*

361. *Id.* There are three procedural aspects to the employer's Section 8(b)(4) defense which should be noted. If the employer fails to litigate the 8(b)(4) issue, the Board will not decide the question *sua sponte*. *Congoleum Indus., Inc.*, 197 NLRB 534 (1972). If the employer fails to charge an 8(b)(4) violation but asserts it as a defense, the Board will decide the question. *Chevron USA, Inc.*, 244 NLRB 1081, 1085 (1979). What is unclear is whether a General Counsel's dismissal of a Section 8(b)(4) charge precludes assertion of the defense as a procedural matter or is merely taken into account, as a matter of deference, in the analysis of the Section 8(b)(4) defense. *See Gould, Inc., Switchgear Division*, 238 NLRB 618, 622 (1978) (ALJ) and the court of appeals decision enforcing the Board's order in *Gould, NLRB v. Gould, Inc.*, 638 F.2d 159, 163 n.2 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981). The obviously better rule—a rule supported by the *Gould* litigation in the sense that both the court of appeals and the Administrative Law Judge reached the merits of the 8(b)(4) issue—is that the employer is entitled to fully litigate the point as a defense, an opportunity not provided in the process by which the General Counsel makes a complaint decision. *See NLRB v. Commercial Letter, Inc.*, 455 F.2d 109 (8th Cir. 1972).

362. *See Perry Norvell Co.*, 80 NLRB 225, 241 (1948). *See generally* GORMAN, *supra* note 8, at 303-05; A. Cox, *supra* note 121, at 325.

establishing the elements of a Section 8(b)(4) violation.³⁶³ One such element is that a union "induced or encouraged" the employee's action. This element is easily established in a case in which the honored picket line is secondary. It is not as easily established where the picket line in issue is not secondary³⁶⁴ or where there is no picket line, but the employer claims that the employee's action was of a secondary character and induced by the union representing that employee.³⁶⁵ In such circumstances, secondary employee work stoppages found not to have been induced by either a primary or secondary union are characterized as spontaneous concerted activity in sympathy with primary employees and therefore protected under Section 7 even where those work stoppages, if induced by either the primary or secondary union, would violate Section 8(b)(4).

*Gould, Inc.*³⁶⁶ illustrates this line of cases. Gould, a manufacturing concern, was engaged in a plant expansion for which it used construction contractors, one of which was a non-union electrical contractor. Manufacturing employees of Gould were represented by Local 584 of The Electrical Workers, a union composed of autonomous construction, manufacturing and maintenance divisions. Gould's manufacturing employees were members of the manufacturing division. The Electrical Workers established an informational picket line at the Gould plant directed at the electrical contractor. Gould's manufacturing employees walked off the job shortly after the appearance of the pickets. Gould discharged two of the striking employees, and was charged with a Section 8(a)(1) violation for the discharges.

One of Gould's defenses was that the sympathy strike was unprotected because the union's objective in establishing the picket line was "forcing [Gould] to stop doing business with the non-union electrical subcontractor, in violation of Section 8(b)(4) of the Act."³⁶⁷ The

363. See *Gould, Inc.*, 238 NLRB 618 (1978), *enforced*, 638 F.2d 159 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981).

364. See *Gould, Inc.*, Switchgear Division, 238 NLRB 618, 622 (1978), *enforced*, 638 F.2d 159 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981). *But cf.* *Truck Drivers Union Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964) (8(e) violation where picket line clause purported to merely protect individual action).

365. See, e.g., *Newbery Energy Corp., Indus. Division*, 227 NLRB 436 (1976); *Congoleum Indus., Inc.*, 197 NLRB 534 (1972). On the question of what constitutes inducement, see generally *International Bhd. Electrical Workers Local 501 v. NLRB*, 341 U.S. 694 (1951); *Building and Constr. Trades Council of Tampa*, 132 NLRB 1564 (1961); *NLRB v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 477 F.2d 260, 265 (2d Cir. 1973).

366. 238 NLRB 618 (1978), *enforced*, 638 F.2d 159 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981).

367. 238 NLRB at 618-19.

Administrative Law Judge, in a decision affirmed by the Board, treated the picketing as lawful informational picketing under Section 8(b)(7)(C) of the Act³⁶⁸ and focused on the conduct of the union's agents independent of the picketing in analyzing the Section 8(b)(4) issue:

The walkout was the spontaneous action of about 85 of the 90 first-shift employees, who decided in unorganized assemblages in the plant that they would not work behind the picket line. The decision and action was not directed by the Union, whose business manager . . . advised the shop steward, and through her the employees, that whatever action the employees took would be their individual choice and action. Such advice does not constitute union authorization or union inducement within the meaning of Section 8(b)(4)(i) of the Act.³⁶⁸

The rules which emerge from this recitation are (1) employees are protected under Section 7 from employer retaliation where their sympathy strike is secondary but the union representing those employees frames its message in terms sufficiently neutral to avoid a finding of inducement and (2) employees are not protected under Section 7 in identical circumstances where their union errs by framing its message in terms which may be characterized as inducing the sympathetic action.³⁷⁰ The question is whether these rules make any sense.

A basis for a negative answer to that question is the proposition that, although Section 8(b)(4) prohibits union rather than individual conduct, a function of the Section 8(b)(4) proviso is to confirm the protected status of secondary employee conduct only to the extent permitted by the proviso. It is possible to argue that the proviso, by declaring only particular secondary conduct lawful, implicitly assumed that secondary employee conduct not satisfying the proviso (and not satisfying other independent bases for exception) was unlawful—that

368. *Id.* at 623. Section 8(b)(7)(C) contains a proviso exempting from the prohibitions of that subsection "picketing or other publicity for the purpose of truthfully advising the public . . . that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person . . . not to perform any services." In *Gould*, the proviso's caveat was circumvented by a finding that the manufacturing employee's walkout lasted only six hours and therefore did not create a "substantial disruptive effect." 238 NLRB at 623.

369. 238 NLRB at 622.

370. Compare *Gould*, 238 NLRB at 622 with *NLRB v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 477 F.2d 260 (2d Cir. 1973).

is, unprotected. The picket line in *Gould* could not lawfully have been used for the purpose of inducing a complete sympathy strike by secondary employees and the sympathy strike did not satisfy the conditions previously discussed here for applying the Section 8(b)(4) proviso. The arguably secondary character of the "spontaneous" sympathy strike would, under this interpretation, render that strike unprotected because inconsistent with the policy of Section 8(b)(4).³⁷¹

One difficulty with this argument is that the preceding discussion here of the proviso characterized it as directed at a particular form of person—a union acting in its capacity as a secondary union.³⁷² Indeed, the trial examiner's opinion in *Interborough News* rejected the "non-protection" interpretation of the proviso's use of the term "unlawful." But a characterization of the proviso as contemplating secondary union conduct may be reconciled with a conclusion that employees who engage in secondary conduct should not enjoy Section 7 protection even where their conduct is not union induced by considering the function of nonprotection. The preceding discussion of derivative non-protection suggested that its function was not deterrence of individual conduct inconsistent with the policies of the Act because individual employees lack the resources to make the legal calculations necessary to determinations about the legitimacy of picket lines.³⁷³ That suggestion is confirmed by *Gould*.

The employer's argument in *Gould* was that the disciplined employees had been engaged in unprotected activity either because the union's picket line violated Section 8(b)(7) or because the union, in its capacity as the representative of the secondary employees, had induced the sympathetic work stoppage in violation of Section 8(b)(4), or because the sympathetic work stoppage violated the no strike clause

371. *Contra*, e.g.: *NLRB v. Rockaway News Supply Co.*, 197 F.2d 111, 115 (2d Cir. 1952), *aff'd on other grounds*, 345 U.S. 71 (1953); *Auto Parts Co.*, 107 NLRB 242, 246 (1953) (trial examiner). The argument for concluding that the employee strike in *Gould* was secondary is that it constituted a total work stoppage; it was not limited to work related to the operation of the picketed contractor.

372. See *supra* notes 314-58 and accompanying text. If it is assumed that "unlawful" means "unprotected", the proviso cannot be explained except on the basis of a congressional assumption that, absent the proviso, employee conduct would be unprotected. Cf. *NLRB v. Rockaway News Supply Co., Inc.*, 345 U.S. 71, 80 (1953) (The proviso "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree."). By treating the proviso as an enabling grant for contractual protection or for waiver of protection, the Court at least implicitly assumed that employee secondary conduct would be unprotected absent the grant.

373. See *supra* notes 259-64 and accompanying text.

of a collective bargaining agreement.³⁷⁴ If any of those theories had been accepted, the function of the non-protection doctrine in the *Gould* circumstances could not have been deterrence of individual employee conduct. The legitimacy of the picket line under Section 8(b)(7) and of a sympathy work stoppage under the collective bargaining agreement turned on highly technical interpretations of the statute and the contract the employees could not be expected to accurately anticipate. And the means by which the union avoided 8(b)(4) exposure was the simple expedient of statements of neutrality. That neutrality left employees to their own devices in calculating, if they calculated at all, the protection Section 7 might afford their sympathy strike. It therefore left employees in the position of risking non-protection under all of the employer's theories. If the employees in *Gould* lacked the capacity to assess that risk, the doctrine of nonprotection could not serve a purpose of deterring individual conduct inconsistent with statutory policy. Indeed, that inefficacy may be viewed as the unstated motivation for the result in *Gould*: There was no violation of Section 8(b)(7) or of the no-strike clause because a finding of a violation would have left the employees unprotected for no apparent purpose.

If the function of the doctrine of nonprotection is instead viewed as generating risks of employer retaliation which will in turn generate internal political costs for unions,³⁷⁵ a different result was warranted in *Gould*. The paradigm case for nonprotection is individual employee participation in a union unfair labor practice.³⁷⁶ In such a case, union direction of employee conduct is assumed and the case for a political costs of nonprotection rationale appears strongest. In *Gould*, union direction of the sympathy strike did not occur; the union, in its capacity as a secondary union, purported to be neutral. *Gould* may therefore be viewed as consistent with the rationale in the sense that the *Gould* rule is that a union incurs the political costs of nonprotection only where it engages in an unfair labor practice.

But the conclusion that the union did not "induce" employee action for unfair labor practice purposes does not exhaust the question of the union's responsibility for the sympathy strike. Under the Board's resolution of that question in *Gould*, employees are free to "spontaneously" engage in a secondary strike and their union is free to enjoy the fruits of that strike so long as its general encouragement

374. 238 NLRB at 622-23.

375. See *supra* notes 264-69 and accompanying text.

376. See Local Union 707, Motor Freight Drivers (Claremont Polychemical Corp.), 196 NLRB 613 (1972).

of union solidarity and loyalty is not expressed at the time of that strike. A political costs rationale for nonprotection suggests a different resolution of the question. Because sympathetic employee action is action for and by the group, the union representing that group is responsible for that action in the sense that the group's right to engage in such action is measured by the union's right to engage in it. Where the union induces a secondary sympathy strike, union responsibility is enforced by means of the unfair labor practice prohibition and by nonprotection of employees who participate in the unfair labor practice. Where union inducement cannot be established, the responsibility is enforced by nonprotection alone.³⁷⁷ There is, under such a rationale, an affirmative duty to prevent secondary activity imposed on secondary unions, but the means by which that duty is enforced is not, in the absence of affirmative union misconduct, either unfair labor practice or civil damage action³⁷⁸ exposure.

The view earlier advocated here that the Section 8(b)(4) proviso contemplates secondary union conduct may therefore be reconciled with the proposition that the proviso implicitly assumes that individual employee conduct inconsistent with the statute is unprotected conduct on three grounds.

First, the Landrum Griffin Act's use of the term "unlawful" in the picketing proviso to Section 8(b)(4)(B) was intended by Congress to protect primary union picketing from Section 8(b)(4)(B) exposure and secondary employee refusals to cross primary picket lines from nonprotection exposure.³⁷⁹ The picketing proviso focuses on primary union conduct; it contemplates a primary picket line appeal to secondary employees and clearly assumes that secondary employee Section 7 protection is dependent upon the legitimacy, under the primary-secondary distinction, of the primary picket line.³⁸⁰ But the Taft-Hartley Act's Section 8(b)(4) proviso is worded differently. It refers to the refusal of a "person" to enter premises, and person is defined by the Act to include both unions and individuals.³⁸¹ If Congress thought it

377. Cf. *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964) (recognizing, for preemption purposes, that particular remedies for misconduct created by Congress themselves reflect a congressional balance dictating the degree to which misconduct is to be prohibited); *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477 (1960) (fact that employee conduct was unprotected does not warrant unfair labor practice finding).

378. See 29 U.S.C. § 187 (1976).

379. See *supra* note 353.

380. That is the clear assumption because the primary picketing proviso refers to picketing, not refusals to cross picket lines, and the legislative history discloses an intent to protect both. See 29 U.S.C. § 158(b)(4)(B) (1976); *supra* note 353.

381. 29 U.S.C. § 152(1) (1976).

necessary to exempt some refusals by individuals to enter premises from unlawfulness, it conceivably viewed such a refusal unlawful in the absence of the exemption in the only sense relevant to an individual: non-protection under Section 7.³⁸² To the extent that employee action is not action which could be lawfully induced by a primary picket line, it should enjoy neither the derivative protection afforded the honoring of a primary picket line nor the direct protection afforded by the Section 8(b)(4) proviso.

Second, the legislative history of the Section 8(b)(4) proviso indicates that the proviso was originally a part of the Ball bill making individual participation in the secondary boycott unlawful in a civil or criminal, rather than unfair labor practice, sense.³⁸³ Although this history has been cited as a reason for ignoring the proviso on the ground that it is incongruent with Section 8(b)(4) as enacted,³⁸⁴ the fact remains that the proviso was included in the enactment. While it is true that Section 8(b)(4) as enacted makes only union conduct unlawful in an unfair labor practice sense,³⁸⁵ the retention of the earlier

382. The doctrine of derivative non-protection predates the Taft-Hartley Act, and Congress was specifically aware of it. *House Conference Rep. No. 510*, 38-39 (1947), reprinted in 1 LEG. HIST. OF THE LMRA 542-43 (1948). See *infra* note 386.

Note that this argument assumes two grounds for protection: To the extent that employee conduct is a response to a primary picket line within the scope of the response which may be lawfully induced by such a picket line, it is protected by the Section 8(b)(4)(B) primary picketing proviso. To the extent that the employee conduct constitutes conduct falling on the primary side of the primary/secondary distinction made by the related work doctrine, it is protected by the Section 8(b)(4) proviso whether or not there is primary picketing. To the extent that neither of these conditions is met, the conduct is unprotected.

383. See *supra* notes 278-79 and accompanying text.

384. Lesnick, *supra* note 253, at 1406-07; Getman, *supra* note 8, at 1229 n.143 (1967).

385. Section 303 of Taft Hartley, 29 U.S.C. § 187 (1976), makes, and made in its original Taft-Hartley form, only unions subject to judicial (civil damages) remedies. See *supra* note 386. And Section 502 of Taft-Hartley, 29 U.S.C. § 143 (1976), makes it clear that the Congress did not intend to subject individuals to civil remedies, but it is not clear that its use of the term "illegal" in that section refers, as well, to "unprotected":

Nothing in this Act shall be . . . construed to make the quitting of his labor by an individual employee an illegal act . . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

Id. Indeed, the special dispensation given the quitting of work in the face of dangerous conditions, made in terms of a "strike", indicates a congressional awareness of the distinction between "illegal" and the concept of non-protection for breaching statutory policy. See 29 U.S.C. § 158(d).

proviso to the Ball bill may be viewed as a retention of a concept of individual exposure, again in the only manner in which the enacted legislation conceived of individual conduct as unlawful.³⁸⁶

386. Section 12 of the House Bill which eventually formed the basis for the Taft-Hartley Act, H.R. 3020 § 12, 80th Cong., 1st Sess. (1947) *reprinted in* 1 LEG. HIST. LMRA 77-80 (1949), declared certain conduct to be "unlawful concerted activities", including "calling, authorizing, engaging in, or assisting" an "illegal boycott", and further provided for a civil damages action against the "person or persons" responsible for such activity. *Id.* Moreover, that bill amended Section 7 of the NLRA by exempting from the protection of that statute activities "constituting unfair labor practices under Section 8(b), unlawful concerted activities under Section 12, or violations of collective bargaining agreements." *Id.* § 7 *reprinted in* 1 LEG. HIST. LMRA at 49.

The Senate version of Section 12—which as enacted became Section 303 of Taft-Hartley and which, as enacted, duplicated Section 8(b)(4), including the proviso to Section 8(b)(4)—was amended on the floor of the Senate to substitute the term "labor organization" for the term "person" as the party to be sued for damages. That amendment was expressly grounded on the proposition that individual employees should not be subject to civil liability. 93 CONG. REC. 5041-42 (1947) *reprinted in* 2 LEG. HIST. LMRA 1356-59 (1948).

In the Conference Committee, the House amendment to Section 7 and Section 12 of the House bill were rejected in favor of the provisions of the Senate bill. *House Conference Rep.* No. 510, 38-40, 58-59 (1947) *reprinted in* 1 LEG. HIST. LMRA 542-44, 562-63 (1948). The basis for that rejection was, however, not a rejection of the notion that individual conduct of the sort rendered unprotected by the House version of the legislation should be treated as protected. It was, rather, that a statutory declaration of non-protection had been rendered unnecessary by Board decisions:

The first change in section 7 of the act made by the House bill was inserted by reason of early decisions of the Board to the effect that the language of section 7 protected concerted activities regardless of their nature or objectives. An outstanding decision of this sort was the one involving a "sit down" strike wherein the Board ordered the reinstatement of employees who engaged in this unlawful activity. Later the Board ordered the reinstatement of certain employees whose concerted activities constituted mutiny. In both of the above instances, however, the decision of the Board was reversed by the Supreme Court. More recently, a decision of the Board ordering the reinstatement of individuals who had engaged in mass picketing was reversed by the Circuit Court of Appeals (*Indiana Desk Co. v. NLRB*, 149 Fed. 2d 987 (1944)).

Thus the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts.

... By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act.

Finally, on a collectivist view of the Section 7 right to honor a picket line, the function of non-protection is influencing a secondary union's conduct by generating risks of non-protection which, it is hoped,

In addition, other provisions of the conference agreement deal with this particular problem in terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the "elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible.

Id. at 38-39 (*Leg. Hist.* at 542-43).

Many of the matters covered in section 12 of the House bill are also covered in the conference agreement in different form, as has been pointed out above in the discussion of section 7 and section 8(b)(1) of the conference agreement. Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10(c). Furthermore, under section 10(k) of the conference agreement, the Board is given authority to apply to the district courts for temporary injunctions restraining alleged unfair labor practices temporarily pending the decision of the Board on the merits.

Id. at 59 (*Leg. Hist.* at 563).

Three points of relevance to the present discussion may be derived from this recitation. First, the Taft-Hartley Congress was well aware of both the doctrine that individual employee misconduct may render that employee unprotected by Section 7 and the notion that participation in an unfair labor practice or participation in a strike in breach of a no-strike clause would render an employee derivatively unprotected. Second, Congress was well aware of the distinction between unlawful in the sense of subject to civil damages remedies and unlawful in the sense of unfair labor practice and non-protection. Third, although Congress made only labor organizations subject to unfair labor practice prohibitions and, in some instances, to civil liability, it appears to have contemplated both non-protection of employees for participation in union induced conduct amounting to an unfair labor practice and non-protection for "unlawful or improper" conduct not induced by a union, but failed to clearly differentiate between these categories of conduct. That failure suggests that individual conduct amounting to secondary activity was viewed as "unlawful or improper" and therefore "unprotected." In short, "[t]he [Conference] Committee . . . opted for a discharge remedy for violations of § 303 by individuals, rather than for the damages remedy that had been proposed by the House." *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 415 (1981).

On these premises, the Section 8(b)(4) proviso's use of the terms "person" and

will influence a union's exercise of that right.³⁸⁷ The rule that a union has no duty to actively discourage secondary activity,³⁸⁸ a rule cited by the Administrative Law Judge as authority for the result in *Gould*, is warranted if one wishes to preserve the efficacy of the "induce or encourage" element of Section 8(b)(4). Absent that rule, the requirement of affirmative union conduct is vitiated for purposes of unfair labor practice exposure.³⁸⁹ But a rule that employees who purport to act "spontaneously" risk non-protection may well cause employees to demand more in the way of direction from their union than occurred in *Gould*. To be sure, the union may have a conflict of interest which causes it to pursue institutional objectives inconsistent with the individual interests of the employees it represents. The conduct of the union in *Gould* makes that point. And if one starts with the premise that Section 7 rights are individual and fundamental, that possibility is a powerful argument against the result advocated here. But that premise and possibility also make a powerful argument both against derivative non-protection in general and against the fortuity with which non-protection is visited upon employees.³⁹⁰ Derivative non-protection is the current state of the law, and non-protection, when made dependent upon the form in which a union communicates, provides no incentive for that union to act responsibly. Indeed, adequately advised unions are likely to exercise the right to honor when not exposed as institutions to substantial risks of Section 8(b)(4) liability and to abdicate, as in *Gould*, where their participation would generate such exposure.

"unlawful" are not incongruent with either the legislative history or the purposes of Section 8(b)(4) and that Section's cousin, Section 303. The proviso is consistent with both because intended to make it clear that secondary union and secondary employee conduct falling within its terms would not be subject to either the unfair labor practice or non-protection remedies Congress assumed would otherwise apply.

387. See *supra* notes 264-69 and accompanying text. Cf. *Truck Drivers Union Local 413 v. NLRB*, 334 F.2d 539, 542-46 (D.C. Cir.), cert. denied, 379 U.S. 916 (1964) (union's attempt to protect employees by means of a picket line clause is permissible under Section 8(e) to the extent picket line contemplated by the clause is primary).

388. *Building and Constr. Trades Council of Los Angeles (Kon Lee Building Co.)*, 162 NLRB 605, 608n09 (1967). Cf. *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979) (in absence of express contractual undertaking, there is no Section 301 Taft-Hartley duty enforceable by damages action imposed on a union to take affirmative steps to stop wildcat strikes). But c.f., e.g. *Gould Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979), cert. denied, 449 U.S. 890 (1981) (Section 8(a)(3) not violated by discharge of union official, but not other employees, for participation in a strike in breach of contract because union officials have greater duties than rank and file in acting consistently with collective bargaining agreements); *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979) (same).

389. And for purposes of Section 303 exposure. 29 U.S.C. § 187 (1976).

390. See Schatzki, *supra* note 8, at 395-402.

The argument assumes, of course, that it is desirable that unions act "responsibly" and that acting responsibly entails obligation—albeit an obligation not enforced by an affirmative declaration that its breach is an unfair labor practice—to control the concerted activity of employees where that activity is inconsistent with the policies of the Act. The assumption is, however, the point: the implication of a characterization of the right to honor as collective is, for Section 8(b)(4) purposes, that its exercise is always collective, and that employees, when they act concertedly, must look to the collective for the preservation of their individual interests.

(B) *Balancing "Employee" Interests In Protected Activity and Employer Interests In Continuity of Operations*

On its face, Section 8(a)(1) requires only an inquiry into whether employer "interference, restraint or coercion" occurred. Employer motive or intent is generally thought irrelevant to this inquiry; adverse effect upon the exercise of Section 7 rights is sufficient for a violation.³⁹¹ But the inquiry under Section 8(a)(1) is not as abbreviated as the statutory language would indicate, for employer conduct adversely affecting the exercise of Section 7 rights may nevertheless be lawful if sufficiently justified by the employer's business interests.³⁹² Business interests may be viewed as forming a kind of legal status quo ante—as either generally protected or generally unregulated by law before the enactment of the Wagner Act.³⁹³ The Section 8(a)(1) analysis proceeds from the assumption that the enactment of Section 7 and Section 8(a)(1) was not intended as a total abrogation of that status quo. The question is accommodation of the status quo and the rights conferred by Section 7—an accommodation generally thought to be derivable through a balancing of interests.

Indeed, analysis of Section 8(a)(1) and of Section 7 may be viewed

391. NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964); Norten Concrete Co., 249 NLRB 1270 (1980); Caterpillar Tractor Co., 242 NLRB 523 (1979), *enforced*, 638 F.2d 140 (9th Cir. 1981).

392. See, e.g., Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

393. It has been suggested that the Labor Act should be viewed as requiring the recognition of employer rights. Barron, *A Theory of Protected Employer Rights: A Revisionist Analysis of the Supreme Court's Interpretation of the National Labor Relations Act*, 59 TEX. L. REV. 421 (1981). Although there are examples of specifically recognized employer "rights" in the legislation, e.g., Section 8c, 29 U.S.C. § 158(c) (1976), the Court's interpretations of the Labor Act are in my view best seen not as recognizing an express grant of rights to employers but as assuming antecedent employer rights and inquiring into the extent to which those "rights" have been limited by the statute.

as entailing in fact two distinct balancing processes. The "protected" characterization is itself the product of a balancing of the conflicting interests of employees, employers and society in the sense that some economic weapons are so disruptive that their use is deemed unprotected.³⁹⁴ And a violation of Section 8(a)(1) turns on a balancing of interests in the sense that an employer's interest in property³⁹⁵ or production and the continuity of production³⁹⁶ are accommodated. But, as Professor Haggard has pointed out,³⁹⁷ the Section 8(a)(1) balance is normally conducted in terms of the generalized interests of employers writ large.³⁹⁸ That balance generates general rules rebuttable in a particular case only where it can be shown that the interests of employers as a class assumed by the general rule to be present are in fact not present in that case—a showing normally made by establishing that the employer has discriminated against union activity where both that activity and similar activity not union related threatens assumed employer interests.³⁹⁹

Such is not the case in the context of employee refusals to cross picket lines.⁴⁰⁰ In that context, the Board purports to undertake individualized balancing analyses—to consider employer interests writ small.⁴⁰¹ Balancing writ small has produced an ironic anomaly: an employee who honors a stranger picket line in effect receives a greater

394. See, e.g., *NLRB v. Local 1229, Int'l Bhd. of Electrical Workers*, 346 U.S. 464 (1953); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

395. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

396. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

397. Haggard, *Observance*, *supra* note 8, at 86-93.

398. *Id.* See also Brousseau, *supra* note 4, at 43 n.189.

399. See P. Cox, *supra* note 5, at 170-76.

400. See *Southern Cal. Edison Co.*, 243 NLRB 372 (1979), *enforced*, 646 F.2d 1352 (9th Cir. 1981); *Torrington Const. Co.*, 235 NLRB 1540 (1978); *Newbery Energy Co.*, 227 NLRB 436 (1976).

401. Haggard, *Observance*, *supra* note 8, at 83-93. See, e.g., *Overnite Transp. Co.*, 154 NLRB 1271 (1965), *enforced in part sub nom.*, *Truck Drivers Local 728 v. NLRB*, 364 F.2d 682 (D.C. Cir. 1966); *Redwing Carriers, Inc. and Rockana Carriers, Inc.*, 137 NLRB 1545 (1962), *enforced sub nom.*, *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964). It is, however, possible to describe the Board's insistence upon balancing particular employer interests against the generalized interests of employees in honoring picket lines as in fact a mere reversal of the more generalized process at work in other Section 8(a)(1) contexts: The employees' interest is presumed to be ascendant and the general interest of employers as a class in continuity of operations will be treated as overcoming that presumption only where a particular employer can establish peculiar circumstances in which the threat to that employer's interest in continuity of operations is uniquely harmful. See *G & P Trucking Co.*, 216 NLRB 620 (1975), *enforcement denied*, 539 F.2d 705 (4th Cir. 1976).

degree of Section 7 protection than an employee who participates in primary economic strike against his employer.⁴⁰² A striking employee may be temporarily or permanently replaced,⁴⁰³ and although such an employee has reinstatement rights, they are exercisable only upon the departure of permanent replacements.⁴⁰⁴ By contrast, an honoring employee may be "permanently replaced" or "discharged"⁴⁰⁵ only if the balance of interests in a particular case favor the employer.⁴⁰⁶ Actual replacement of the honoring employee is only one factor in striking that balance.⁴⁰⁷

What distinguishes the replacement rules applicable in a primary strike from the replacement rules applicable in a picket line case is that the honoring of a picket line is a partial strike. The employer faced with such a partial strike does not, where actual replacement is a mere factor in a balancing test, have the clear privilege to insist that the honoring employee either cease all work for the employer (strike) or perform all that the employer requires (cross the picket line). That insistence is precisely the employer's privilege in the strike context, for there the presumption favoring the employer privilege of permanent replacement is a general rule arguably the product of a balancing analysis conducted writ large.⁴⁰⁸

Although the Board's balancing analysis is explicable as the position it was forced to take in response to Supreme Court dictum disapproving of the strike/replacement analogy in the picket line context,⁴⁰⁹

402. Southern Cal. Edison Co., 243 NLRB No. 62 (1979), *enforced*, 646 F.2d 1352 (9th Cir. 1981); Schatzki, *supra* note 8, at 393. See Carney & Florsheim, *supra* note 8, at 969-70.

403. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

404. Laidlaw Corp., 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

405. See NLRB v. Rockaway News Supply Co., 345 U.S. 71, 75 (1953). The Board has recently insisted that only replacement, not discharge, is permissible in the stranger picket line context, and that the full panalogy of reinstatement rights are applicable in such a context. See Torrington Constr. Co., 235 NLRB 1540 (1978). Torrington appears, however, to retain the balancing writ small test for invoking the employer's replacement right. *Id.* See Southern Cal. Edison Co., 243 NLRB 372 (1979), *enforced*, 646 F.2d 1352 (9th Cir. 1981).

406. See Redwing Carriers, Inc., 137 NLRB 1545 (1962), *enforced sub nom.*, Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

407. G & P Trucking Co., 216 NLRB 620, 624 (1975), *enforcement denied*, 539 F.2d 705 (4th Cir. 1976).

408. See Schatzki, *supra* note 8, at 382-92. See also P. Cox, *supra* note 5, at 202, 259 n.382.

409. NLRB v. Rockaway News Supply Co., 345 U.S. 71, 75 (1953). See also NLRB v. L.G. Everist, Inc., 334 F.2d 312 (8th Cir. 1964).

there are two substantial difficulties with that analysis. First, the Board starts with the premise that the employee's right at stake is individual and fundamental.⁴¹⁰ That premise is perhaps understandable given that the Board is faced with a precept of union ethics it is at best difficult to ignore.⁴¹¹ But a balancing analysis which starts with that premise starts automatically with a bias in favor of "individual rights" which assigns too great a weight on that side of the scales.⁴¹²

Second, the erroneous notion that the right to honor is individual generates a failure to accurately analyze the nature both of the employer's interest in continuity of operations and of the collective interests of employees at stake in the act of honoring. The act of honoring a stranger picket line is an act of economic coercion directed at a stranger employer, but the "incidental" effects of that coercion befall the honoring employee's employer. At stake from the point of view of labor policy is the efficacy of the primary strike as a weapon, but the honoring employee's employer is not a legitimate target of that weapon. At stake from the standpoint of the collective consisting of the honoring employee and his fellows is, by the terms of mutual-ity theory, long term and relatively remote gain. That gain lacks, on the employee side of the scales, the immediacy which justifies the use of economic warfare in a primary dispute⁴¹³ and although the employer cannot be said to be wholly indifferent to the possibility of that employee gain, the gain is not, on the employer side of the scales, gain the employer has power to confer.⁴¹⁴ Balancing writ small by the Board ignores these dimensions of the problem by treating the right to honor as individual and inviolable absent a showing of business necessity—a necessity measured by the Board's judgment in individual cases of the employer's ability to withstand the disruption generated by a refusal to cross.⁴¹⁵ Such a balancing misconceives

410. See *supra* note 118.

411. See Schatzki, *supra* note 8, at 393.

412. See P. Cox, *supra* note 5, at 251-64.

413. Cf. *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922) (local versus non-local union motives in pre-Labor Act applications of antitrust laws); *Duplex Printing Co. v. Deering*, 254 U.S. 443 (1921) (Clayton Act exemption of labor from Sherman Act applicable only to cases of disputes between employer and employee in relationship of employer and employee); *Loewe v. Lawlor*, 208 U.S. 274 (1908) (in effect, primary strike is lawful and secondary boycott is unlawful). It is not my purpose by these citations to suggest a return to the good old days. The purpose, rather, is to suggest that the notion of proximity has a long history which was not clearly overruled in toto by the Labor Act.

414. See *supra* notes 222-25 and accompanying text.

415. Thus, the Board focuses on such matters as the availability of other employees to do the work, and the percentage of the employers' work done by sym-

the problem by treating the employee interest at stake as a primary value to be overcome only in extreme circumstances.⁴¹⁶ It is instead the collective's interest in long term power and economic gain distinguishable from the collective interest underlying other economic weapons only by the remoteness of the gain and the employer's relative neutrality. Not the least troublesome of the consequences of that misconception is the employer's inability to predict the legal consequences of its response to the honoring of stranger picket lines.⁴¹⁷

The balancing writ small analysis was adopted in response to Supreme Court disapproval of the Board's initial notion that the striker replacement rule should be applied in picket line cases. The replacement rule, if replacement is presumptively lawful, in effect requires the employer to offer the honoring employee the option of either performing all tasks assigned (i.e., of crossing the stranger picket line) or of engaging in a full strike (i.e., of replacement).⁴¹⁸ The rule was criticized by the Court as a misapplication of the strike analogy in a distinguishable circumstance.⁴¹⁹ The stranger picket line case is sufficiently distinct from the primary strike case to make the analogy strained. In addition to the distinctions previously noted, the employer in the stranger picket line case may be expected to have less difficulty in obtaining a replacement for a single or a few honoring employees than it would encounter in replacing an entire striking workforce.⁴²⁰

But the presumptive lawfulness of replacement in the stranger picket line context need not be viewed as the unthinking application of a rule designed for other circumstances. Three considerations commend its application. First, the replacement rule is a rule of accommodation of general interests—the interests of employees and employers writ large—founded on the assumption that the problem it resolves is a problem of contending economic collectivities,⁴²¹ not

pathy strikers. See *G & P Trucking Co.*, 216 NLRB 620 (1976), *enforcement denied*, 539 F.2d 705 (4th Cir. 1976).

416. See Rubin, *supra* note 8, at 433; Getman, *supra* note 8, at 1226-30; Harper, *supra* note 8, at 372-80.

417. See Carney & Florsheim, *supra* note 8, at 959; Haggard, *Observance*, *supra* note 8, at 86.

418. See Rockaway News Supply Co., 95 NLRB 336, (1951), *enforcement denied*, 197 F.2d 111 (2d Cir. 1952), *aff'd*, 345 U.S. 71 (1953); Cyril de Cordova & Bros. Constr. Co., 91 NLRB 1121, 1137-38 (1950) (trial examiner).

419. 345 U.S. at 75.

420. Carney & Florsheim, *supra* note 8, at 954.

421. Compare Haggard, *Observance*, *supra* note 8, at 57 n.60 (favoring a firm presumption that replacement is permissible in the strike context) with Mackay, *The Mackay Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782, 795 (1972) (criticizing the presumption); Schatzki, *supra* note 8, at 382-92 (same). Cf. Carney &

a problem of fundamental individual rights. Second, the rule recognizes the fundamental nature of the refusal to cross—a partial strike—without invoking the usual rule that a partial strike is unprotected. It therefore simultaneously recognizes that the act of honoring is characterized by only one of the twin evils inherent in the partial strike: it makes an employer response to the strike difficult,⁴²² but it does not have as its objective the high degree of coercive leverage that difficulty implies.⁴²³ Third, the rule places the decision to honor or to not honor where it belongs—in the hands of the honoring employee's union.

The last statement may seem odd given that the rule requires the employer to give the honoring employee a choice before replacing that employee, but that choice is only superficially individual. If the employee is a union member (a likelihood if he has honored or intends to honor a stranger picket line) he is subject to the possibility of a discipline which effectively makes his choice his union's choice.⁴²⁴ The employee is therefore likely to refer to the contemporaneous or antecedent position of his exclusive representative on the matter, and the exclusive representative is likely to be forced by employee pressure to take a formal or informal position. If it fails to do so, it is furthermore likely that the threat of replacement will dissuade individual refusals—a result consistent with the proposition that it is the collective's right to honor or to not honor because the collective has in such circumstances decided that it will not honor. Moreover, the rule places the choice, antecedently, in the hands of the union and the employer at the bargaining table where resolution of the question of the employer's future response properly may be made the subject of trade offs which reflect the relative strength of the parties and the relative importance of the issue to the parties.⁴²⁵

Florsheim, *supra* note 8, at 969-70 (focusing on economic interests, but in a manner inconsistent with the premise that the right to honor is not individual).

422. See *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946); *Cyril de Cordova & Bros. Constr. Co.*, 91 NLRB 1121, 1137-38 (1950) (trial examiner). *Cf.* *United Auto Workers v. Wisconsin Employee Relations Board*, 336 U.S. 245, 264 (1949) (quickie strike disables management from self-help). Professor Archibald Cox at one time found merit in the NLRB's original approach to the problem of quickie strikes and partial strikes, to treat such activity as protected but to permit the employer to exclude employees "until they offered to obey his instructions while they were on the job." A. Cox, *supra* note 121, at 339, citing *Mt. Clemons Pottery Co.*, 46 NLRB 714, 716 (1943), *enforcement denied*, 147 F.2d 262 (6th Cir. 1945).

423. See Getman, *supra* note 8, at 1226 n.133 (arguing that reasons for finding partial strikes unprotected are not applicable in this context).

424. See *supra* notes 156-76 and accompanying text.

425. See generally Note, *Picket Line Observance*, *supra* note 8.

Bargaining table resolution again places choice in the hands of the parties who in fact are the repositories of the interests at stake—the employer and the collective represented by the union—and removes that choice from a Board exercising decision in individual cases in the guise of preserving an individual right.

CONCLUSION

The Supreme Court has said that “[Section 7 rights] are, for the most part, collective rights to act in concert with one’s fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife by encouraging the practice and procedure of collective bargaining.”⁴²⁶ The argument here has been that the Section 7 right to engage in concerted activity for “other mutual aid or protection” is, like the right to engage in such activity “for the purpose of collective bargaining,” a collective right. But the Supreme Court’s notion that Section 7’s collective rights are granted for instrumental reasons contains an ambiguity which may constitute the source of the individual right conception of an employee’s refusal to cross a picket line.

The ambiguity is that Section 7’s instrumentalism may be viewed either as licensing collective action and providing a measure of statutory protection from employer interference with that action or as authorizing administrative and judicial interpretation of Section 7 to serve, instrumentally, an administrative and judicial perception of appropriate “labor policy.”⁴²⁷ The first view interprets Section 7’s function as instrumental, but the instrument by which ultimate statutory ends are to be accomplished is to grant the collective both a measure of legal protection and an autonomy with which the collective is to pursue its self-generated ends. Both labor peace and industrial democracy are, in short, to be achieved by means of a conflict between interests represented by autonomous collections of economic power with only limited intrusion by government.

The second view treats Section 7 protection as instrumental as well, but the instrumental conception is quite different: Administrative or judicial recognition of a Section 7 right to protection in any given circumstance is a matter of the efficacy of the right in furthering authoritatively perceived labor policy in that circumstance. Under such a view, a union’s autonomy will be recognized only to the extent that

426. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975) (citing 29 U.S.C. § 151).

427. *See supra* notes 150-56 and accompanying text.

autonomy furthers desirable ends.⁴²⁸ And individual rights will be recognized to the extent that such a recognition furthers such ends.⁴²⁹ The result is a conceptual separation of union and individual employee in the analysis adopted. In the present context, separation is illustrated by the rule that an individual employee's sympathetic work stoppage may be protected under Section 7 where his union's inducement of such a stoppage would, if established, be prohibited and would, if established, render the employee unprotected.⁴³⁰ It is illustrated as well by the rule that, although an individual employee's refusal to cross a picket line is generally protected because viewed as activity seeking shared benefit or reciprocal power, that employee's union may not seek such ends independently of a primary picket line.⁴³¹ It is illustrated, finally, by the anomalous notions that the neutral employer's interest in continued operation is to be balanced on an ad hoc basis against an individual right when an individual honors a stranger picket line,⁴³² but that individual's union may impose internal discipline for crossing such a line.⁴³³

It is apparent that neither of these views has gained complete ascendancy. The second view arises from a perhaps commendable desire to protect individuals from the harshness of a collective right scheme and to therefore more directly and immediately achieve the dignity and freedom for individual workers which is the ultimate objective of such a scheme.⁴³⁴ It has been the contention here, however, that the first view more closely comports with the means congress selected to achieve those ends—individual dignity is to be achieved (whether or not it can be so achieved) by licensing collective power.⁴³⁵

428. See *supra* notes 151-56 and accompanying text.

429. See Gorman & Finkin, *supra* note 71, at 344-34, 355-37.

430. Gould Inc. v. NLRB, 638 F.2d 159 (10th Cir. 1980), *cert. denied*, 452 U.S. 930 (1981), discussed here *supra* notes 366-91 and accompanying text.

431. Grain Elevator Workers, Local 418 (Continental Grain Co.), 155 NLRB 402 (1965), *enfd.*, 376 F.2d 774 (D.C. Cir. 1967), discussed *supra* notes 325-58 and accompanying text.

432. See *supra* notes 391-425 and accompanying text.

433. See *supra* notes 156-76 and accompanying text.

434. See Gorman & Finkin, *supra* note 71, at 344. The point is perhaps best illustrated by the facts that Professors Gorman and Finkin wish to provide Section 7 protection most particularly against discharges of employees merely for making complaints, *id.* at 356, and that they are willing to at least generally permit Board deferral to arbitration in individual protest cases, *id.* at 357, while expressing some reservation about union willingness to press grievances in such cases. *Id.* at 358. These points suggest that Professor Gorman's and Finkin's underlying concern is that the collective system has failed in its ultimate task of preserving the individual; a more direct government intervention for that end is necessary.

435. *Contra: Id.* at 339-46 (urging a non-literal interpretation of the concerted element of Section 7).

Whichever view is the preferable view, it seems clear that they are incompatible and that the incompatibility has generated a quagmire of complexity which serves neither unions, employers nor individual employees.

