

THE INDIVIDUAL AND THE REQUIREMENT
OF "CONCERT" UNDER THE NATIONAL
LABOR RELATIONS ACT

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INTRODUCTION

An employee working for a nonunion company complains each payday to the personnel manager that his job requires more skill than that of other employees being paid the same hourly rate, and that he therefore should be paid a differential. After hearing this complaint once too often, the personnel manager discharges the employee for his "uncooperative attitude." Another nonunion company gives the same reason for discharging an employee who complains, in an openly posted letter to management, that she has been improperly denied a promotion to which she is entitled by virtue of seniority, traditionally taken into account by the employer in awarding promotions. Another company suspends an employee for complaining frequently about dirty washroom facilities or for refusing to drive a truck in which defective fuses prevent the operation of the tail-lights. In a unionized company with a collective bargaining agreement, a black employee asserts to his foreman and plant manager that he has been consistently assigned menial work in violation of the nondiscrimination clause of the agreement. He presses this claim himself in the belief that the union has not effectively enough represented black employees in the unit. He also files a claim with the Equal Employment Opportunity Commission against the company and the union. He is promptly discharged and is also stripped of his union membership.

In these cases, the disciplined employee may decide to seek redress not through a union or a labor contract—there may be doubts about the union's effectiveness or commitment, or there may be no union in the plant at all—but rather by filing a charge with the National Labor Relations Board (NLRB or Board). The charge may allege a violation of section 8(a)(1) of the National Labor Relations Act (NLRA or Act): "It shall be an unfair labor

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practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7";¹ or of section 8(b)(1)(a): "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7."² Although the language of section 7 deals primarily with employee rights to aid or be represented by a labor organization (and that right is not being restrained in the above instances), it also gives employees the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."³

The company or union will likely defend on the ground that the disciplined employee was not engaging in activity that was "concerted"; nor was the desired end "mutual aid or protection." Rather, it will be argued that the employee was voicing only a "personal gripe" solely on his or her own behalf and not as part of a group protest which is all that is protected by section 7.⁴ The employee, on the other hand, will contend that he or she was complaining about an issue of "wages, hours or working conditions," which—whether or not a part of a larger group complaint—should be protected under sections 7 and 8 against employer or union reprisal.

The purpose of this Article is to assess the relative merits of these two positions. When, if ever, can a complaint, demonstration, or work stoppage by an individual employee fall within the shelter of section 7 so that discipline by either the employer or the union will constitute an unfair labor practice?

This issue is becoming increasingly significant in today's workplace. Roughly three-quarters of the workers in America today are not union members.⁵ Although many unorganized employees fall

¹ National Labor Relations Act, ch. 372, § 8(a)(1), 49 Stat. 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(1) (1976)).

² *Id.* § 158(b)(1)(a).

³ *Id.* § 157.

⁴ *Id.* Often, this defense will be joined with an assertion that, however the individual conduct is characterized for the purposes of § 7, it was nonetheless a manifestation of "insubordination," "poor attitude," or "lack of cooperation." These are classic examples of charges which, if sustained, constitute "just cause" for discipline.

⁵ See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 429 table 714 (101st ed. 1980) [hereinafter cited as STATISTICAL ABSTRACT]. This shows that the total number of employed persons in the civilian workforce during 1978 (the last year for which complete data are available) was 102.5 million. Of these, 21.78 million were union members. *Id.* 394 table 652.

outside the coverage of the NLRA,⁶ it is safe to assume that at least half of the workers covered by the NLRA are not represented by a union.⁷ Federal and state statutes offer some protection to these workers when they complain about, or file charges regarding, specific matters such as race discrimination or safety and health violations.⁸ But their only protection against discipline for most work-related complaints will lie with the National Labor Relations Board. With the decline in the percentage and numbers of organized workers in the private sector over the past two decades, the NLRB appears increasingly to have become a source of protection against discipline in the absence of collective bargaining agreements and grievance procedures.

Even in cases where there is union representation and a collective bargaining agreement, there appear to be a greater number of instances in which individuals in the bargaining unit choose to press by themselves complaints about the workplace, sometimes because the union has decided not to invoke the contractual grievance procedure and sometimes because the individual is skeptical regarding the extent of support the union will offer. Perhaps another reason for the increase in these kinds of cases before the NLRB is that individual workers are becoming increasingly sensitive to the fact that many working conditions can be directly challenged as statutory violations, so that complaints about safety and

⁶ 29 U.S.C. § 152(3) (1976). Most notably, public employees and agricultural workers are not covered.

⁷ Only 23.6 percent of nonagricultural employees were union members in 1976. See STATISTICAL ABSTRACT, *supra* note 5, at 429 table 715.

⁸ For example, the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 8(c), 86 Stat. 109 (codified at 42 U.S.C. § 2000e-3(a) (1976)), deals with discrimination on the basis of race, sex, national origin, and religion, and provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 11, 89 Stat. 1590 (codified at 29 U.S.C. § 660(c)(1) (1976)), provides:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

See also 29 U.S.C. § 623(d) (1976) (Age Discrimination in Employment Act).

health matters or about race and sex discrimination are asserted not as violations of collective agreements but as violations of public law for which the worker tends to think of individual redress through government agencies.

In determining whether such individual complaints fall within the protection of section 7, so that employer reprisals will be sharply limited by federal law, the Board has through a number of fictions developed a theory of "constructive concerted activity" as a means of accommodating the language of the statute. Although some courts of appeals have been hospitable to such a theory, most have squarely rejected it, relying upon the "plain meaning" of section 7. This Article first traces the NLRB and court decisions and then attempts to demonstrate that a wider range of protection for individual complaints about wages, hours, and working conditions would better accord with the fundamental purposes and history of the National Labor Relations Act and would be fully consistent with Board and court decisions on related questions arising under the Act.

I. THE LAW OF INDIVIDUAL ACTION

A. "Concerted Activity" or "Personal Gripe"

In order to prove an NLRA violation for discipline of an individual employee for making a work-related complaint, it must be demonstrated that the employee was engaged in a "concerted activity for the purpose of . . . mutual aid or protection." This protected purpose is understood to be roughly equivalent to the goal of affecting "terms and conditions of employment," a phrase which is found at several vital points in the National Labor Relations Act.⁹ The "mutual aid or protection" clause was recently given just such a broad construction by the United States Supreme Court.¹⁰ In all of the not quite hypothetical cases mentioned at the outset of this Article, and in the decided cases generally, there is little question that the purpose of the employee's protest is the improvement of terms or conditions of employment—whether wages, promotions, health and safety, or race and sex discrimination in

⁹ See, e.g., 29 U.S.C. §§ 151, 152(9), 158(d), 159(a) (1976).

¹⁰ *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). The Court held that the phrase "terms and conditions of employment" embraced union leafleting urging employees to protest incorporation of a state "right to work" statute into the state constitution and a presidential veto of an increase in the federal minimum wage. In the course of its decision, the Court equated activity for "mutual aid or protection" with activity "to improve terms and conditions of employment or otherwise improve [the] lot" of the employees. *Id.* 564-68.

work assignments. If these protests were lodged by two employees, their action would have been "concerted" and therefore protected against discipline. Indeed, if two employees agreed to lodge a protest and to designate one of them to speak to management alone, for himself as well as on behalf of the more timid co-worker, the spokesman would also be deemed to have engaged in concerted activity, immune from disciplinary reprisal.¹¹ Yet when an individual employee protests alone, without any consultation with and authorization by fellow employees, his legal rights under section 7 may be drastically curtailed, even when he purports to voice the concerns of others but especially when he is speaking only for himself in lodging a protest regarding working conditions affecting him alone.

The prevailing principle of law—endorsed both by the courts of appeals and the NLRB—is that section 7 does not protect "personal gripes" by individual employees. If an individual complains to management about working conditions affecting him alone, this will be treated as individual rather than concerted activity, and the employee will not be protected against discharge.¹²

For example, in *Ryder Tank Lines, Inc.*,¹³ an employee was discharged for appealing to higher management regarding an alleged shortage in the pay he received for driving on a particular trip. The Board found this to be a "purely personal"¹⁴ complaint and not protected concerted activity. The discharge was therefore lawful. In *Tabernacle Community Hospital & Health Center*,¹⁵ an employee working in the business department sought to transfer to the data processing department. The head of the business department apparently began to harass her, and she wrote a letter to higher management protesting this treatment. Although there was no union representing the workers in her department, the

¹¹ *Hitchner Mfg. Co.*, 238 N.L.R.B. 1253 (1979); *Wilson Freight Co.*, 234 N.L.R.B. 844 (1978) (shop steward), *enforcement denied*, 604 F.2d 712 (1st Cir. 1979); *The Barnsider, Inc.*, 195 N.L.R.B. 754 (1972). Cf. *Mason & Hanger-Silas Mason Co.*, 179 N.L.R.B. 434 (1969) (refusal to hire on account of concerted activity; applicant was spokesman for himself and another).

¹² This rule applies unless employees are protected by other statutes against employer reprisals. For example, workers who have filed charges of race or sex discrimination with the Equal Employment Opportunity Commission cannot be discharged for this reason.

¹³ 135 N.L.R.B. 936, *enforcement denied on other grounds*, 310 F.2d 233 (5th Cir. 1962).

¹⁴ *Id.* 938.

¹⁵ 233 N.L.R.B. 1425 (1977).

hospital had distributed a detailed employee handbook. The letter of protest adverted to passages in the handbook providing that job opportunities would be given to company employees in preference to applicants from outside of the hospital, and announced the employee's intention to utilize the grievance procedure outlined in the employee handbook. For this she was discharged, and the Board found that no unfair labor practice had been committed because her complaint was "purely personal."¹⁶ The Board reasoned that no other employees were involved in the matter protested, and that no other employees would have benefited from the employee's pursuit of her claim.

The Board has also found an unprotected "personal gripe" when other employees have actually disclaimed a protest or when the individual complainant is found to have been motivated by personal animosity or malice.¹⁷

In a number of these "individual protest" cases, particularly those decided some years ago, the Board or a court has held it against the employee that there was a collective bargaining agreement in existence affording an orderly grievance procedure for employee complaints. In *R.J. Tower Iron Works*,¹⁸ for example, an employee—characterized by the Board as argumentative and troublesome—frequently pressed complaints to his supervisor, for

¹⁶ *Id.* 1429.

¹⁷ The disclaimed-protest issue arose in *Del E. Webb Realty & Mgmt. Co.*, 216 N.L.R.B. 593 (1975). The employer modified the work schedule so that the employees had to work an additional half hour, but without additional pay. Not surprisingly, this evoked complaints from the employees. One of them decided to draft a letter of protest, and got ideas from other employees about the contents of such a letter. Soon, however, the others decided not to sign or send the letter; the employee nonetheless decided to write the letter on his own, speaking in the first person but anonymously. Another employee typed it for him, but said that he did not want his name mentioned and did not want anything to do with the letter. When the letter-writer's identity became known to management, he told several supervisors that he had acted alone and not on behalf of any other employees. He was discharged, and the Board found no unfair labor practice because the letter was not a concerted activity.

The case could surely have been decided the other way, given the obvious pertinence of the complaint (an unpaid additional half-hour of work) to all of the employees, and their participation in contributing ideas to the individual author. It is questionable how much weight the Board should have given to the general disclaimers of participation by other employees, because these may have been motivated to some degree by fear of reprisal. Such a reprisal would, of course, have been unlawful were the letter subscribed to by all of the aggrieved employees.

In cases involving personal animosity or malice toward a supervisor, the Board has concluded that the employee's protest is merely a personal gripe. See *NLRB v. Lenkurt Electric Co.*, 459 F.2d 635, 638 (9th Cir. 1972) (dictum). Cf. *Northern Motor Carriers, Inc.*, 130 N.L.R.B. 261 (1961) (discharge valid when employer discovered history of employee malice toward prior employer).

¹⁸ 144 N.L.R.B. 445 (1963).

which he was discharged. The Board held the discharge to be lawful because the complaints were "purely personal."¹⁹ The Board also observed that the existing collective bargaining agreement provided for the submission of written grievances to the foreman as a means of invoking the contractual grievance procedure; by adverting to the fact that the discharged employee had not attempted to utilize this procedure, the Board was obviously suggesting that there was less statutory protection for organized individual grievants than for grievants in nonunion companies. Yet this suggestion appears contrary to the proviso to section 9(a) of the NLRA, giving individual employees represented by exclusive bargaining agents the right to present grievances to the employer on an individual basis.²⁰

The Board has also applied the "individual gripe" analysis to cases in which a union has imposed discipline on a member for engaging in conduct which arguably is not protected concerted activity. In *Local 5795, Communications Workers of America*,²¹ an employee found an empty liquor bottle in the plant during the

¹⁹ *Id.* 446 n.1.

²⁰ The relevant part of § 9(a) states:

"Provided, [t]hat 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 . . ."

29 U.S.C. § 159(2) (1976).

The Board continues to mention the fact that a disciplined employee has made his or her protest without resorting to the grievance procedure as one of several factors which point toward declaring the conduct unprotected. In *Anco Insulations, Inc.*, 247 N.L.R.B. No. 81 (1980), a lawfully discharged employee picketed briefly, protesting his discharge, and turned away workers; when he was later referred to the same employer for a new job, he was not rehired, because of the picketing incident. The Board held that his picketing was not concerted activity, and listed a number of pertinent factors: his picket sign protested only his discharge and not issues of more common concern such as safety; he undertook the picketing without the prior support of other employees, without union approval, without use of the contractual grievance procedure, and without regard to the contractual no-strike clause, and it did not "inure to the benefit of fellow employees." *Id.* 4-5. The Board expressed its concern that any employee thinking he has received unfair treatment might resort to picketing to disrupt his employer's business, regardless of the grounds for the discharge. *Id.* 5.

The *Anco* decision is difficult to square with other decisions in which an employee is deemed to be engaged in concerted activity when he or she circulates a letter or petition among fellow workers urging group action, e.g., *NLRB v. Empire Gas Co.*, 566 F.2d 681 (10th Cir. 1977), or is merely engaged in a conversation with another about working conditions, e.g., *Datapoint Corp.*, 246 N.L.R.B. 234 (1979). Moreover, the Board does not clearly state why disregard of the grievance procedure makes the protest "unconcerted" as opposed to simply unprotected.

²¹ 192 N.L.R.B. 556 (1979).

workday. Apparently in order to avoid discipline for violation of company rules, the employee reported the true owner of the bottle, whom the company promptly disciplined. The union imposed a fine of \$500 upon the reporting employee who was also a member of the union. The Board acknowledged that the fine could coerce and discourage employees from reporting company rule violations, but it held that on the facts of the case the fine did not interfere with a concerted activity. The Board reasoned that the fine did not inhibit organizing or collective bargaining activities by the employees, and the employee's "reporting activities were not concerted, but rather initiated and executed solely by herself."²² The Board also found that the union had a legitimate interest in preventing injury to its members, even when the injury was an apparently deserved discipline for violation of a company rule against drinking alcohol on plant premises.²³

In short, in most "personal gripe" cases the Board's conclusion rests upon the coincidence of several facts. The employee's action is taken completely alone and without advance planning or discussion with other employees, the employee's motive is simply to advance his or her own personal self-interest, and favorable resolution of the complaint will not likely improve other employees' working conditions.²⁴

B. *The Board's Theory of "Constructive Concert"*

1. Non-union Employees

In cases involving mutual consultations, where a group of employees designate one of their number as spokesman, the Board has ruled that the spokesman cannot be discharged for voicing the group's concerns, even though that person "acts alone" in speaking to management.²⁵ But the Board regularly goes further, and treats as protected "concerted" activity protests by individual employees undertaken without consultation with co-workers and without plans for joint action.

²² *Id.* 557.

²³ *Id.*

²⁴ Regrettably, the Board has not been altogether consistent in applying these criteria. It has found a "personal gripe" in a number of cases in which the record would surely have permitted an inference that the complaint was concerted and protected. See, e.g., *Continental Mfg. Co.*, 155 N.L.R.B. 255 (1965), discussed at *infra* note 37 and accompanying text. Most courts have been even less hospitable. See, e.g., *NLRB v. Gibbs Corp.*, 284 F.2d 403 (5th Cir. 1960) (refusing to enforce NLRB order), discussed at *infra* note 41.

²⁵ *NLRB v. Guernsey-Muskingum Elec. Co-op., Inc.*, 285 F.2d 8 (6th Cir. 1960). See cases cited in *supra* note 11.

Thus, even if there is no authorization or designation to speak on behalf of the group, an individual employee will be protected against discipline for complaining about any condition of employment which is "of moment" or a "matter of concern" to other employees. Frequently, the Board finds that an issue is a "matter of concern" to the collectivity because the employees express discontent to one another. Even absent such discussions, however, the Board has found the complaint to be of "mutual concern" because the disputed working condition is one which in fact affects other workers. Although the Board commonly states in these cases that the employee's activity is "concerted" because he or she is speaking "on behalf of" or "for the benefit of" fellow employees, this cannot be intended to mean that the employee was actually designated so to speak but merely that the subject of his or her complaint is a matter which can affect other employees as well.

A relatively early case, in which the Board's reinstatement order was enforced by a court of appeals, shows how a finding of protected "concerted" activity can be justified on a number of different theories. In *Guernsey-Muskingum Electric Co-operative, Inc.*,²⁶ a group of nonunion employees were unhappy about the appointment of an inexperienced foreman from outside of the workforce; their concern was both that he was not selected from within and that his inexperience would adversely affect their own work. Thus, their concern related to their working conditions and promotional opportunities, both clearly "terms or conditions of employment." Three employees had complained to one another, and each went to management individually to relay their complaint. Despite the fact that these visits were made without any coordination, and that none of the three expressly claimed to be a spokesman for any other employees, the Board found the discharge of one of the three to be a violation of section 8(a)(1).²⁷ It mattered not that the discharged employee was not formally designated as spokesman for other workers.

It is enough if the matter at issue is of moment to the group of employees complaining and if that matter is

²⁶ 124 N.L.R.B. 618 (1959), *enforced*, 285 F.2d 8 (6th Cir. 1960).

²⁷ The Board also held that the discharge violated § 8(a)(3), but the court of appeals disagreed because that section requires proof of anti-union animus and there was no union involved in the case. The court found the Board's reinstatement order to be unaffected, because it could be sustained under § 8(a)(1).

brought to the attention of management by a spokesman, voluntary or appointed for that purpose, so long as such person is speaking for the benefit of the interested group.²⁸

The court of appeals enforced the Board's reinstatement order, but on a narrower theory. It found a "concert of action" because the court read the record to indicate that the three employees had actually decided among themselves to take up separately with management the issue of the unwanted foreman.

*Diagnostic Center Hospital Corp.*²⁹ makes it clear that the Board's conclusion that an employee is acting "on behalf of" his co-workers (and is therefore engaging in protected concerted activity) may rest simply on a finding that other employees had previously spoken critically about the matter among themselves. In that case, an employee was discharged after writing a letter protesting inadequate salaries, a subject about which employees had manifested concern. No unfair labor practice was found, because the Board concluded that the discharge was for cause and not on account of the letter. The Board, however, did state that the writing of the letter was a concerted activity, even though the employee who wrote it was not designated as spokesman by other employees and did not even tell the other employees that she was writing it. The Board observed that other employees shared her concern about the salaries and that she was therefore "acting concertedly on behalf of her fellow employees."³⁰ The Board endorsed the view of earlier cases that activity is to be deemed concerted if it relates to a matter of common concern.³¹

In *St. Joseph's High School*,³² the Board further extended this reasoning. A lay teacher was discharged for circulating a critical report about the school shortly before a visit by an accreditation

²⁸ 124 N.L.R.B. at 624. The Board left unclear whether "speaking for the benefit of" meant any more than that the subject was "of moment" to employees other than the complainant.

²⁹ 228 N.L.R.B. 1215 (1977).

³⁰ *Id.* 1216 (dictum).

³¹ Member Walther took issue with the Board majority. It was not enough, he stated, in making out a case of concerted activity, that other employees discussed the matter, and that they shared an interest in the matter, and that they welcomed the employee's letter. He believed it necessary that the individual's action refer to or contemplate group action; therefore, he believed that the letter-writing employee was merely airing a personal gripe.

³² 236 N.L.R.B. 1623 (1978), *vacated on other grounds*, 248 N.L.R.B. 901 (1980).

team. Although there was no evidence that any other employees knew of the report or endorsed its circulation, or endorsed the specific views articulated therein, the Board found the circulation of the report to be protected concerted activity, and the discharge to violate section 8(a)(1). The report, which dealt with such matters as salary scale and labor relations problems, "could only be interpreted as involving concerns of all of the lay faculty"; the respondent school was fully aware of the "continuing unsatisfied concerns" expressed by the employees.³³

In several cases, in which the Board determined that the complained-of working condition was "of moment" or "of mutual concern" to other employees, it looked not only at employee expressions of concern but also, and indeed principally, at the fact that the employer's rectifying of the working condition would have the effect of improving the lot of other employees. In *Oklahoma Allied Telephone Co.*,³⁴ a group of telephone operators complained to one another when the air conditioner in the office broke down, thus making the atmosphere more oppressive, a condition that was aggravated by paint fumes in the air. When an individual employee voiced a complaint about these circumstances to management, she was summarily discharged. The Board found this unlawful, stating that the unhealthy air affected all of the employees. Thus, the grievance presented by the individual employee "was inextricably enmeshed with the complaints of other employees and could not have been adjusted favorably without benefit from such adjustment flowing to the other employees . . ." ³⁵ In other cases as well, the Board has made clear that the self-interest of the complaining employee is not enough to rob that complaint of its concerted nature; it is sufficient that remedying the complaint will in fact inure to the benefit of other employees. Such is the meaning which the cases give to the ambiguous standard that the employee must be acting "on behalf of" fellow workers.

In a recent decision, *Dover Garage II, Inc.*,³⁶ the Board unveiled a rationale which, if literally and consistently applied, would obliterate the distinction between concerted activity and "personal

³³ *Id.* 1623 n.1.

³⁴ 210 N.L.R.B. 916 (1974).

³⁵ *Id.* 920.

³⁶ 237 N.L.R.B. 1015 (1978), *enforcement denied mem.*, 86 Lab. Cas. (CCH) ¶ 11,330 (2d Cir. 1979).

gripes" (although there was no explicit recognition by the Board of this implication). In *Dover Garage*, a taxi driver complained to his dispatcher that another employee had improperly been dispatched out of turn. Soon after, the dispatcher warned the employee that he would be fired if he again interfered with the dispatch system. The employee filed a charge of violation of section 8(a)(1) on the theory that the threat of discharge interfered with a protected activity. The administrative law judge rejected this claim, finding that the complaint was not concerted. The Board reversed. It concluded that, although the threat grew out of a particular incident, it was not necessary to decide whether the employee's protest was concerted activity, for the threat would become operative in the event of any *future* interference by this employee with the dispatcher, and such future action might be carried out in a concerted manner. In a separate concurring opinion, Member Jenkins addressed the question whether the employee's protest about the dispatching sequence was indeed concerted activity, and he concluded (contrary to the administrative law judge) that it was; it concerned a working condition which affected many if not all of the employees (and certainly those employees, other than the complainant, who were waiting in line for an assignment before the employee who was actually dispatched).

The Board's decision in *Dover Garage* clearly demonstrates the ambiguity and fragility of its standards in these cases. The administrative law judge characterized the employee's complaint as a "personal gripe"; one of the Board members characterized it as a concerted activity; and a Board majority declined to characterize it at all, but concluded that because the employer's present threat might chill concerted activity in the future, the threat was unlawful. It need hardly be stated that such a rationale would make any discipline even for "personal gripes" unlawful, because the disciplined employee or others might well be restrained from presenting such gripes on a concerted basis in the future. The confusion was compounded further when the Court of Appeals for the Second Circuit denied enforcement of the Board's order, for it did so by an unpublished oral opinion in open court.

In any event, what the Board appears to be holding in its decisions is that a protest, even by a self-interested individual, will be deemed concerted if it relates to a matter affecting the working conditions of other employees. There are, however, at least two difficulties with the Board's formulation. The first is that it has not been consistently applied. For example, in *Continental Manu-*

facturing Co.,³⁷ a discharge of an employee was upheld in spite of the fact that she was complaining about favoritism by supervisors, the insulting of employees, and management's locking of employee washrooms. Certainly these are conditions of "mutual concern." In a more recent decision, *Auto-Truck Federal Credit Union*,³⁸ an employee was discharged for making a protest by telephone about her salary, office tensions, and the discharge of a fellow employee. The Board adopted the findings and conclusion of the administrative law judge, who concluded that the complaint about tensions was not protected concerted activity because it was shared by only the other discharged individual, who was no longer an "employee" with whom the complainant could act in "concert." Nor was the complaint about her wages a concerted activity; although wages are indeed a "matter of moment" for all employees, the employee had complained only about her own salary. Remarkably, however, the Board concluded that the protest of the discharge

³⁷ 155 N.L.R.B. 255 (1965). The incident that ultimately resulted in the discharge began when the manager reprimanded employees for the dirty condition of the washroom. Two employees agreed between themselves to monitor the use of the washroom by other employees in order to determine blame for the concededly dirty conditions there. One of those two employees—who was ultimately discharged for her activity—handed the owner of the company a letter which complained of the fact that the employees had been insulted and that the washrooms used by many employees were being kept locked by management; the letter also complained of favoritism on the part of supervisors and of the need for the supervisors to take a personnel course in order to improve productivity and employee morale; the letter also observed that a majority of the employees were disgusted with their treatment but that they were too frightened to complain. The Board, conceding that the employee's discharge was in substantial part for writing this letter, found no unfair labor practice. It noted that the letter was prepared and signed only by the one employee, who did not consult with her co-worker or with any other employee about the grievances in the letter or about sending it. Moreover, the employees were represented by a union, and the letter-writing employee had not first consulted union representatives nor did the union announce support for the sentiments expressed in the letter. The Board specifically concluded that the letter could not fairly be treated as the extension of the washroom-monitoring plan between the letter writer and her co-worker.

The Board's decision is questionable in a number of respects. The union's failure to endorse the sentiments in a letter ought not disqualify that letter as a protected activity if it otherwise would be. The lack of protection for protests within the bargaining unit which was accorded by the Supreme Court in *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), applied only to the use of picketing and other economic weapons and not to the presentation of grievances in letter form. The letter in *Continental*, moreover, complained about matters squarely within the range of employee concern, and about matters (particularly the locked washrooms) which affected all employees and were a source of concern to them. The letter also could have been linked, had the Board been so inclined, to the monitoring plan being implemented by the two employees for the purpose of assuring the sanitary condition, and the full availability, of the washrooms. Finally, the narrow reading of the letter's message seems inconsistent with a number of other decisions of the Board.

³⁸ 232 N.L.R.B. 1024 (1977).

of a former fellow employee (even assuming the discharge to have been lawful) is concerted activity, because matters relating to discharge are of common concern to all employees. The Board completely overlooked the inconsistency in the holdings as to wages and discharge. Indeed, in the same year, the Board upheld the discharge of an employee who had complained that she was being harassed by a supervisor for seeking to transfer out of the department; in her letter to management, she adverted to a provision in the company's employee handbook which gave employees priority in job opportunities to new hires. It was held that the employee's letter of protest was designed to secure a job opportunity for herself only, that it did not relate generally to working conditions of other employees, and that it did not relate to a matter of "mutual concern" to her co-workers.³⁹

Even apart from the elusiveness and inconsistency of the Board's standards and opinions, its "mutual concern" test may run into difficulty with the language of section 7 of the National Labor Relations Act. That section protects "concerted activity" which has as its purpose the "mutual aid and protection" of employees. Congress apparently contemplated concerted activity as the *means* and improvement of working conditions as the *purpose*. By defining concerted activity as conduct, even by an individual, which has some general improvement in working conditions as its purpose, the Board has in effect read out of section 7 the apparent requirement that the *means* be somehow concerted. It has substituted the independent requirement of concerted benefits for that of concerted activity, creating a redundancy in the Act. Although the Board's construction of section 7 may be unexceptionable—and indeed correct—it would be illuminating if the Board were explicitly to attempt in its decisions to come to grips with this problem.

2. Unionized Employees

The cases already discussed deal with employee complaints or grievances that are asserted in a plant in which there is no union representation and no collective bargaining agreement. When

³⁹ Tabernacle Community Hosp. & Health Center, 233 N.L.R.B. 1425 (1977); see also Capitol Ornamental Concrete Specialties, Inc., 248 N.L.R.B. 851 (1980). In *Capitol*, the Board found that an employee's complaint about the condition of the road leading to the company parking lot was not to be deemed concerted: no other employees complained about or even discussed the matter among themselves, there was no reason to "infer that his complaint touched a matter of common concern," and it was therefore no more than a "personal gripe." *Id.* 851. Another example of the Board's inconsistencies is *Anco Insulations* discussed at *supra* note 19.

there is a union and a collective bargaining agreement, complaints by individuals—at least those which plausibly can be referred to provisions of the agreement—are generally given even greater protection by the Board, because the Board is more ready to find them “concerted.” The clearest cases for protection are those in which the person asserting a complaint is a designated union spokesman and he or she is making reference to a provision of the collective agreement.⁴⁰ Here the employee is speaking in a representative capacity on behalf of the union and of the employees in the unit which the union represents, safeguarding not only the interest of a particular employee but also the interests of the entire bargaining unit by making certain that the employer does not initiate or continue a practice which contravenes the labor agreement.⁴¹

The same protection has been accorded to a rank-and-file employee who is discharged for asserting a grievance in the manner contemplated by the agreement regardless whether the employee expressly purports to invoke the contract and the grievance procedure. In *NLRB v. Selwyn Shoe Manufacturing Corp.*,⁴² an employee asserted that she was finished with her work and wanted more. She refused to follow instructions to “clock out” while a more junior employee continued to work at a job that the complaining employee was capable of doing. She was fired for this, and she later returned to the plant with her shop steward. Interestingly, the court was prepared to concede that the employee was

⁴⁰ *Trailmobile Div., Pullman, Inc. v. NLRB*, 407 F.2d 1006 (5th Cir. 1969); *Clayton Constr. Co.*, 250 N.L.R.B. 798 (1980), *enforced per curiam*, 652 F.2d 6 (8th Cir. 1981); *see also Hilton Hotels*, 248 N.L.R.B. 255 (1980) (union steward interceded on behalf of co-worker denied a sandwich from employer as was customary at end of shift; held, protected concerted activity).

⁴¹ *International Ladies' Garment Workers Union v. Quality Mfg. Co.*, 420 U.S. 276 (1975); *see also NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). A dubious evasion of this policy and application of the “personal gripe” doctrine can be found in *NLRB v. Gibbs Corp.*, 284 F.2d 403 (5th Cir. 1960). There, the court of appeals held that it was lawful for an employer to discharge an employee—who was also the shop steward—for his “personal gripes” about his own seniority rights. The employee, as steward, had in the past on a few occasions presented to the employer grievances about the seniority rights of other employees, and the Board concluded that it was for this (as well as pressing his own grievances) that he was discharged. The Board's finding of an unfair labor practice was reversed by the court, which concluded that the employee had been discharged not for conduct in his representative capacity but rather for his insistence on his own seniority claims. This decision (which may in any event have been rendered obsolete by the subsequent Supreme Court decision in *Quality Mfg.*) needlessly jeopardizes the job security of union grievance representatives by applying the “personal gripe” standard in a context in which the grievances of the steward personally and those of the employees he represents are closely congruent.

⁴² 428 F.2d 217 (8th Cir. 1970).

voicing only a "personal gripe," but it held that this case was distinguishable from other "gripe" cases because the gripe was expressed in the manner provided in the grievance procedure of the labor agreement, which had as its first step the employee's presentation of a grievance to the foreman. The agreement also had a requirement that seniority be employed in cases of layoff; but it is clear that the employee did not expressly invoke that provision, or any part of the contract, just prior to her discharge. The court held that the company had wrongfully refused to recognize the employee's right to submit her grievance. "The submission of a grievance based on the collective bargaining agreement cannot be the basis for discharge," lest the purposes of the Act—promoting harmony in labor-management relations and protecting the rights of the individual to organize for "mutual protection and individual security"—be thwarted.⁴³ A concurring judge would have found the discharge unlawful on the broader theory that the employee, regardless of conformity to the contractual grievance procedure, was asserting a substantive right found in a collective bargaining agreement.

The Board has consistently utilized this broader theory⁴⁴ to hold discharges unlawful, although—as will be discussed below—the courts of appeals are sharply divided on the matter. Thus, in *B & M Excavating, Inc.*,⁴⁵ the Board held that the employer violated section 8(a)(1) by discharging two employees for filing claims with a state labor commission for overtime pay contended to be due them under the labor agreement. Even if the employees had each independently decided to file a claim, without any prior consultation with the other, their action would have been protected as an implementation of the labor agreement and "an extension of the concerted activity that gave rise" to it.⁴⁶

The Board has articulated yet another rationale for treating as "concerted" the assertion of claims resting on a labor agreement: such claims "affect the rights of all of the employees in the bargaining unit." In *John Sexton & Co.*,⁴⁷ an employee whose driver's

⁴³ *Id.* 221.

⁴⁴ See *Schneider's Dairy Inc.*, 248 N.L.R.B. No. 1093 (1980) (grievance was protected concerted activity when employee claimed pay rate was less than that set by bargaining agreement); *E.A. Nord*, 250 N.L.R.B. 403 (1980) (employee was engaged in protected concerted activity when he asked what would happen if he filed a grievance).

⁴⁵ 155 N.L.R.B. 1152 (1965), *enforced*, 368 F.2d 624 (9th Cir. 1966).

⁴⁶ *Id.* 1154.

⁴⁷ 217 N.L.R.B. 80 (1975).

license had been suspended refused for that reason to drive for the company, and was discharged. Because there was a collective agreement in existence which the Board found arguably to give the employee the right to refuse to drive for this reason, the Board found the refusal to be protected concerted activity.⁴⁸ The Board reasoned that section 7 protects individual employees' attempts to implement the agreement, for such attempts necessarily affect the rights of all employees in the bargaining unit.⁴⁹ A similar case, *T & T Industries*,⁵⁰ involved refusal to drive a truck because it regularly blew fuses, rendering its lights inoperative. The Board held that an employee discharged for refusing to drive the truck was entitled to reinstatement. It reasoned that when the collective agreement requires the employer to provide safe equipment and conditions, an employee complaining about and refusing to work with unsafe equipment acts in the interest of all employees.

In both *John Sexton* and *T & T* the Board threw its protective net broadly, holding that section 7 protection applies even if the employee's complaint is ultimately found to lack merit. The rationale for this position is that:

when an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered

⁴⁸ The Board also found a violation of section 8(a)(3), prohibiting "discrimination with regard to hire or tenure of employment . . . to encourage or discourage union membership." 28 U.S.C. § 158(a)(3) (1976). In many of these cases of discharge for assertion of contract claims, the Board is inconsistent in its resort to that section. Thus, in *B & M Excavating, Inc.*, 155 N.L.R.B. 1152 (1965), *enforced*, 368 F.2d 624 (9th Cir. 1966), the Board expressly found it unnecessary to review the conclusion of the administrative law judge that section 8(a)(3) was violated, because the Board's order could adequately rest on a finding of violation of section 8(a)(1). See also *supra* note 27. Because "union membership" has traditionally been given a broad construction so as to include any activity which promotes the union, see R. GORMAN, *LABOR LAW* 137-38 (1976), it would probably be in keeping with that construction to include within the protection of section 8(a)(3) employee assertions rooted in the labor agreement. As is often pointed out in the cases, however, the Board can rest a fully effective order on section 8(a)(1) alone.

⁴⁹ See also *Chas. Ind. Co.*, 203 N.L.R.B. 476 (1973) (employee seeking to enforce the agreement is affecting the rights of all of the employees in the unit, so that he necessarily acts not for himself alone but for all of the other workers).

This rationale is very much the same as that adopted by the Supreme Court in the *Quality Mfg.* case, discussed at *supra* note 41. In that case a union steward asserting a grievance was held to be engaging in protected concerted activity because this activity safeguards the interest not only of the grievant but also of the entire bargaining unit by assuring that the employer will not initiate or continue a practice violative of the collective bargaining agreement.

⁵⁰ 235 N.L.R.B. 517 (1978).

under that contract. Such activity we have found to be concerted and protected under the Act⁵¹

Yet the Board expanded the Act's protection even beyond meritless claims in *John Sexton* and *T & T*. It held that section 7 protection applies to attempts to implement the bargaining agreement regardless whether the employee refers to the collective bargaining agreement in asserting the claim, and regardless whether the employee even knows of the agreement.⁵² For good measure, the Board added another and its broadest rationale: discharge for refusing to drive will restrain other employees (and thus truly concerted activity) from future attempts to implement the labor contract.

Under the Board's theory—widely referred to as that of “constructive concerted activity”—it is sufficient, to secure the Act's protection, that the employee's contract-based protest will “redound to the group's benefit. . . . Individual complaints of this sort are similar to grievances, and since they will have an effect on all employees, the Board has taken the position that such conduct is protected by the Act.”⁵³

3. Statutory Claims

Perhaps the most dramatic extension made by the NLRB in its theory of constructive concerted activity relates to the claims of individual employees concerning matters of health and safety or other rights derived from federal or state statutes or administrative regulations. In *Alleluia Cushion Co.*,⁵⁴ an employee was dis-

⁵¹ *Roadway Express, Inc.*, 217 N.L.R.B. 278, 279 (1975), *enforced mem.*, 532 F.2d 751 (4th Cir. 1976).

⁵² *Id.*; see also *Erie Strayer Co.*, 213 N.L.R.B. 344 (1974) (bald truck tires). Consistent with its prevailing approach to the individual's assertion of claims under a labor contract, the Board holds that, in making safety claims or in refusing to perform allegedly unsafe work, the employee need have only an honest and genuine belief that the task is unsafe; there may be protected concerted activity even though the claim lacks merit. *Bay-Woods Indus.*, 249 N.L.R.B. 403 (1980), *enforcement denied*, 108 L.R.R.M. (BNA) 3175 (6th Cir. 1981).

⁵³ *ARO, Inc.*, 227 N.L.R.B. 243, 244 (1976), *enforcement denied*, 596 F.2d 713 (6th Cir. 1979). There is, however, a line of Board decisions, rather difficult to square with those cited, in which a claim under a collective bargaining agreement is found to be unprotected or nonconcerted activity because the claim is found by the Board to be unsupportable on the merits. *E.g.*, *Snap-On Tools Corp.*, 207 N.L.R.B. 238 (1973) (probationary employee was lawfully discharged for complaining about his failure to get a temporary transfer which was offered instead to a junior employee; Board observed that the labor contract gave probationary employees no seniority, that the complaining employee had rested his claim not upon the labor contract but upon his personal observation of past practices, and that his complaint was thus purely personal and not “concerted”).

⁵⁴ 221 N.L.R.B. 999 (1975).

charged principally because he made complaints to the California Occupational Safety and Health Agency concerning plant violations of state safety regulations. The administrative law judge found the discharge to be lawful, because it was not for a concerted activity protected by section 7 of the NLRA. There was no collective bargaining agreement in effect; the discharged employee was not joined in his complaint by other employees; he did not consult with other employees, and no employees later approved of his actions; and he therefore acted (concluded the judge) purely from his own individual concerns about safety. The NLRB reversed the administrative law judge and found a violation of section 8(a)(1).

The Board stated that it was obligated to construe the NLRA in a manner recognizing the policies of other employment legislation, such as that dealing with occupational safety and health. It refused to assume that other employees did not endorse the complaints to California OSHA, and held that filing a complaint with the state safety agency was in furtherance of all employees' rights under the state statute. The Board thus announced a broad presumption that health or safety complaints are endorsed by all employees, and that their filing is therefore concerted activity. The filing of a complaint with the state safety agency was deemed by the Board to be in furtherance of the rights of the respondent's employees under the California act. Because safe and healthful conditions

have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. . . . In the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.⁵⁵

The Board has subsequently applied these principles to other instances of formal employee complaints or charges filed with governmental agencies enforcing safety legislation.⁵⁶ The *Alleluia*

⁵⁵ *Id.* 1000.

⁵⁶ *E.g.*, *Bighorn Beverage*, 236 N.L.R.B. 736 (1978), *enforced as modified*, 614 F.2d 1238 (9th Cir. 1980). There, the employee acted alone in complaining to the state Department of Health and Environmental Sciences about carbon monoxide fumes at his workplace; the Board found concerted activity, because there was "a safety problem of common concern to all persons who were then working at the Respondent's facility." 236 N.L.R.B. at 752. The court of appeals denied enforcement, emphasizing the absence of a collective bargaining agreement which it thought to be essential to application of the "constructive concerted activity" doctrine, assuming that doctrine to be valid at all.

Cushion precedent also was applied in a case in which the employee complained not to a state agency but directly to the employer. In *Akron General Medical Center*,⁵⁷ the employee was disciplined for complaining to the employer about the excess of lint and dust in the hospital laundry. In finding an unfair labor practice, the Board observed that the employee's complaint sought compliance with "standards concerning occupational safety."⁵⁸ The Board has also clearly stated that, in the absence of a collective bargaining agreement, an individual complaint about unsafe working conditions is protected concerted activity even when it takes the form of a refusal to perform the work in question. In *Pink Moody, Inc.*,⁵⁹ an employee was laid off and not recalled because he had complained about the defective brakes on the employer's truck and had refused to drive the truck. The Board concluded that employee compliance with the employer's order to drive the unsafe truck would have violated safety regulations, and therefore that the employee's refusal "would inure to the benefit of all of the [employer's] drivers."⁶⁰ Because the employee's protest was, under the analysis of *Alleluia Cushion*, a matter of "vital concern" to all of the employees, his refusal to drive was to be deemed concerted in the absence of disavowal by other employees.

Two different themes can be heard in the Board's decision in *Alleluia Cushion*. One is simply the familiar refrain in the Board's decisions of many years: a complaint by an individual employee will be deemed concerted—even though he is in fact acting alone—if the issue he raises is "of moment to" or is "of mutual concern to" other employees in the plant. The other theme is more specific and more innovative: a complaint by an individual employee which finds its source in public labor legislation or regulations is presumed to be of mutual concern to all employees, and that presumption can be overcome only by proof of general employee disavowal. The Board, very soon after *Alleluia Cushion* was decided, made it clear that that decision did not rest alone on the latter rationale but rather more broadly on the "mutual concern" rationale.

⁵⁷ 232 N.L.R.B. 920 (1977).

⁵⁸ *Id.* 927. Despite this conclusion, it is unclear whether there were any formal governmental standards which obtained, and apparently the employee never adverted specifically to any such standards in registering his complaint with the employer.

⁵⁹ 237 N.L.R.B. 39 (1978).

⁶⁰ *Id.* 40.

In *Air Surrey Corp.*,⁶¹ paychecks issued by the employer had in the past been dishonored; three employees drove to the employer's bank, and one went in to inquire whether the employer had sufficient funds to meet its next payroll. Upon learning of this incident, the employer discharged the inquisitive employee. The Board, expressly disclaiming any reliance upon the fact that the inquiry at the bank was part of a group visit there, held that the employee's individual inquiry was protected concerted activity. *Alleluia Cushion*, which was regarded as the controlling precedent, was said to rest not only on the policy of advancing the purposes of federal and state safety laws, "but also on the premise that an individual's actions may be considered to be concerted in nature if they relate to conditions of employment that are matters of mutual concern to all the affected employees."⁶² The Board concluded that collecting pay for one's work is on a par with safe working conditions as a vital employee concern. Although the inquiring employee was not acting from entirely altruistic motives, his actions "clearly encompassed the well being of his fellow employees" and there was a "likelihood that the other employees, in the absence of evidence to the contrary, shared his interest in receiving a valid paycheck and supported his effort to secure Respondent's compliance" with its financial obligation.⁶³ Not content, however, to rest on this broader rationale, the Board also observed that as in *Alleluia Cushion* the employee's individual action was designed to forestall employer violation of state law—that is, the Ohio law which makes it a misdemeanor to issue a check knowing that it will be dishonored. In dissent, Member Walther read *Alleluia Cushion* to rest narrowly on a Board policy of fostering the aims of federal safety and health legislation, and he would

⁶¹ 229 N.L.R.B. 1064 (1977), *enforcement denied*, 601 F.2d 256 (6th Cir. 1979) (enforcement denied because the employer had no knowledge that the discharged employee was acting other than in an individual capacity).

⁶² 229 N.L.R.B. at 1064.

⁶³ *Id.*; see also *G.V.R., Inc.*, 201 N.L.R.B. 147 (1973), in which the employer had unlawfully required two employees to give him kickbacks from their wages on a hospital construction job for the United States Army, and then discharged them for giving interviews to an Army labor compliance inspector regarding payroll irregularities and to a Labor Department investigator regarding the employer's non-compliance with the Davis-Bacon Act. Giving interviews was held to be protected concerted activity because the interviews were for the protection of all similarly situated company employees. Chairman Miller dissented, arguing that an individual making a complaint to another governmental agency regarding noncompliance with another labor statute should not per se be protected under § 7 of the NLRA. This case was decided before *Alleluia Cushion*.

have held that the discharge of the inquiring employee was lawful, principally because the employer was unaware at the time of the discharge that two other employees were part of the plan to make inquiry at the bank.⁶⁴

In spite of the de-emphasis in *Air Surrey* of that part of *Alleluia Cushion* which developed the importance of specific health and safety legislation, the Board in the few years since *Alleluia Cushion* was decided has placed very great weight indeed upon that part, and has expanded it quite beyond its initial boundaries. In a setting not unlike that in *Air Surrey*, the Board in *Ambulance Services of New Bedford*⁶⁵ held that it was unlawful to discharge an individual employee for filing a criminal complaint against the company president on account of payroll checks returned for insufficient funds. The Board noted that there were earlier protests on the subject by many employees as well as by the union, so that the criminal complaint was "part and parcel" of this group action. But the Board also emphasized that the discharged employee was disciplined for resorting to a state-provided public procedure which could reasonably be expected to aid all of his fellow employees. In *Self Cycle & Marine Distributor Co.*,⁶⁶ it was held unlawful for an employer to discharge an employee in part for pursuing a claim for unemployment compensation covering a period of layoff some months before. The Board reiterated its position in *Alleluia Cushion* that it was obliged to accommodate its decisions to the larger scheme of labor legislation as a whole. Because unemployment compensation benefits arise from the employment relationship and are an aspect of national labor policy, and because the employee's compensation claim was a matter of common interest to other employees who might find themselves in a similar position in the future, the Board held that the employee's assertion of his claim demonstrated to other employees that access to state unemployment compensation procedures could not lawfully be denied by the employer. The Board accorded section 7 protection, for similar reasons, to an individual employee who filed a workmen's compensation claim following a work-related illness,⁶⁷ and to an

⁶⁴ The approach suggested by Member Walther was later adopted by the court of appeals in denying enforcement of the Board's order. See *supra* note 61.

⁶⁵ 229 N.L.R.B. 106, *enforced mem.*, 564 F.2d 88 (1st Cir. 1977).

⁶⁶ 237 N.L.R.B. 75 (1978).

⁶⁷ *Krispy Kreme Doughnut Corp.*, 245 N.L.R.B. 1053 (1979), *enforcement denied*, 635 F.2d 304 (4th Cir. 1980).

individual employee who filed a sex-discrimination complaint with a state Fair Employment Practices Commission.⁶⁸

The Board has gone even further and has concluded that the refusal of an individual employee to perform work, not because it is dangerous but because it is not properly compensated by virtue of title VII of the 1964 Civil Rights Act, is protected concerted activity. In *Dawson Cabinet Co.*,⁶⁹ a female employee was discharged for refusing a job assignment when her reason for doing so was that men performing the same work were paid more than women. The Board held that, even though the employee acted alone, her protest about sex discrimination, and her refusal to work in pursuit of that protest, were protected concerted activity. The Board held that her attempt to vindicate the rights of women employees under title VII was as a matter of law concerted activity. This was not simply an individual concerned with her own pay; it was an individual protesting the employer's noncompliance with a federal statute and was therefore concerted activity for the protection of employees similarly situated.⁷⁰

The Board has also applied the *Alleluia Cushion* principle to find a union's discipline of an employee to violate section 8(b)(1)(A). In *General Teamsters Local 528 (Theatre Service Co.)*,⁷¹ a black employee asked his union to get him onto the company's seniority list. After concluding that the union was not effectively asserting his seniority claim, the employee filed a charge against the union with the Equal Employment Opportunity Commission (EEOC). Some months later, the employee was elected to serve as the union's alternate steward; a squabble within the membership induced both the steward and the employee to resign their positions, but not long after they both sought reinstatement. Union officials reinstated the steward, but not the alternate steward, stating that the reason was his having filed a charge against the union with the EEOC. The employee then filed a charge against the union with the NLRB, claiming that the withholding of reinstatement

⁶⁸ *Hotel & Restaurant Employees*, 252 N.L.R.B. 1124 (1980) (union found to discriminate in making assignments of work, in its capacity as employer of business agent).

⁶⁹ 228 N.L.R.B. 290, *enforcement denied*, 566 F.2d 1079 (8th Cir. 1977).

⁷⁰ The Board's order was, however, denied enforcement on appeal, the court holding that the doctrine of "constructive concerted activity" was unsound and that it was in any event inapplicable for lack of a controlling collective bargaining agreement. 566 F.2d at 1083-84.

⁷¹ 237 N.L.R.B. 258 (1978); *see also Hotel & Restaurant Employees*, 252 N.L.R.B. 1124 (1980).

to his position as alternate steward violated section 8(b) (1)(A). The Board agreed, and took the rather unusual step of ordering reinstatement as alternate steward. The Board, citing *Alleluia Cushion*, *Air Surrey*, and *Dawson Cabinet*, reiterated that the policies of title VII must be accorded the same primacy in the enforcement of the NLRA as the policies of the Occupational Safety and Health Act. The Board conceded that the charging employee acted alone in filing his charge against the union and that in doing so he was concerned only about his own seniority status. Nonetheless, the Board held that the charge presented to the EEOC must be treated as having been made in the common interest of all of the employees, and that it was therefore protected concerted activity.

By way of summary, one might say that the doctrine of "constructive concerted activity" as developed by the National Labor Relations Board rests (as do most "constructive" facts) upon an accumulation of fictions and fabricated presumptions. An individual complaint is said to have been made "on behalf of" a group of workers not because the complainant has been delegated to speak but rather because rectification of his grievance will inure to the benefit of others. Others will also benefit whenever an individual asserts a claim which can plausibly (even if after the fact) be linked to a collective bargaining agreement. Even in the absence of such an agreement, group benefit is presumed to flow from claims concerning safety and health, or from claims which find their source in any statute or public regulations. Through the accumulation of these fictions and presumptions, the Board has accorded "protected concerted" status to the great majority of individual complaints (sometimes accompanied by a refusal to work) about conditions in the workplace. Yet the Board continues to cling to the notion that certain such complaints are merely "personal gripes," and continues to place specific factual situations into that category with little apparent consistency, a most unfortunate failing given the fact that fundamental rights of employers and employees are in the balance.

It is the major thesis of this Article that all work-related claims of individual employees should be treated as within the scope of the term "concerted activities" in section 7 of the NLRA. The Board's doctrine of "constructive concerted activity" represents a fitful groping towards precisely this reading of section 7. Whatever criticism the Board might merit for utilizing fictions to achieve results that are for the most part sound, far greater criticism is warranted for the courts of appeals, which have either endorsed the doctrine of

"constructive concerted activity" in a begrudging and niggardly manner or have rejected it outright.

C. *The Judicial Reaction*

The doctrine of "constructive concerted activity" has provoked some division and confusion within the courts of appeals, but the tide—which has gathered momentum in only the last two years—runs strongly against the approval of that doctrine. Two circuits—the Second and the Seventh—have explicitly endorsed the view that the individual assertion of claims under a collective bargaining agreement is to be treated as concerted activity. But even those two courts have made it clear that in any other context, activity will not be deemed concerted unless it is part of or a prelude to some form of group protest. Seven other courts of appeals, clearly adhering to the latter approach, have either avoided dealing with or have disparaged the view that claims under labor contracts are necessarily to be treated as concerted. No court of appeals has endorsed the proposition that individual complaints, protests, or refusals to work become concerted activity merely because they will inure to the benefit of other employees or because they invoke statutory procedures for the protection of public rights. Indeed, judicial reversals of the NLRB have reflected not only disagreement with the Board's articulated legal theory of constructive concerted activity, but also all too frequently a reading of the factual record in so inhospitable a manner as to find only individual protest when a reasonable factfinder could readily have found actual group conduct.⁷²

The appellate case most frequently cited to support the doctrine of "constructive concerted activity" is a Second Circuit decision, *NLRB v. Interboro Contractors, Inc.*⁷³ In that case, an employee was discharged, and the Board concluded that the reason was his frequent complaints to management and the union about such matters as work assignments and his entitlement to overtime and expense money. The court of appeals enforced the Board's reinstatement order, concluding that the Board was free to reject the trial examiner's inference that the employee was simply seeking to harass his employer into granting him more money. The court explained:

Even if it were true that John was acting for his personal benefit, it is doubtful that a selfish motive negates the pro-

⁷² See *infra* text following note 89.

⁷³ 388 F.2d 495 (2d Cir. 1967).

tection that the Act normally gives to Section 7 rights. . . . Contrary to the examiner's statements that John was acting alone despite an almost complete lack of interest by his fellow employees, the testimony of William Landers, Collins, Soebke, and Kleinhans shows that on several occasions John was speaking for William and Collins as well as for himself. Furthermore, while interest on the part of fellow employees would indicate a concerted purpose, activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees.⁷⁴

This latter, conclusory statement was buttressed by no further reasoning or citation of precedent.

The *Interboro* case was cited and endorsed by the Court of Appeals for the Seventh Circuit in *NLRB v. Ben Pektin Corp.*,⁷⁵ in which an employee—whose paycheck reflected only a \$27 pay increase for the month instead of a \$75 increase promised by the employer—asked a union officer and a co-worker whether there had been a “payoff” (presumably from the employer to the union). The employee later reiterated this accusation to company representatives. The court agreed with the Board that this was protected concerted activity, even in the absence of any interest by fellow employees, as an attempt to enforce the collective bargaining agreement.⁷⁶

The Fourth Circuit appeared to endorse *Interboro* in its memorandum decision in *Roadway Express, Inc. v. NLRB*.⁷⁷ The court enforced a Board order in a case in which the Board had held that “when an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract.”⁷⁸

⁷⁴ *Id.* 499-500.

⁷⁵ 452 F.2d 205 (7th Cir. 1971) (per curiam).

⁷⁶ The court distinguished an earlier case in which an employee's protest (in the absence of a union and a collective bargaining agreement) about a meager pay increase was held to be unprotected, *Indiana Gear Works v. NLRB*, 371 F.2d 273 (7th Cir. 1967), as involving a “malicious” venting of a personal grievance. 452 F.2d at 207.

⁷⁷ 532 F.2d 751 (4th Cir. 1976).

⁷⁸ 217 N.L.R.B. 278, 279 (1975), *enforced mem.*, 532 F.2d 751 (4th Cir. 1976). Because the court's order was issued without any published reasons, it is difficult to assert that the disposition constituted a considered endorsement of the *Interboro* approach. This is confirmed by the fact that within four years, the

Only two appellate decisions reflect any development of the rationale for the doctrine of constructive concerted activity as applied in cases of individual claims under collective bargaining agreements (often referred to in court opinions as "the *Interboro* doctrine"). One court, enforcing a Board order under section 8(a)(1), purposefully chose to decide the case on grounds other than the *Interboro* doctrine, but nonetheless articulated a basis for its decision which is widely believed to underlie *Interboro* as well. In *NLRB v. Selwyn Shoe Manufacturing Corp.*,⁷⁹ an employee was discharged for refusing to "clock out" for the day so long as there was a junior employee doing work that she (the complaining employee) was capable of performing; she made known her reasons in a conversation with her foreman. The court agreed that the discharge was for engaging in a protected concerted activity. Although one judge would have applied the rule of *Interboro*—that asserting a right found in a collective agreement is per se concerted activity—the court majority instead viewed the discharge as having been triggered by the employee's presenting a formal grievance in the precise manner contemplated by the labor agreement (i.e., a communication from the employee to her foreman). The court held that the presentation of a grievance cannot lawfully be a basis for discharge, but its rationale was sufficiently broad to sustain even the *Interboro* rule; it stated that rights under a collective agreement, although personally asserted by individual employees, are protected under section 7 "because the collective bargaining agreement is the result of concerted activities by the employees for their mutual aid and protection."⁸⁰ The theory that the employee's complaint constitutes something of a revival of

Fourth Circuit rendered a major decision, explicitly disavowing reliance on *Interboro*, extensively quoting from flatly contrary judicial authority, and never mentioning its decision in *Roadway Express*. *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980).

Indeed, *Interboro* has fallen on hard times even in the circuit whence it came. The Second Circuit recently referred to *Interboro's* endorsement of the principle of constructive concerted activity as dictum. *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980); accord *NLRB v. Adams Delivery Serv.*, 623 F.2d 96, 100 n.1 (9th Cir. 1980). That is even less charitable treatment than the Court of Appeals for the District of Columbia Circuit accorded *Interboro*, characterizing the constructive concerted activity principle as an alternative holding. *Kohls v. NLRB*, 629 F.2d 173, 176 (D.C. Cir. 1980), cert. denied, 101 S. Ct. 1390 (1981). See *infra* text accompanying notes 115-20.

⁷⁹ 428 F.2d 217 (8th Cir. 1970). Subsequently, this court once again carefully avoided endorsing *Interboro*. *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079 (8th Cir. 1977). Indeed, *Dawson* and a later case all but explicitly rejected it. *Koch Supplies, Inc. v. NLRB*, 646 F.2d 1257 (8th Cir. 1981) (per curiam).

⁸⁰ 428 F.2d at 221.

the concerted activity leading to the negotiation of the labor contract has been endorsed by the NLRB, and has been articulated, albeit with skepticism, by other courts of appeals.⁸¹

The one judicial declaration that comes close to supplying a thorough and satisfying rationale for the doctrine of constructive concerted activity appears in a dissenting opinion by Judge Lay of the Court of Appeals for the Eighth Circuit. In *Illinois Ruan Transport Corp. v. NLRB*,⁸² a truckdriver was discharged after reporting certain safety deficiencies to his employer and seeking an inspection of the company's vehicles by the Interstate Commerce Commission. The Board found this conduct to be protected concerted activity, in furtherance of all employees' rights under the collective bargaining agreement. The court of appeals, however, refused to enforce the Board's order, because it concluded from its reading of the record that the discharge must have been for other and work-related reasons.⁸³

In dissent, Judge Lay focused upon the public policies underlying section 7. He argued that section 7 was intended to protect not the union's interest but the employees' interest, and that employees are specifically given the right by section 9(a) of the NLRA to assert and process their own complaints and grievances individually (provided the outcome is consistent with the collective agreement). Judge Lay believed it "too superficial a guideline" to deny protection to this employee's activities "merely because he did not have an assistant in his truck"⁸⁴ at the time. He urged that "concerted activity" could be defined only in the context of its neighboring and interrelated phrase "mutual aid or protection." Although Judge Lay did not read the Act to protect an individual protest which perhaps is vented by reason of personal animosity or is unrelated to group interest or concern, he felt that:

it is a reasonable and necessary construction of the Act that "concerted activity" may exist if there is some reasonable relationship connecting an employee's conduct with the "mutual aid and protection" of other employees and such activity is based upon rights collectively recognized within a bargaining agreement.⁸⁵

⁸¹ *E.g.*, *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d at 308; *Kohls v. NLRB*, 629 F.2d at 176-77.

⁸² 404 F.2d 274, 281 (8th Cir. 1968).

⁸³ *Id.* 277-80.

⁸⁴ *Id.* 288 (Lay, J., dissenting).

⁸⁵ *Id.* 288-89.

Thus, in Judge Lay's view, the individual's protest, regardless of his motive, is protected if it has the intended effect of improving working conditions in a manner which benefits other employees, and that will always be the case when the protest is consistent with the labor agreement.

[W]here [the employee] is asserting a right consistent with the collective contract, both §§ 9(a) and 7 give him a right to proceed alone. Congress obviously intended through § 9 and § 7 to recognize that an individual employee's rights are not totally submerged by the group when assertion of those rights is otherwise consistent with the interest of the group. To reason otherwise is to deny the very purpose for which the union exists; that is, the protection of the rights of the individual employee.⁸⁶

In an aside, Judge Lay suggested that the protection of "concerted activities" in section 7 was not intended to constrict the rights of individuals but was rather to overturn "the early common-law anomaly which permitted individual conduct, but proscribed the same activity by two or more persons acting collectively"⁸⁷ on a theory of criminal and civil conspiracy. He quoted from a 1796 English case, in which the court had said: "As in the case of journeymen conspiring to raise their wages; each may insist on raising his wages if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy."⁸⁸ Congress's principal purpose in section 7 of the Wagner Act was simply to make it clear that group action to improve working conditions was to rest on no weaker legal foundation than individual action undertaken with the same purpose.

All other judicial decisions that deal with the Board's doctrine of constructive concerted activity either totally reject it or else limit it to situations in which the complaining individual relies upon a collective bargaining agreement. The courts which do go as far as half-heartedly endorsing *Interboro*—or more accurately leaving *Interboro* untouched—take pains to show that the case before them is not governed by that decision because, for example, no collective bargaining agreement is in effect; their "approval" of *Interboro* is thus dictum, and is usually accompanied

⁸⁶ *Id.* 289 (footnote omitted).

⁸⁷ *Id.* 289 n.6.

⁸⁸ *Id.* 289 n.6 (quoting *Rex v. Mawbey*, 6 T.R. 619, 636 (1796)).

by sharp criticism. In short, *Interboro* and its "constructive concert" doctrine have no other real champions in the court of appeals.

These judicial decisions rejecting the doctrine of constructive concerted activity have focused upon something akin to a dictionary definition of the word "concerted," and have been unilluminated by any analysis of the history and purposes of the National Labor Relations Act. These decisions have rejected the Board's attempt to link, by one or more fictions, individual protests to group activity. They have instead concluded that statutory protection is dependent upon proof of at least incipient group action, as distinguished from mere group benefit. The courts have looked not merely for concerted *effect* but also for concerted *purpose* and concerted *conduct*.

Perhaps the most well known and frequently cited decisions manifesting this approach come from the Court of Appeals for the Third Circuit. *Mushroom Transportation Co. v. NLRB*,⁸⁹ which was decided prior to *Interboro*, presented a factual record which readily could have justified a conclusion that there was concerted activity in fact without requiring resort to any theory of "constructive" concerted activity rooted in an employee's attempt to enforce provisions of the collective bargaining agreement. But the court chose to read the requirement of "concerted" activity very narrowly, and reversed the Board's finding of a section 8(a)(1) violation.

Like the Board, the court was prepared to assume that the discharged employee was ordered by management to be assigned no further work on account of his stated intention to report the company for violations of Interstate Commerce Commission regulations and because he counseled drivers about their entitlement under the collective agreement to such benefits as holiday pay, vacations, and trip assignments. The court also accepted the Board's factual conclusion that the employee's purpose was not to advance his personal interest but was instead directly related to the interests of all of the employees in their working conditions.

At that point, however, the court and the Board parted, as the court found no evidence that the discussions of contract rights involved any effort "to initiate or promote any concerted action to do anything"⁹⁰ about the various complaints and grievances discussed.

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and

⁸⁹ 330 F.2d 683 (3d Cir. 1964).

⁹⁰ *Id.* 684-85.

a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees. . . . Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere "griping."⁹¹

The court suggested, in dictum, that there would have been protected activity had the employee actually prosecuted a grievance of his own. It failed, however, to explain why this would have been "concerted" activity, or why counseling other employees with a possible view toward their filing a grievance was any less deserving of statutory protection.⁹²

Despite that *Mushroom Transportation* dictum, an employee who did register a complaint with management was treated no better by the same court in *NLRB v. Northern Metal Co.*,⁹³ decided after the *Interboro* case in the Second Circuit. A probationary employee received his paycheck for his third week of employment, but was not paid for the Labor Day holiday which fell within the pay period. The employee raised this issue with the company's chief executive officer, and was informed that although the collective bargaining agreement provided for pay for Labor Day, it was long-standing company practice that probationary employees received no holiday pay. When the employee raised the claim with union officials, he was informed that the union would not take up the matter because he was not a union member.

Because disputes of probationary employees were excluded from the contractual grievance procedure, the employee pressed his com-

⁹¹ *Id.* 685. The court found irrelevant the fact that many of the discussions were initiated by other employees, who knew that the soon-to-be terminated employee had been a shop steward in a previous job; this fact "would carry no implication that there was any general or concerted move on foot or sought." *Id.*

⁹² Presumably, the court would have been prepared to find "concerted" the explanation of contract rights when done by a formally designated union representative. Indeed, it is quite likely that this conclusion would now be compelled by the analysis of the Supreme Court in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). One must wonder why a self-appointed but knowledgeable employee advisor is entitled to any less protection against discipline by the employer.

⁹³ 440 F.2d 881 (3d Cir. 1971).

plaint to the company president a second time. The president, evidently displeased that the employee had been given a copy of the collective bargaining agreement, discharged him as an "undesirable employee."⁹⁴ The Board, concluding that there is concerted activity in pressing a contract grievance which affects the rights of other employees in the unit, found the discharge unlawful.⁹⁵

The court repudiated this analysis, and with it that of the *Interboro* case. The *Interboro* doctrine, said the court, was based on "a legal fiction, constructive concerted activity, in an effort to support a judicial conception of a sound interpretation of the Act."⁹⁶ The court observed that the words of the statute were unambiguous: "The Act surely does not mention 'concerted purposes.'"⁹⁷ The court consulted Webster's New International Dictionary for the meaning of "concert" and "concerted," which it found to be "mutually contrived or planned." It concluded that the protection afforded by *Mushroom Transportation* to "talk looking toward group action" was the "most expansive view" adopted in the circuit, but that this "stretching" of the normal meaning of the statutory language would be endorsed "in order to facilitate the policies of the Act."⁹⁸ Because the employee's claims in *Northern Metal* regarding his contractual rights to holiday pay did not look toward group action for its enforcement, his discharge was held to be lawful.

Judge Biggs filed a dissenting opinion⁹⁹ in which he argued that the efforts of an individual employee to enforce a collective bargaining agreement should be considered concerted activity per se. He invoked the *Selwyn Shoe* decision in the Eighth Circuit,¹⁰⁰ and the dissenting opinion in that circuit of Judge Lay in *Illinois Ruan*,¹⁰¹ arguing that attempts to enforce provisions under collective agreements constitute the assertion of a "collective" right because success will redound to the direct benefit of all employees similarly situated (there, all other probationary employees, both present and future). Judge Biggs stated that his analysis would pose no threat to the contractual grievance procedure, because employees would normally request union assistance in prosecuting a

⁹⁴ *Id.* 883.

⁹⁵ 175 N.L.R.B. 896 (1969), *enforcement denied*, 440 F.2d 881 (3d Cir. 1971).

⁹⁶ 440 F.2d at 884.

⁹⁷ *Id.* (emphasis in original).

⁹⁸ *Id.*

⁹⁹ *Id.* 887 (Biggs, J., dissenting).

¹⁰⁰ See *supra* text accompanying notes 79-89.

¹⁰¹ See *supra* text accompanying note 82.

grievance, and because in any event Congress has, in section 9(a) of the NLRB, "put its imprimatur on individual processing of grievances."¹⁰²

Three other circuit courts have declined to follow the lead of *Interboro* in cases involving individual claims within the context of a labor contract. Although in each case the court purported to distinguish *Interboro*, the reasoning and outcome were so in conflict with the *Interboro* approach as to make clear the court's rejection of that precedent.

In *NLRB v. C & I Air Conditioning, Inc.*,¹⁰³ the Court of Appeals for the Ninth Circuit faced a situation tailor-made for the

¹⁰² 440 F.2d at 888. In a case decided between *Mushroom Transportation* and *Northern Metal*, the Third Circuit sustained a Board finding that two employees had been unlawfully discharged for protesting the company's one-year suspension of profit-sharing payments. The plant was apparently not unionized. The employees, along with other dissatisfied employees, voiced their concerns and their suggestions at an employee meeting called by management, as well as to their foreman before and after the meeting. Their individual vocalization of dissatisfaction on behalf of all employees was deemed by the court to be sufficient "group action" within *Mushroom Transportation*. There was sufficient concerted activity when the two discharged employees were part of a group which had a gripe and assembled to present it to management. It was irrelevant that the group failed formally to select a spokesman. *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970). In a dissenting opinion in which he invoked *Mushroom Transportation* to reach a very different conclusion from that of the court, Judge Kalodner stated: "These expressions were nothing more than 'griping' and could not by any stretch of the imagination be said to attain the dimension of an intention or attempt to initiate or promote concerted action by their fellow employees." *Id.* 1357.

Before taking leave of the Court of Appeals for the Third Circuit, which has been perhaps the most vigorous opponent of the doctrine of constructive concerted activity, it is appropriate to recount the startling development represented by *Reading Hosp. & Med. Center*, 226 N.L.R.B. 611 (1976), *enforced mem.*, 562 F.2d 42 (3d Cir. 1977). There, an employee who served as an operating room technician, upon learning of the hospital's proposed termination of its surgical residency program, mentioned to other employees her intention to write a letter to a newspaper because "such a letter might help." *Id.* 612. She did not elaborate on this statement; nor did she tell any other employee at any time what she planned to include in the letter. The hospital first suspended her, then discharged her, in part for her threat to write the letter. In the face of the employer's argument that her threat to send the letter was not concerted activity, the administrative law judge found the opposite to be true, simply stating—without reasons or citation of precedent—that her conduct "fell within the Act's protection." *Id.* 614. The Board, in a short-form opinion, adopted the findings and conclusions of the administrative law judge. Without explanation—and inexplicably—the Third Circuit enforced the Board's reinstatement order. Here was an individual employee, making an unelaborated threat on a single occasion, to write an individual letter to a newspaper, about a subject which—for all that is shown in the report of the administrative law judge—did not threaten the working conditions of the employee in question or indeed of any other persons deemed "employees" within the coverage of the NLRA. No group action was taken, planned, or even mentioned. No collective bargaining agreement existed. The disposition of this case in the Third Circuit goes considerably further than any judicial opinion has yet gone in protecting (albeit without any discussion whatever) individual employee complaints as "concerted activity."

¹⁰³ 486 F.2d 977 (9th Cir. 1973).

Board's "constructive concerted activity" theory: a combination of a labor contract and an individual complaint about safety. The Board found that the employee engaged in protected concerted activity, for which he was discharged, when he complained to the general contractor that a temporary stairway on which he had to climb with heavy air conditioning equipment was hazardous.¹⁰⁴ The court overturned the Board's decision, holding that for an employee complaint to constitute concerted activity the employee must be acting with other employees or actually on their behalf; in this case, the employee was acting alone and on his own behalf.¹⁰⁵

The court declined to endorse the *Interboro* doctrine. But it held that *Interboro* would be inapplicable under the facts of this case because the complaining employee did not make express reference to the collective bargaining agreement, did not file a grievance, and apparently did not even know that the labor agreement applied to the safety issue he raised. Thus, the court could not conclude that the employee had an intention to implement rights under the agreement.¹⁰⁶

In *ARO, Inc. v. NLRB*,¹⁰⁷ three individuals were hired as temporary janitor-cleaners and the next day, the company hired a person to work as permanent janitor-cleaner. The collective bargaining agreement provided that all were to serve on a probationary basis for three months. Less than three months later, the three temporary janitors were laid off due to a company "belt tightening" policy, but the permanent janitor was retained. When informed of her layoff, one of the employees, Ms. Williams, claimed that she had greater seniority than the employee kept on the job. She was informed by several supervisors, however, that probationary employees had no seniority at all under the collective agreement, and that in this layoff decision preference was given to the probationary permanent janitor over the probationary temporary janitors. When Ms. Williams continued to make persistent inquiries during her layoff about her opportunities for rehiring, she was informed by management that she would not be re-employed because of her complaints. The Board found the refusal to recall her an unfair labor practice, regardless of the merits of her position,

¹⁰⁴ 193 N.L.R.B. 911 (1971), *enforcement denied*, 486 F.2d 977 (9th Cir. 1973).

¹⁰⁵ 486 F.2d at 978, 980.

¹⁰⁶ *Id.* 979.

¹⁰⁷ 596 F.2d 713 (6th Cir. 1979).

because she had referred to the collective bargaining agreement in asserting priority in the matter of layoff and recall.¹⁰⁸

The court of appeals, in a deplorably reasoned opinion, refused enforcement. Initially, the court felt obligated to reject the *Interboro* doctrine by virtue of its earlier, pre-*Interboro* decision in *NLRB v. Guernsey-Muskingum Electric Cooperative, Inc.*¹⁰⁹ In that case, the court had found that three employees had engaged in concerted activity when they individually complained, pursuant to a common understanding, that the company had unfairly appointed a foreman from outside the workforce. Although *Guernsey* had found those facts *sufficient* to warrant protection, the *ARO* court distorted that decision and insisted that they were *necessary*:

Thus, under *Guernsey-Muskingum*, for individual action to be deemed concerted action it must be shown that the individual in fact was acting on behalf of, or as a representative of, other employees rather than acting for the benefit of other employees only in a theoretical sense. . . . We, therefore, decline to adopt the holding in *Interboro*.¹¹⁰

The court also went on to demonstrate that protecting Ms. Williams in this case would in any event have gone beyond the protection afforded in *Interboro*; the employee in *Interboro* was terminated because he voiced complaints, but Ms. Williams was terminated because of a lack of need for her work, and her complaints were voiced only after she had been informed of her termination. The distinction is totally spurious, because the alleged unfair labor practice in *ARO* was not Ms. Williams's discharge but rather the refusal to recall her from layoff, an adverse employment decision made because of the complaints which Ms. Williams had communicated earlier to management.

Then, as if to buttress its decision with sound economic policy, the *ARO* court observed that the Board's decision below would improperly interfere with the employer's contractual right to judge a probationary employee's merit by constantly subjecting management to the filing of grievances, in the form of NLRB unfair labor practice charges, beyond those permitted by the labor agreement. "Nothing in the language of the Act, nor its legislative history evidences an intent on the part of Congress so to in-

¹⁰⁸ 227 N.L.R.B. 243 (1976), *enforcement denied*, 596 F.2d 713 (6th Cir. 1979).

¹⁰⁹ 265 F.2d 8 (6th Cir. 1960). See *supra* text accompanying notes 26-28.

¹¹⁰ 596 F.2d at 717.

trude into the day-to-day operation of an employer's business."¹¹¹ Of course, Congress intends to do just that, when—regardless of the lack of protection which might be afforded probationary employees under a collective bargaining agreement—an employer has violated the *statutory* rights of such employees to engage in concerted activity for mutual aid or protection. The employer is forbidden in no other way to judge the quality of probationary employees, or to assign them work, or to terminate them altogether. The court also summarily rejected the argument that section 9(a) should be interpreted to protect from discharge or other discipline workers who attempt to assert the right given by section 9(a) to present and process grievances with the employer on an individual basis.

In summary, the principle announced by the *ARO* court is that, in order for an individual claim or complaint to amount to concerted activity, "it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action *and* have some arguable basis in the collective bargaining agreement."¹¹² Assuming that the court intended to use the conjunctive, its rule is far more stringent than that adopted by any other court of appeals, because all other courts would deem it sufficient that the individual complainant "induces or prepares for group action" *or* (at least under *Interboro* and *Ben Pekin*)¹¹³ is derived from the labor contract.¹¹⁴

Most recently, this troubling language was quoted with approval, and *Interboro* discredited and distinguished, by the Court of Appeals for the District of Columbia Circuit in *Kohls v. NLRB*.¹¹⁵ There, an employee refused an order to drive a truck because he believed the brakes to be unsafe, a belief that the administrative law judge found to be rooted in "ascertainable objective evidence."¹¹⁶ Although the labor contract expressly provided that an employee would not violate the agreement by refusing to operate any equipment "unless such refusal is unjustified,"¹¹⁷ the

¹¹¹ *Id.* 718.

¹¹² *Id.* (emphasis added).

¹¹³ See *supra* text accompanying note 75.

¹¹⁴ The same conjunctive also makes the court's rule subject to convincing attack under the Supreme Court decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), in which an individual's request for union representation at an investigatory interview was held to be concerted activity, independent of any arguable basis in the collective bargaining agreement for such a request.

¹¹⁵ 629 F.2d 173 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 1390 (1981).

¹¹⁶ 629 F.2d at 175-76. The administrative law judge, however, "expressly declined to decide whether the truck brakes were in fact unsafe." *Id.* 175.

¹¹⁷ *Id.* 175 n.8.

employee was discharged for refusing to drive. The Board's finding that his refusal was a protected concerted activity, under the *Interboro* line of reasoning, was rejected by the court of appeals.

The court began by endorsing the view that the *Interboro* doctrine was an "alternative holding," and a "clear expansion of the Act's coverage, in the face of unambiguous words in the statute."¹¹⁸ Thus, it viewed *Interboro* as "creat[ing] a legal fiction of *constructive* concerted activity in the face of statutory language that plainly protects workers who 'engage in concerted activity' for the mutual aid and protection of other workers."¹¹⁹ Although the court concluded by noting that *Interboro* was in any event distinguishable from the case before it, as if to dull the edge of some of its criticism of that case, the distinctions are clearly makeweight and unconvincing, and the departure from *Interboro* patent.¹²⁰ The court observed that its denial of unfair labor practice relief would not leave Kohls without a remedy, because he could enlist the union's aid to invoke the contractual grievance procedures.

This alternative is, of course, not available to an employee discharged for making an individual complaint when there is no union and no collective bargaining agreement. In these cases, the Board, in extending statutory protection to the individual, has relied on the theory that an individual protest is necessarily "on behalf of" or "in the interest of" other workers when employer rectification would inure to their benefit. But even the Second Circuit in *Interboro* did not go so far as to endorse that theory in the absence of a labor contract, and every court of appeals that has passed upon that view of constructive concerted activity has flatly rejected it. The courts have consistently applied the *Mushroom Transportation* standard, and have required that the individual complainant act "with the object of initiating or inducing or preparing for group action or that the act have some relation to group action in the interest of the employees."¹²¹ Moreover, it has not been unusual for courts to apply such a standard narrowly, so as to treat as a

¹¹⁸ *Id.* 176. The quotation was taken by the court from the opinion of the Third Circuit court in *Northern Metal*. See *supra* text accompanying note 93.

¹¹⁹ *Id.* 177 (emphasis in original).

¹²⁰ Kohls's conduct was found to be less "concerted" than that of the employee in *Interboro* because: (1) he merely asserted that the truck was not safe enough for him, (2) he did not act together with the union to protect other employees, and (3) he withdrew a grievance which the union had filed on his behalf under the labor contract. *Id.*

¹²¹ *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), quoted in *Krispy Kreme*, 635 F.2d at 307.

“personal gripe” conduct which without difficulty could have been treated as concerted in fact.

A good example of this narrow application is *Indiana Gear Works v. NLRB*,¹²² which involved the Seventh Circuit’s treatment of an individual’s wage protest in the absence of a collective bargaining agreement. The problem started when the company granted a wage increase of only two cents an hour. An employee, who had earlier been reprimanded by management for his poor attitude and excessive sarcasm, posted cartoons with his own captions ridiculing the wage increase and the company president. Although the Board found that this activity was concerted and that the employee’s subsequent discharge because of this activity was a violation of section 8(a)(1), the court reversed. The court was prepared to assume the correctness of several of the Board’s factual findings: that other employees were dissatisfied with the wage increase, that at least two other employees suggested captions for the employee’s cartoons, and that one of them posted a cartoon. The court, however, found that the “casual assistance” of two other employees in the cartoon scheme was inadequate to constitute concerted activity.¹²³ It went on to state that to be concerted, activity must be “for the purpose of inducing or preparing for group action to correct a grievance or a complaint.”¹²⁴ In this case, the court concluded, no one had been designated as a spokesman for the employees and no employees had agreed among themselves to present their views as a group. The employee, relying on his habitual sarcasm, was merely gratifying his own personal whim.

Four years later, the same court appeared to narrow the reach of *Indiana Gear* by treating it as a case in which “concerted” status had been denied because the employee was motivated by “malice.”¹²⁵ But recently, this court changed direction again and made it clear that *Indiana Gear* must be read more broadly and that it indeed announces an even stricter standard for concerted activity than that of *Mushroom Transportation*. In *Pelton Casteel, Inc. v. NLRB*,¹²⁶ the Board, placing some emphasis upon the fact that the individual was supporting a unionization effort, found illegal a written warning given to an employee for complaining about job risks and mandatory overtime. The court of appeals refused en-

¹²² 371 F.2d 273 (7th Cir. 1967).

¹²³ *Id.* 277.

¹²⁴ *Id.* 276.

¹²⁵ *NLRB v. Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971) (per curiam).

¹²⁶ 627 F.2d 23 (7th Cir. 1980).

forcement, holding that the public venting of a personal grievance, without purporting to be representing the views of others and without inducing collective action, is not concerted activity, even though the grievance was in fact shared by others, was complained about by others individually, and was an issue that got many of the employees interested in unionizing. Fatal to the employee's claim was the fact that he expressly complained only about his own situation, and that neither he nor the other employees viewed him as representing others in airing the grievance.¹²⁷

Another frequently cited case narrowly construing the requirement of "concerted activity" outside the context of an existing labor agreement is *NLRB v. Buddies Supermarkets, Inc.*,¹²⁸ a decision of the Court of Appeals for the Fifth Circuit. There a group of milk drivers over a period of roughly two years expressed concern and held meetings in response to the employer's change from an hourly pay system to a commission system. After the drivers had apparently become reconciled to the new system and had signed new contracts, one of them continued to complain about his commission rate and the commission system generally. For those complaints, and for causing dissension, he was discharged. The Board found that the discharge was for concerted activity, but the court disagreed: "We are persuaded by the reasoning in *Northern Metal* . . . that a statutory basis for the concerted activity rule announced in *Interboro* is questionable and hence we decline to follow that decision."¹²⁹ The court also observed that even had it chosen to follow *Interboro*, the employee's complaints would have been unprotected because they "did not arise in the framework of an attempt to enforce an existing collective bargaining agreement."¹³⁰ Applying *Mushroom Transportation*, the court found inadequate support for any conclusion that the employee "was inviting the other drivers to join him in his protests and thereby was seeking to instigate some form of group action."¹³¹ He did not purport to speak on behalf of other employees; he was never designated as their spokesman; his conversations with other employees were not designed to arouse concerted action; and his complaints

¹²⁷ The court treated its earlier decision in *Ben Pekin* as controlling. See *supra* text accompanying note 75. It conceded, however, that the result would have been different had the individual employee been attempting to enforce an existing collective bargaining agreement. 627 F.2d at 28 & n.10.

¹²⁸ 481 F.2d 714 (5th Cir. 1973).

¹²⁹ *Id.* 719 (footnote omitted).

¹³⁰ *Id.*

¹³¹ *Id.* 720.

“were advanced entirely in pursuit of personal, not group, economic goals. . . . Even if his success in this regard might have inured to the benefit of the other drivers, it is an exceedingly tenuous basis upon which to rest a finding of concerted activity.”¹³²

Even the Court of Appeals for the Second Circuit, the source of the *Interboro* decision, has made it clear that the doctrine of constructive concerted activity will have no role in a non-union setting. The result the court reached in *Ontario Knife Co. v. NLRB*¹³³ is particularly surprising because of the ease with which it could have found concerted activity to have existed in fact. Three women employees on the night shift were assigned a disproportionate amount of work (in comparison with the day shift) riveting knife handles to machetes, a job which was both dirty and lower paying than other work to which they could have been assigned under an incentive-pay arrangement. Two of the three women were known by management to be rather constant complainers about the situation, and they both approached a supervisor to discuss the matter. In the course of this discussion, they both stated that the next time it was their turn to work on machetes they were going to refuse. When their supervisor reiterated that if they did not like the work they were assigned they could quit, the colloquy got heated and one of the women, Ms. Cobado, returned to her machine, shut it down, and walked off the job in tears. Ms. Cobado telephoned the next day to ask if she should report for work, but she was later informed that she had been discharged for walking off the job. The NLRB, mentioning the joint protest of Ms. Cobado and her co-worker and the group concern reflected in Ms. Cobado's walkout, found it to be protected concerted activity,¹³⁴ but the court of appeals disagreed.

The court parsed the language of section 7 and concluded that it requires both an objective of “mutual aid or protection” and a form of activity that is “concerted.”¹³⁵ The former requirement was satisfied by the fact that Ms. Cobado's co-worker shared her objections to the machete work and jointly protested that work. Thus, the discharge of either employee for this joint protest would have violated the Act. But the court held that Ms. Cobado was discharged not for complaining but for walking out, in which her

¹³² *Id.*

¹³³ 637 F.2d 840 (2d Cir. 1980).

¹³⁴ 247 N.L.R.B. No. 168, *enforcement denied*, 637 F.2d 840 (2d Cir. 1980).

¹³⁵ 637 F.2d at 843.

coworker did not join. The court read its decision in *Interboro* as one in which "two employees were discharged and the court found that the more vocal one was speaking on behalf of two others."¹³⁶ Furthermore, the court characterized as no more than dictum its statement in that case that "activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees."¹³⁷ The court agreed with other courts that the dictum was properly limited to claims under labor contracts, and concluded:

We think that, except in the context of agreements between an employer and his employees which are themselves the product of concerted activities, as in *Interboro*, § 7 . . . should be read according to its terms. Not only must the ultimate objective be "mutual" but the activity must be "concerted" or, if taken by an individual¹³⁸ . . . , must be looking toward group action. The Board did not and could not reasonably find that Cobado was discharged for making the protest in which Swift joined; she was discharged and refused reinstatement because she walked off her job.

All of the aforementioned appellate cases involved complaints about wages, overtime, work assignments, and the like; none of the cases involved any strong public policy reflected in governmental regulations or statutes. It will be recalled that in cases of the latter kind, the Board has been quick to apply the doctrine of constructive concerted activity. In several recent decisions, the courts have been just as quick to repudiate the doctrine in that context.

In *NLRB v. Dawson Cabinet Co.*,¹³⁹ the Court of Appeals for the Eighth Circuit overturned a potentially significant Board decision. In that case, a female employee was discharged for refusing

¹³⁶ *Id.* 845.

¹³⁷ *Id.* (quoting *Interboro*, 388 F.2d at 499-500).

¹³⁸ For authority, the court referred to the United States Supreme Court decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). But its narrow reading of the *Weingarten* case as merely one in which an employee seeking the presence of a union representative at an investigatory interview was "looking toward group action" is not shared. In *Anchortank, Inc. v. NLRB*, 618 F.2d 1153 (5th Cir. 1980), the court read *Weingarten* to adopt the *Interboro* approach by considering not whether the individual's request was designed to induce or prepare for group action or had a relation to group action in the interest of other employees, but rather by focusing upon the effects upon the bargaining unit that would flow from union representation at the interview.

¹³⁹ 566 F.2d 1079 (8th Cir. 1977).

to perform work unless given assurance that she would be paid as much as the male employees performing the same work. The Board found her conduct concerted and protected because her attempt to enforce the statutory policies of title VII, banning sex discrimination in employment, was per se in the interest of all female employees of the company.¹⁴⁰ The court disagreed. It endorsed the Board's finding that the employee acted alone when she refused the work; no other employee joined in her refusal or apparently even shared her concern on the issue of equal pay. The court rejected any expansion of the *Interboro* doctrine to cases in which there was no collective bargaining agreement, quoting extensively from the decision of the Fifth Circuit in *Buddies Supermarkets*. The female employee who complained about unequal pay was determined simply to solve a personal problem. Her discharge was not for engaging in concerted activity but rather for her failure to follow the company's reasonable directions as to her work assignments.¹⁴¹

Courts of appeals have reached like results in cases of formal employee claims to government agencies, essentially rejecting the Board's position in *Alleluia Cushion*. In *Jim Causley Pontiac v. NLRB*,¹⁴² an employee was discharged for filing with the Michigan Department of Public Health, under the state Safety and Health Act, a complaint about excessive paint fumes in the workplace. The court rejected the theory of *Alleluia Cushion* that there is implied group participation in an individual's claim for enforcement of safety legislation, and held instead that the complaining individual must actually (and not merely constructively) represent the views of other employees, even though it is not necessary that there be a formal group designation.¹⁴³ Applying that test, the court concluded that the employee had engaged in concerted activity when he filed his complaint with the department. This holding was buttressed by the findings that a fellow worker had complained to other employees and to management about the fumes, and had agreed to the use of his name on the complaint. But the discharged employee still could not win, unless on remand the Board could reasonably conclude on the basis of the record evidence that the

¹⁴⁰ 228 N.L.R.B. 290, *enforcement denied*, 566 F.2d 1079 (8th Cir. 1977).

¹⁴¹ The same court recently relied upon *Dawson Cabinet* while reiterating its opposition to the doctrine of constructive concerted activity and its endorsement of the *Mushroom Transportation* test. *Koch Supplies, Inc. v. NLRB*, 646 F.2d 1257 (8th Cir. 1981) (*per curiam*).

¹⁴² 620 F.2d 122 (6th Cir. 1980).

¹⁴³ *Id.* 125.

employer *knew* that the filing of the complaint with the Department of Public Health was on behalf of others beside the complaining employee.¹⁴⁴

The Ninth Circuit, in a strikingly similar case, *NLRB v. Big-horn Beverage*,¹⁴⁵ also concluded that an employee discharged for telephoning to the Department of Health a complaint about carbon monoxide poisoning from truck fumes was not engaged in concerted activity. The court explicitly rejected *Alleluia Cushion*, finding it inconsistent with another decision in the same circuit in which safety claims were found to be constructively concerted only if they specifically referred to a collective bargaining agreement.¹⁴⁶

In *Krispy Kreme Doughnut Corp. v. NLRB*,¹⁴⁷ the Board found the filing of a workmen's compensation claim presumptively to reflect group conduct and participation. The Court of Appeals for the Fourth Circuit, however, rejected this presumption and found instead that there was "no proof of a purpose enlisting group action in support of the complaint."¹⁴⁸ The court thus refused to overturn the employee's discharge, which the employer justified by the employee's careless attitude toward safety and "a preoccupation with filing claims for compensation."¹⁴⁹ In explaining its holding, the court reviewed the many pertinent appellate decisions, finding that the *Mushroom Transportation* test was sound and that *Interboro* was in any event inapplicable because of the absence of a labor contract. The court concluded that a finding of "concerted activity" was "in effect a jurisdictional requirement" which had to rest on fact and not on a "purely theoretical assumption."¹⁵⁰

¹⁴⁴ In invoking this "knowledge" requirement, the court relied upon its decision in *Air Surrey, Inc. v. NLRB*, 601 F.2d 256 (6th Cir. 1979). See *supra* text accompanying notes 61-63.

¹⁴⁵ 614 F.2d 1238 (9th Cir. 1980). Three other employees left work early that day after being exposed to fumes. A physician who attended one of the sick employees telephoned a complaint to the Occupational Health Board. *Id.* 1242.

¹⁴⁶ *NLRB v. C & I Air Conditioning, Inc.*, 486 F.2d 977 (9th Cir. 1973). See *supra* text accompanying note 103. The court made the same point once again in *NLRB v. Adams Delivery Serv., Inc.*, 623 F.2d 96 (9th Cir. 1980), in which concerted activity was found because the employee had asked the union to look into his overtime claim under the labor contract.

¹⁴⁷ 635 F.2d 304 (4th Cir. 1980).

¹⁴⁸ *Id.* 304.

¹⁴⁹ *Id.* 305. The claim in question was the employee's fourth in two years.

¹⁵⁰ *Id.* 310.

II. THE BETTER READING OF SECTION 7

The narrow reading of section 7 adopted by the vast majority of the circuit courts is based entirely upon an abstract analysis of statutory language. It proceeds on the general assumption that there are two discrete categories of action, individual activity for self-interest and concerted activity for mutual interest, and that when Congress chose in terms to protect only "concerted activity for mutual aid," it necessarily excluded individual activity for individual aid from statutory protection.¹⁵¹ This is a plausible reading, given the precise text; but, as Justice Frankfurter once admonished, statutes "are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends."¹⁵²

As the preceding analysis of the opinions of both the Board and the courts of appeals evinces, the construction of the term "concerted activity" found in section 7 has resulted in statutory protection for an activity engaged in by two employees while the very same activity engaged in by one remains unprotected. This extraordinary anomaly suggests the need to reexamine the policies and objectives embraced in the NLRA in order to ascertain whether section 7 properly extends to individual activity. This more precise attention to the policy the statutory language sought to achieve is entirely consistent with the history of judicial construction of the NLRA.

The Supreme Court has frequently confronted policy choices in which the precise language of the Labor Act supplied more of a hurdle than a guide, and it is not unusual for the Court to invoke legislative history to justify what appears on the surface to be a departure from a rather clear congressional declaration. A pertinent illustration can be found in a case¹⁵³ construing the so-called publicity proviso to the secondary boycott provisions of the Labor Act; this proviso permits, at the location of a secondary employer, "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers . . . that a product or prod-

¹⁵¹ In *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980), the Court parsed the statute even more closely. Judge Friendly found that Angel Cobado's protest was for "mutual aid or protection," inasmuch as she was joined by a co-worker, but failed of "concert" when her co-worker declined to walk off the job with her. *Id.* 844.

¹⁵² Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947).

¹⁵³ *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964).

ucts are produced by an employer with whom a labor organization has a primary dispute and are distributed by another employer.”¹⁵⁴ The Court held that the proviso sheltered consumer handbilling at a supermarket, even when the handbills called attention to a dispute with a primary employer which was a distributor, rather than a producer, of goods sold there. It justified this expansive, and counter-literal, interpretation of the statutory language by invoking the protective purposes of Congress when it enacted the proviso:

The proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded. . . . It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. . . . There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.¹⁵⁵

One can readily supply other instances in which seemingly clear statutory language was given a counter-literal meaning as a result of the Court's attention to the underlying policy.¹⁵⁶

Thus, it is not at all self-evident that a reading of section 7 based solely on an abstract analysis of the language is necessarily

¹⁵⁴ 29 U.S.C. § 158(b)(4) (1976).

¹⁵⁵ 377 U.S. at 55.

¹⁵⁶ In spite of the exclusion of *picketing* appeals from the shelter of the proviso to § 8(b)(4), the Court concluded in *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964), that some consumer picketing is in fact exempted from the reach of that section. By the same token, § 8(a)(3) prohibits employer discrimination in terms and conditions of employment which is intended to discourage union membership. 29 U.S.C. § 158(a)(3) (1976). The Court has held, however, that some employer decisions violate that section despite the fact that the employer's demonstrable intent is grounded solely in business judgment, *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), and per contra the Court has held that the closing of an entire business does not violate that section even when the employer's expressed motivation is hostility to the employees' selected bargaining representative, *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

Yet another example can be found in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), in which the Court dealt with the § 7 right, accorded to "employees," to "form, join or assist labor organizations," a right ordinarily understood to encompass the circulation of union literature. The Court held that although this right could be invoked by employees of the company in question, it could not be invoked by a full-time union organizer, in spite of the fact that the text of the statute, 29 U.S.C. § 152(3) (1976) (emphasis added), takes pains to provide that an "employee" includes "any employee, and shall not be limited to the employee of a particular employer, unless the Act explicitly states otherwise."

the only, let alone the best, available reading of the Act. How that section should best be read turns upon an appreciation of the provenance of section 7.

A. *The History and Policy of Section 7*

The phrase "other concerted activities for . . . mutual aid or protection" is first found in federal law in section 2 of the Norris-LaGuardia Act,¹⁵⁷ a statute limiting the power of federal courts to issue injunctions in labor disputes. This Act was a reaction to the extraordinary record of judicial excess in regulating labor under the antitrust laws.¹⁵⁸ Because the language of section 2 was carried over into the National Labor Relations Act, the Norris-LaGuardia Act and its legislative history assume considerable significance.¹⁵⁹

At common law, many states regarded group protests with regard to wages and working conditions as unlawful conspiracies. At first, such group activity was criminally indictable; later, it was treated as a civil wrong subject to injunctive relief. At the same time, however, individual protests, whether in the form of a verbal protest or a refusal to work, were perfectly lawful.¹⁶⁰ With the enactment of the Sherman Antitrust Act in 1890,¹⁶¹ outlawing combinations and conspiracies in restraint of interstate commerce, the substance of the doctrine of unlawful conspiracy was imported from the common law. As a result, the Sherman Act in the early years of the twentieth century was applied by the federal courts to more labor activity than business activity.¹⁶² In response, Congress enacted as part of the Clayton Act of 1914 an exemption for certain labor activities from the reach of the Sherman Act and from all of its criminal and civil sanctions.¹⁶³

The opening sentence of section 6 of the Clayton Act declares that "[t]he labor of a human being is not a commodity or an article of commerce."¹⁶⁴ Both the text and the underlying congressional

¹⁵⁷ 29 U.S.C. § 102 (1976).

¹⁵⁸ See, e.g., I. BERNSTEIN, *THE LEAN YEARS—A HISTORY OF THE AMERICAN WORKER, 1920-1933*, at 393-97 (1960).

¹⁵⁹ 29 U.S.C. §§ 151, 157, 158(a)(1) (1976).

¹⁶⁰ See R. GORMAN, *LABOR LAW 2* (1976).

¹⁶¹ Ch. 647, 26 Stat. 209 (codified at 15 U.S.C. § 1 (1976)).

¹⁶² See R. GORMAN, *supra* note 160, at 3.

¹⁶³ 15 U.S.C. § 17 (1976).

¹⁶⁴ *Id.* This provision reads more like a manifesto than a piece of economic legislation. Indeed, Samuel Gompers wrote: "Those words are sledge-hammer blows to the wrongs and injustice so long inflicted upon the workers. The declaratory legislation . . . is the Industrial Magna Carta upon which the working people will rear their constructive of industrial freedom." Gompers, *The Charter of Industrial Freedom, Labor Provisions of the Clayton Antitrust Law*, in 21 *THE AMERICAN*

debate confirm that the principal purposes of this provision were protection of individual liberty¹⁶⁵ and rejection of the theory that conduct lawfully engaged in by an individual should nevertheless be prohibited by law if engaged in by a group. As Senator Lewis argued:

If it be true that the individual occupies such relation to human life that, with regard to his personal welfare and for the calling which he pursues, it has been the policy of the law to exempt him from those rigors or those enactments which apply to other associations, the fact that he may, with others of his kind, join an association will not rob him of that individual right that applies to him as a citizen and as a person—of his status.¹⁶⁶

True to this philosophy, section 20 of the Clayton Act insulated from injunctive relief such peaceful devices as work stoppages, picketing, and other activity "whether engaged in singly or in concert."¹⁶⁷ By 1921, however, the Supreme Court chose to view the Act as no more than declarative of preexisting law.¹⁶⁸ The Court's frustration of congressional intent in the Clayton Act set the stage for further legislative action.

In 1927, Senator Shipstead introduced a bill written by Andrew Furuseth, president of the International Seaman's Union, narrowing the definition of property which could be protected by injunctive relief.¹⁶⁹ Although Furuseth was a popular (and colorful) figure, and his bill had strong labor support, he was not a lawyer, and there was a general consensus among those with a legal background that his approach was doomed to failure. In response, a subcommittee of the Senate Judiciary Committee invited four lawyers and an economist to Washington in the spring of 1928 to draft a substitute. This ad hoc drafting group consisted of Professors Felix Frankfurter and Francis B. Sayre of the Harvard Law School, Herman Oliphant of Columbia University, Edwin Witte, chief of the Wiscon-

FEDERATIONIST 957, 971 (1914), *reprinted in* 51 CONG. REC. 16,340 (1914). The provision was offered as an amendment on the Senate floor. 51 CONG. REC. 14,590 (1914).

¹⁶⁵ *See, e.g.*, 51 CONG. REC. 14,588 (remarks of Sen. White); *id.* 14,589 (remarks of Sen. Vardaman).

¹⁶⁶ *Id.* 14,586.

¹⁶⁷ 29 U.S.C. § 52 (1976).

¹⁶⁸ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 469 (1921).

¹⁶⁹ S. 1482, 70th Cong., 1st Sess., 69 CONG. REC. 475 (1927), *reprinted in* I. BERNSTEIN, *supra* note 158, at 395.

sin Legislative Reference Library, and Donald Richberg, a Chicago lawyer who had participated in drafting the Railway Labor Act (and who was later to lead the National Industrial Recovery Administration). When this group convened in Washington,¹⁷⁰ it had various drafts of proposed substitutes previously prepared by Frankfurter and Sayre and by Oliphant.¹⁷¹ The overriding concern was to draft a bill that would withstand constitutional challenge before what was thought to be an inhospitable judiciary.

Frankfurter had circulated to the group beforehand a bill he and Sayre had drafted in 1923 which he particularly commended to the group and which focused upon substantive law. The bill provided for the insulation from legal prohibition of certain activities growing out of a labor dispute whether engaged in "singly or in concert," and further legalized "any act . . . which might be lawfully done by a single individual in the absence of such dispute or industrial conflict."¹⁷² It exempted from the law of criminal conspiracy "any act in contemplation or furtherance of an industrial dispute between employers and employees . . . if such act committed by one person would not be punishable as a crime."¹⁷³ Indeed, it stated as a general policy that it shall not be "unlawful to do any act in pursuance . . . [of the objectives of a labor organization] not forbidden by law if done by a single individual."¹⁷⁴

A difference developed among the draftsmen, however, not over the ultimate goals embodied in the draft, but only concerning the

¹⁷⁰ According to Richberg's biographer, the entire group met for two days. T. VADNEY, *THE WAYWARD LIBERAL—A POLITICAL BIOGRAPHY OF DONALD RICHBERG* 86 (1970). But according to Witte's biographer, the group met for three days and Sayre was unable to attend. T. SCHLABACH, *EDWIN WITTE—CAUTIOUS REFORMER* 64 (1969). The latter account appears to be more accurate. On May 25, 1928 and July 14, 1928, Witte wrote to Senator Blaine and President Green (of the AFL) respectively mentioning Sayre's absence, and the tenor of the correspondence with Sayre indicates that he had not met with the group. Moreover, Witte's note on the tentative draft reveals the group met for three days. The authors wish to express their appreciation to the State Historical Society of Wisconsin for duplicating much of the correspondence from the Witte papers and to David Rabban, Esq. of the American Association of University Professors for culling a portion of the Frankfurter papers.

¹⁷¹ T. SCHLABACH, *supra* note 170, at 64.

¹⁷² Bill entitled "Revision of an Act Concerning Labor Organizations, § 4" (April 9, 1923) (attached to Frankfurter's letter of transmittal of April 24, 1928) (on file with the University of Pennsylvania Law Review).

¹⁷³ *Id.* § 5.

¹⁷⁴ *Id.* § 1. Frankfurter commended the draft to the group as a bill that he and Sayre had "labored over a good many years and which seems to us to carry out concretely the desirable and, indeed, the needed changes in the law." Letter from Felix Frankfurter to Edwin Witte (April 24, 1928) (on file with the University of Pennsylvania Law Review).

best practical approach to the problem. Witte doubted that the courts would sustain any drastic change in substantive law, and urged exclusively procedural reforms.¹⁷⁵ Frankfurter, who assumed a major role in drafting, was persuaded.¹⁷⁶ The result, not unexpectedly, was a compromise that attended largely to procedural reform while adopting a declaration of policy that spoke to substantive ends.¹⁷⁷ This policy statement was adopted as section 2 of the Norris-LaGuardia Act with but one alteration by Congress:¹⁷⁸

The public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of

¹⁷⁵ Letter from Edwin Witte to Francis Sayre (May 26, 1929); letter from Edwin Witte to Senator Blaine (Nov. 3, 1928) (on file with the University of Pennsylvania Law Review). Sayre, who did not attend the Washington meeting, argued for a substantive change in the law with some vehemence. Francis Sayre, "Suggestions and Criticisms of Mr. Francis B. Sayre with regard to proposed Tentative Draft of Bill Limiting the Use of Injunctions" (May 17, 1928) (on file with the University of Pennsylvania Law Review). See also Sayre, *Labor and the Courts*, 39 *YALE L.J.* 682 (1930).

¹⁷⁶ See letter from Edwin Witte to Senator Blaine (Nov. 3, 1928); letter from Edwin Witte to Francis Sayre (May 26, 1928). Shortly after this exchange, Frankfurter wrote to Witte:

I am in substantial accord with the views you express to Sayre. I think one bill should concentrate on the procedural abuses of the injunction to the exclusion of modifications of the substantive law, either civil or criminal. Personally, as I have told Sayre and as I have written to our associates, I should confine this bill to the procedural features governing injunctions. Let's see how far we can get with comprehensive, adequate corrections of the procedural evils. Substantive law can be dealt with separately, so far as necessary. I think there is better chance of passage of a procedural measure and better likelihood of securing its fair interpretation and observation by the courts, if we do not over-load it either with doubtful substantive provisions or, at all events, provisions which run counter to the deeper hostilities of the judges.

Letter from Felix Frankfurter to Edwin Witte (May 29, 1928) (all letters on file with the University of Pennsylvania Law Review).

¹⁷⁷ T. SCHLABACH, *supra* note 170, at 65. See also Witte, *The Federal Anti-Injunction Act*, 16 *MENN. L. REV.* 638, 646-47 (1932).

¹⁷⁸ Memorandum, "Tentative Draft" (with notation "Final Draft as Worked Out at Conference at Washington May 1-3, 1928") (on file with the University of Pennsylvania Law Review) [hereinafter cited as "Tentative Draft"].

After the bill was proposed, the need for such a statement of policy was debated. See, e.g., 75 *CONG. REC.* 5465 (1932) (remarks of Rep. Michener); Christ, *The Federal Anti-Injunction Bill*, 26 *ILL. L. REV.* 516, 521 (1932). It was argued that, in terms of legal effect, the statement was only "useful rhetoric" to guide the courts. F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 212 (1930). As a Supreme Court Justice, Frankfurter took a rather different view of the practical effect of § 2. See *infra* note 221. Indeed, Frankfurter especially among the drafters believed in the importance of the provision. F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 212 (1930); Frankfurter & Greene, *Congressional Power Over the Labor Injunction*, 31 *COLUM. L. REV.* 385, 389 (1931).

property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he 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 protection¹⁷⁹

Like the ringing language of section 6 of the Clayton Act, the persistent focus of the more detailed language of section 2 of Norris-LaGuardia is upon the freedom of the individual—"freedom of labor," "freedom of association," and freedom "from the interference, restraint, or coercion of employers." Just as in the debate over the Clayton Act, much stress was placed in the debate on Norris-LaGuardia upon the need to protect individual liberty, even to the point of the Senate's insistence upon the insertion of the clause "though he should be free to decline to associate with his fellows,"¹⁸⁰ which was not included in the draft produced by the ad hoc committee. The extraordinary scope of injunctions was pointed to again and again as an infringement of civil rights: prohibiting the payment of family assistance to strikers; prohibiting the dissemination of information concerning a labor dispute, even of the fact that such a dispute existed, and prohibiting an individual to appeal an eviction from company housing—a right otherwise conferred by state law.¹⁸¹

As in section 20 of the Clayton Act, section 4 of the Norris-LaGuardia Act listed several forms of activity, including work stop-

¹⁷⁹ 29 U.S.C. § 102 (1976).

¹⁸⁰ 75 CONG. REC. 4755 (1932). See H.R. Rep. No. 793, 72d Cong., 1st Sess. 6 (1932).

¹⁸¹ See, e.g., 75 CONG. REC. 5467 (1932) (remarks of Rep. Greenwood); *id.* 5490 (remarks of Rep. Celler); *id.* 5491 (remarks of Rep. Hill); *id.* 5515 (remarks of Rep. Schneider); *id.* 5487 (remarks of Rep. Sparks). Indicative of the tone of the debate are the remarks of Senator Norris; "[T]he real object of the injunction is not to protect property but to restrain the constitutional rights of individuals and thus to interfere with human liberty," *id.* 4502, and Rep. Oliver: "It is strange, in the field of American freedom where laws do not govern but men alone reign, that the most powerful impulse of these free rulers is toward tyranny." *Id.* 5481.

pages and publicity, which when carried out in a labor dispute—"whether singly or in concert"¹⁸²—were not to be enjoined by a federal court. Moreover, the definition of a "labor dispute" in section 13 of the act indisputably embraces a dispute between an employer and a single employee, not merely as to matters of association and group representation but as to "any controversy concerning terms or conditions of employment."¹⁸³ As in the case of section 2, despite refinement in other regards, section 13's treatment of the individual was simply not in controversy; it went unmodified in both the drafting group's later changes in the draft and in the Congress.¹⁸⁴ The whole emphasis of the Act was upon the helplessness of the individual worker. As Senator Norris argued in debating section 3, rendering the "yellow-dog" contract unenforceable:

[B]y the combination of large corporations in a particular line of business, the laboring man must accept unconditionally the terms laid down by the employer. He is absolutely helpless under such contracts. His family cannot have food to eat or clothes to wear unless he gets a job. If he gets a job, he must surrender his liberty. He must, for the time being, become a slave. He cannot associate with his fellows. In connection with his fellows he cannot present a grievance to the employer. He has agreed to make no such demand. If conditions become unbearable, his only remedy is to go alone and face the big combination of perhaps millions of wealth. *He must singly present any grievance he has.* He must abide by the decision which is thus given him. He has no appeal. He has no opportunity to join with his fellows and make his demands effective. In effect, if he must live and support his family and clothe his children, he must surrender his liberty.¹⁸⁵

The assumption of the Act was *not* that action which should be protected when engaged in by a group should be left unprotected when engaged in by the individual, but that lawful individual action should not become unlawful when engaged in collectively.¹⁸⁶

¹⁸² 29 U.S.C. § 104 (1976). See *id.* § 52 (Clayton Act).

¹⁸³ *Id.* § 113.

¹⁸⁴ The subsequent exchanges among the draftsmen focused rather intensively upon the Tentative Draft's definition of a "labor dispute," but it does not appear that it was ever suggested that a dispute with an individual employee should be exempted from statutory reach. See "Tentative Draft," *supra* note 178.

¹⁸⁵ 75 CONG. REC. 4504 (1932) (emphasis added).

¹⁸⁶ One student of the Norris-LaGuardia Act has concluded that the rights conferred by it "were intended to be protected whether exercised by a single individual or by a group." Lynd, *The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History*, 50 IND. L.J. 720, 727 (1975).

By its terms, however, the Norris-LaGuardia Act only regulated the power of federal courts; section 2 was, in Frankfurter's terms, simply "useful rhetoric" to guide judicial construction—it did not otherwise limit the power of employers over employees. A partial step toward the regulation of employers was taken in the National Industrial Recovery Act, which required the adoption of codes of fair competition regulating industry.¹⁸⁷ As submitted to Congress, section 7(a) of that Act provided that each code contain a condition that "employees shall have the right to organize and bargain collectively through representatives of their own choosing."¹⁸⁸ In testifying before the House Ways and Means Committee, William Green, President of the American Federation of Labor, urged that that provision be amended to include, "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."¹⁸⁹ He pointed out that the proposed provision was "a verbatim statement from the declared policy of the Government as set forth in the Norris-LaGuardia anti-injunction law"¹⁹⁰ and so represented no departure from established policy. The Congress proved amenable and the NIRA adopted the language of Norris-LaGuardia.¹⁹¹

The experience under the NIRA proved to be a great disappointment to organized labor and to Senator Wagner, who chaired the National Labor Board.¹⁹² Of special concern was the widespread formation of employee representation plans (which had once been encouraged as a matter of national labor policy but had been in decline since the advent of the Depression) ostensibly to comply with section 7(a). As a result, Senator Wagner set to work on a separate labor bill well before the NIRA was struck down in *Schechter Poultry Corp. v. United States*.¹⁹³ Not surprisingly, the language of section 2 of Norris-LaGuardia, which was reiterated in

¹⁸⁷ Ch. 90, § 7, 48 Stat. 195 (1933). See *infra* note 191.

¹⁸⁸ H.R. 5664, 73d Cong., 1st Sess. § 7(a)(1) (1933).

¹⁸⁹ *National Industrial Recovery: Hearings on H.R. 5664 Before the House Comm. on Ways and Means* 117, 73d Cong., 1st Sess. (1933) (statement of William Green).

¹⁹⁰ *Id.*

¹⁹¹ Ch. 90, § 7(a), 48 Stat. 195 (1933) (struck down in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

¹⁹² See generally I. BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* (1950).

¹⁹³ 295 U.S. 495 (1935).

section 7(a) of the NIRA, was adopted in sections 7 and 8(1) of the NLRA. Section 7 conferred the right to organize, bargain, and engage in "other concerted activities for the purpose of . . . mutual aid or protection."¹⁹⁴ Section 8(1) adopted Norris-LaGuardia's aspiration that the employee should be "free from the interference, restraint, or coercion of employers"¹⁹⁵ in the exercise of those rights and turned it from a mere preamble for a statute limiting equity jurisdiction into positive law firmly limiting employer action.¹⁹⁶

It seems rather clear that one of the objectives of the NLRA was to take the same forms of conduct which the Clayton and Norris-LaGuardia Acts had declared protected against governmental sanction and declare them as well to be protected against private sanction through employer coercion and discipline. All of this legislation, to be sure, was focused principally upon the protection of group action for the purpose of improving wages and working conditions. But there is not the slightest hint in the history of the NLRA that in attempting to *expand* the protection that the law would give to *group* activity to secure benefits or improvements, Congress contemplated a *less* favored status for *individual* activity having the same objective. Throughout the development of the common law and the construction of the federal antitrust laws, this individual activity was accepted as lawful and was singled out for protection under section 20 of the Clayton Act¹⁹⁷ and even more explicitly under sections 4 and 13 of the Norris-LaGuardia Act.¹⁹⁸

Thus the history of the phrasing of section 7 leads to a rather different reading than the narrow, if literal, view adopted by the courts of appeals and, in essence, by the Board as well. The question is whether this more generous reading better comports with the broader policy goals of the Act. In construing the NLRA, the Supreme Court has admonished that section 7 rights are protected "not for their own sake but as instruments of national labor policy."¹⁹⁹ The Court has stressed that aspect of federal policy which fosters the institution of collective bargaining and the achievement of industrial stability. That such is the policy of the Act cannot

¹⁹⁴ Ch. 372, § 7, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 157 (1976)).

¹⁹⁵ 29 U.S.C. § 158(a)(1) (1976). *See id.* § 102 (1976) (Norris-LaGuardia).

¹⁹⁶ Ch. 372, § 8(1), 49 Stat. 449 (1935) (codified at 29 U.S.C. § 158(a)(1) (1976)).

¹⁹⁷ 29 U.S.C. § 52 (1976).

¹⁹⁸ 29 U.S.C. §§ 104, 113 (1976).

¹⁹⁹ *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1975).

be gainsaid. But an additional element thought to undergird the Act and its antecedents in the Clayton and Norris-LaGuardia Acts was the achievement of "industrial democracy," despite the subordinating context of the employment relationship.²⁰⁰ To the contemporary ear, the appeal of an earlier period to "industrial democracy" may sound like a shibboleth; but that appeal was taken very seriously at the time, it did have weight, and it necessarily informs the policy of the law. As the Court observed about construing the NLRA, the judicial function is to "reconstitute the gamut of values current at the time when the words were uttered."²⁰¹

The idea of "industrial democracy," despite the variety of meanings that were attached to it, grew out of a widely shared perception of a social problem and came to have at least one thread of meaning common to most of those accustomed to employ the term. The social problem was the stark fact of a permanent laboring class, its members dependent for the duration of their working lives upon wages, and so subject to the autocratic control of the employer. In the mid-nineteenth century, wage earning was thought to be a mere way station to independence as farmer, artisan, or entrepreneur; those who failed to achieve economic independence could only blame themselves. By the time of the passage of the Clayton Act, that simple faith had been convincingly contradicted by experience.²⁰² As a leading study has pointed out, the development of a

²⁰⁰ In his Presidential Message of May 20, 1919, Woodrow Wilson opined:

The object of all reform in this essential matter must be the genuine democratization of industry, based upon a full recognition of the right of those who work, in whatever rank, to participate in some organic way in every decision which directly affects their welfare and the part they are to play in industry. Some positive legislation is practicable.

58 CONG. REC. 40 (1919).

²⁰¹ *National Woodwork Mfg. Ass'n v. NLRB*, 386 U.S. 612, 620 (1967).

²⁰² Note, for example, the remarks of Representative Bailey about Abraham Lincoln in the debate on the Clayton Act:

Freedom was [Lincoln's] watchword, and he turns aside in a grave state paper, dealing with the perplexities of war and the mighty problems which rebellion thrust upon him, to felicitate the country on the fact that there was not of necessity any such thing as the free hired laborers being fixed to that condition of life.

Many independent men everywhere . . . a few years back in their lives were hired laborers. The prudent, penniless beginner in the world labors for wages a while, saves a surplus with which to buy tools or land for himself, then labors on his own account another while, and at length hires another new beginner to help him. This is the just and generous and prosperous system which opens the way to all, gives hope to all, and consequent energy and progress and improvement of condition to all. No men living are more worthy to

permanent, economically dependent social class was widely thought to challenge the democratic foundations of the Republic.²⁰³ "Must not this mean," wrote Louis Brandeis, "that the American who is brought up with the idea of political liberty must surrender what every citizen deems far more important, his industrial liberty? Can this contradiction—our general political liberty and this industrial slavery—long coexist? Either political liberty will be extinguished

be trusted than those who toil up from poverty; none less inclined to take or touch ought which they have not honestly earned. Let them beware of surrendering a political power which they already possess and which, if surrendered, will surely be used to close the door of advancement against such as they and to fix new disabilities and burdens upon them until all of liberty shall be lost.

These words were written over 50 years ago. What has become of that just and generous and prosperous system which then opened the way to all, gave hope to all, and consequent energy and progress and improvement of condition to all? Can it now be truly said that labor is not fixed to that condition of life? Lincoln said that labor was not so fixed in his day. Can you say as much in 1914? The prudent, penniless beginner of his time labored for wages a while, then he began working for himself, and then he became an employer. Has the beginner in my State of Pennsylvania any such spur to energy? Largely speaking, is there any hope for him ever to cease working for wages? Can he ever seriously aspire to rise much higher than to a petty foremanship? Is there one chance in a hundred thousand that he may become himself an employer?

51 CONG. REC. 9155 (1914).

²⁰³D. ROGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920*, at 57 (1978). This formed part of Washington Gladden's call for reform in 1911.

So shall we realize our democracy. It has never been anything more than the skeleton of a democracy; so long as industry is feudalistic it cannot be. But when the common man is emancipated and called into partnership by the captain of industry, we shall have a real democracy. No superhuman vision is needed to discern the fact that the confusions and corruptions of our political democracy are largely due to the disorganizing influence of this industrial feudalism, in constant contact with it, and continually thrusting its alien conceptions and ideals into the political arena. When industry is fairly democratized, it will be much easier to reform our politics.

W. GLADDEN, *THE LABOR QUESTION* 99-100 (1911); *see also* N. WARE, *LABOR IN MODERN INDUSTRIAL SOCIETY* 430 (1935):

During and immediately after the war there was a great deal of talk and agitation about "industrial democracy." This, of course, meant different things to different people. The existence of autocratic sovereignty in industrial affairs alongside "democracy" in political matters had always given rise to criticism and to suggestion that some degree of democratic control in industry might be desirable. But the war for "democracy" gave a new impetus to these ideas. The workers in 1918-1919, intellectuals attached to their cause, and many employers were converted to a new but vague conception of democratic control in some degree in industry. It was generally admitted that there was something strange about a situation in which, after the Nineteenth Amendment, all citizens of age might help to choose their representatives in political government of which they knew little and were denied any shadow of self-government in industry of which they knew much more.

or industrial liberty must be restored.”²⁰⁴ This perception was shared by thoughtful employers²⁰⁵ and reformers,²⁰⁶ including, especially, Senator Wagner.²⁰⁷

A variety of proposals were offered to deal with the perceived conflict between political liberty and industrial autocracy: the industrial cooperative movement, public ownership of business, scientific management, employee works councils, and the palliative of welfare capitalism. By the time of the NLRA, however, the major confrontation had devolved into one between employer-sponsored employee representation plans and trade unionism, both laying claim to the banner of “industrial democracy.” A key feature of company unionism was a grievance procedure through which the individual could complain of the treatment accorded him. Not infrequently, these plans provided for binding arbitration by a joint employee-management committee or by an outside neutral.²⁰⁸

²⁰⁴ L. BRANDEIS, *THE CURSE OF BIGNESS* 39 (1934).

²⁰⁵ And it is still harder to see how we can much longer send Jones the worker in steel or shoes or sealing-wax to the exercise of his rights as an American, and if an industrial order in which he is habituated to an autocratic control that was old before his country was born.

A. FILENE, *A MERCHANT'S HORIZON* 47 (1924). The Filenes were closely associated with Brandeis, and sponsored one of the more successful employee representation plans in their department store in Boston. See M. LADAME, *THE FILENE STORE* (1930).

So, too, John D. Rockefeller, Jr. addressed the National Industrial Conference in 1919, a few years after he had introduced an extensive employee representation system in the Colorado Fuel and Iron Company (in the face of the infamous “Ludlow Massacre” of 1914), in terms like those of Brandeis and Filene: “Surely it is not consistent for us as Americans to demand democracy in government and practice autocracy in industry.” J. ROCKEFELLER, *THE PERSONAL RELATION IN INDUSTRY* 86 (1923).

²⁰⁶ “To put it bluntly, an economic autocracy and a democratic government cannot support each other long. There will be an eventual choice between the ideals of mastery and service.” D. RICHBERG, *THE RAINBOW* 47 (1936). See also N. ZUCKER, *GEORGE W. NORRIS* 53 (1966) (“Norris astutely realized that political democracy was impossible without economic democracy, and that the only way to achieve and insure both was to champion the affirmative state.”).

²⁰⁷ In the debate on the Norris-LaGuardia Act, Senator Wagner argued: “If into this condition of affairs [the accumulation of capital] we should inject the archaic notion of master and servant, what kind of citizenship will inhabit the continent in the next generation?” 75 CONG. REC. 4918 (1932).

In 1937, Wagner wrote: “Let men become the servile pawns of their masters in the factories of the land and there will be destroyed the bone and sinew of resistance to political dictatorship.” Fleming, *The Significance of the Wagner Act*, in *LABOR AND THE NEW DEAL* 121, 135 (M. Derber & Young, eds. 1972). Senator Wagner’s deeply felt belief in this is significant not merely because he was the sponsor of the NLRA; by all accounts he was the prime mover whose efforts to secure passage were virtually singlehanded. See J. HUTHMACHER, *SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM* 189-98 (1968).

²⁰⁸ E. BURTON, *EMPLOYEE REPRESENTATION* 169 (1926); C. FRENCH, *THE SHOP COMMITTEE IN THE UNITED STATES* 61 (1923).

The difference between the proponents of company unionism and trade unionism "was not one of political theory, but of implementation,"²⁰⁹ and should not obscure the assumption shared in common between them. "[T]he industrial democracy plans," writes the historian Daniel Rodgers, "all looked toward reconstruction of the factories on essentially political and constitutional lines. Somewhere between independence and servitude they hoped to create something akin to industrial citizenship."²¹⁰ As William Leiserson (who later testified in favor of the Labor Act and was to serve as a member of the labor board) had earlier opined:

[T]he fact now remains that Personnel Management and Trade Unionism now agree "in principle," as the diplomats put it. Both accept what might be called the citizenship theory of labor relations, in place of the older theories that considered labor as a commodity, or a machine. These older theories guaranteed no rights, privileges, or immunities for the wage earner in an industry which management was bound to respect.²¹¹

²⁰⁹ Fleming, *supra* note 207, at 135. See generally NATIONAL INDUSTRIAL CONFERENCE BOARD, COLLECTIVE BARGAINING THROUGH EMPLOYEE REPRESENTATION (1933).

²¹⁰ D. RODGERS, *supra* note 203, at 61. "It was this nerve," Rodgers writes, "that John Leitch touched so effectively." *Id.* (referring to J. LEITCH, MAN TO MAN: A STORY OF INDUSTRIAL DEMOCRACY (1919)). As Samuel Haber wrote of Leitch's approach:

Leitch simply presented a literal-minded application of Brandeis' rhetorical pronouncement that the nineteenth century had been the century of political democracy and the twentieth would be the century of industrial democracy. He transferred the apparatus of a modified American constitution to the factory. There was a "House of Representatives," usually elected by a meeting of all employees below the rank of foreman; a "Senate," consisting of superintendents and foremen; and a "Cabinet," composed of executive officers and presided over by the president. There were speakers of the House, presidents of the Senate, legislative committees, bills passed, Roberts' Rules of Order followed, etc. . . . His program seemed to appeal especially to those who were just coming to accept the existence of the large, permanent working class of large-scale industry but who longed for the old, supposedly harmonious, employer-worker relationship of small-scale enterprise

S. HABER, EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890-1920, at 125 (1964). Haber points out that even the otherwise skeptical Holmes waxed enthusiastic about Leitch's ideas. *Id.* 124-25.

²¹¹ Leiserson, *Contributions of Personnel Management to Improved Labor Relations*, WERTHEIM LECTURES ON INDUSTRIAL RELATIONS 1928, at 125, 160 (1929). Leiserson had served as Executive Secretary of the National Labor Board, established under the NIRA, and was called upon by Senator Wagner for assistance in drafting the NLRA. I. BERNSTEIN, TURBULENT YEARS—A HISTORY OF THE AMERICAN WORKER, 1933-1941, at 186 (1970).

The proponents of company unionism sought to give the individual the right to present his grievance; the proponents of trade unionism sought to expand that right to representation by outsiders. But in both cases, the right of the individual to complain was not seriously contested.²¹² The exercise of that right, as an attribute of industrial citizenship, was explicitly described by Edwin Witte, who argued before the Senate Committee for the right of the individual in an organized plant to present a grievance independent of the union:

The right to petition, the right to lay grievances before Congress is a right that any individual and every group must have. Similarly, in industrial government, the right of petition, the right to lay grievances before the employer seems to me a right that every group should be accorded, and every individual. As a matter of fact, that is all the employers that are promoting company unions have in mind.²¹³

His concerns were accommodated in the proviso to section 9(a).

The appeal to individual civil rights, which had been a strong element in support of the Clayton and Norris-LaGuardia Acts,²¹⁴ was made even more strongly in the debate over the NLRA; but now the argument was for civil rights at the workplace rather than freedom from judicial control. The bill, argued Representative Mead, "creates a democracy within industry which gives our industrial workers the same general idea of freedom which the founding fathers conferred upon citizens of the United States."²¹⁵ Repre-

²¹² Clyde Summers has correctly pointed out that company unions did not protect the individuals against retaliation if they did speak up. Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 33 (1979). But retaliation for submitting a grievance would defeat the whole purpose of the plan which, in part, was to avoid unionization. Thus, as Milton Derber observes, "The most widespread advance toward industrial democracy in the twenties came in the area of due process for employee complaints. In this respect the employee-representation plans contributed about as much (and in the same manner) as the unionized situation." M. Derber, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1865-1965*, at 276 (1970).

²¹³ NATIONAL LABOR RELATIONS BOARD, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935*, at 273 (1949) (testimony of Edwin Witte) [hereinafter cited as *LEGISLATIVE HISTORY*].

²¹⁴ President Wilson spoke of the Clayton Act in terms of "emancipation" and of the treatment of workmen as "responsible individuals." 1 *MESSAGES AND PAPERS OF WOODROW WILSON* 302, 307 (1924). Senator Norris later reflected upon the Act that bore his name as a "[L]aw that attempts to safeguard and protect the liberties of the individual man." G. NORRIS, *FIGHTING LIBERAL* 316 (1945).

²¹⁵ *LEGISLATIVE HISTORY*, *supra* note 213, at 3180-81.

sentative Wood argued, "Ever since human history began, in the days of absolutism, in the days of feudalism and serfdom, and finally, under our democratic and capitalistic system, the struggle of the ages has revolved around a desire for freedom, and all this bill is designed to do is to make men free."²¹⁶ Representative Truax put it even more flamboyantly, "As Lincoln freed the blacks in the South, so the Wagner-Connery bill frees the industrial slaves of this country from the further tyranny and aggression of the overlords of wealth."²¹⁷ These several themes are reflected in the Senate Committee's report on the precursor bill to the Labor Act:

The first unfair labor practice restates the familiar law enacted by Congress in section 2 of the Norris-LaGuardia Act The language restrains employers from attempting by interference or coercion to impair the exercise by employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy.²¹⁸

Accordingly, the history of the language of section 7 and an examination of the policy it was designed to effect suggest a far more expansive reading—one that encompasses the individual's right to complain and to act in his own self-interest. It is anomalous to read the Act to provide that an individual who protests of mistreatment can be summarily fired unless he is accompanied by a fellow worker making the same complaint. It is even more anomalous that a letter written by an individual worker to a supervisor should render him subject to discharge while a disruptive mass work stoppage in the midst of the workday should be protected. Such anomalies could be tolerated if it were clearly the will of the legislature; but the policy of the Act is to ensure the liberty and dignity of the individual working person. The discharge of one individual because he or she has had the temerity to complain to the employer is no less a naked exercise of autocratic power than the discharge of two, and the lesson to other employees is no less clear. In terms of statutory construction, there are not two abstract and distinguishable categories of action—individual action for self-interest and collective action for mutual interest—one which Congress chose not to protect and the other which Congress chose to protect, but rather a continuum of individual activity—of individuals choosing to speak and act on their

²¹⁶ *Id.* 3177.

²¹⁷ *Id.* 3185.

²¹⁸ S. REP. No. 1184, 73d Cong., 1st Sess. 4 (1934), reprinted in LEGISLATIVE HISTORY, *supra* note 213, at 1103.

own behalf, singly and in small and large groups.²¹⁹ Thus, the narrow reading of the Act proceeds upon a false dichotomy, for at the core of the freedom of the individual to protest in a group necessarily lies the freedom of the individual to protest at all. Merely because Congress, for historically explicable reasons, chose in framing section 7 to emphasize out of that continuum of individual activity only the controversial aspect of combination is no reason to read the noncontroversial, lesser included activity out of the Act's "omnibus guaranty of freedom."²²⁰ As Justice Holmes explained while sitting on the circuit court:

²¹⁹ In the debate on the Clayton Act, Senator White argued:

I do not believe, as we are sometimes told, that one man has not the right to personally persuade another man not to work when they are both in a place where they have a right to be, and it makes no difference whether there are a few or whether there are many present. He has the right to use that persuasion to a thousand as well as to a lesser number.

51 CONG. REC. 14,588 (1914).

²²⁰ Senator Wagner testified on the need to articulate the Act's unfair labor practices "without in any way placing limitations upon the broadest reasonable interpretation of its omnibus guaranty of freedom." LEGISLATIVE HISTORY, *supra* note 213, at 1414. A contrary view is reflected, however, in *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845-46 (2d Cir. 1980), in which the court held that an employee's discharge did not violate the NLRA because the individual activity did not satisfy the "concerted" requirement. That court took notice of the Senate Report accompanying the NLRA, admonishing that: "Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair." *Id.* 843 n.4 (quoting S. REP. No. 573, 74th Cong., 1st Sess. 8 (1935)). The court then concluded that, "in dealing with a situation as that here presented, courts should adhere rather closely to the statutory text." *Id.* 843.

The quoted portion of the Senate Report adds little to the inquiry, however, for the Report merely addresses the question whether the Board, like the Federal Trade Commission, should enjoy a broadly delegated power to declare practices to be "unfair." The issue in *Ontario Knife*, on the other hand, was whether the individual's protest was protected by § 8(a)(1). On that question, the Senate Report is consistent with Senator Wagner's view, for the Report adverts to the specific unfair labor practices spelled out in §§ 8(2)-(5) as not imposing "limitations or restrictions upon the general guarantees of the first." S. REP. No. 573, at 9, *reprinted in* LEGISLATIVE HISTORY, *supra* note 213, at 2309 (emphasis added). In fact, the Report points out that "the unfair labor practices listed in this bill are supported by a wealth of precedent in prior Federal law," including, *inter alia*, the Norris-LaGuardia Act. S. REP. No. 573, at 8-9, *reprinted in* LEGISLATIVE HISTORY, *supra* note 213, at 2308. Thus, the Second Circuit's conclusion in *Ontario Knife* simply does not follow. The absence of an adequate explanation why only "concert" of action seems to be protected, in the face of the extraordinary anomaly produced by a literal reading, merely suggests the need for closer examination of the policy the Act sought to establish (in part by resort to the "wealth of precedent" in prior law that assists that inquiry), not capitulation to the dictionary. Curiously, the court relied upon a student note which concluded that the requirement of concert of action should simply be read out of the statute. *Id.* 843 (citing Note, *The Requirement of "Concerted" Action Under the NLRA*, 53 COLUM. L. REV. 514, 529 (1953)). Another student commentator has more recently come to the same conclusion. Note, *Individual Right for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 TEX. L. REV. 991 (1980).

The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. . . . [T]he change in policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we will go on as before.²²¹

B. *The Practical Implications of Protecting the Individual*

Not only does the meaning here proposed for the term "concerted activity" in section 7 best comport with the legislative purpose, but it also has a number of other significant benefits. It is more consistent with Board and court precedents on closely related issues, and it will eliminate harsh and unwarranted artificialities that have developed in the law under the prevailing judicial construction (and even the Board's construction) of section 7.

The construction of section 7 proposed here gives protection to individual conduct which makes no less of an appeal to congressional solicitude than kindred forms of conduct which have been held—in Board and court decisions, including those of the Supreme Court—to be protected against discipline. The National Labor Relations Act itself requires that an individual employee be protected when filing a charge with or giving testimony before the NLRB, regardless whether he is acting alone and out of self-interest.²²² The theory is that "self-interest" is beside the point, for the individual is acting

²²¹ *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908); see *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd* 326 U.S. 404 (1945). (Judge Learned Hand observed: "[I]t is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."). See also *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952), *aff'd per curiam*, 345 U.S. 979 (1953); *United States v. Hutcheson*, 312 U.S. 219, 235 (1941) (Justice Frankfurter's later treatment of his own handiwork in the *Norris-LaGuardia Act*).

²²² Section 8(a)(4), 29 U.S.C. § 158(a)(4) (1976). See *Gunnels Indus. Painters, Inc.*, 197 N.L.R.B. 599 (1972). In this case, an employee who was discharged for slow work picketed and threatened to complain to the NLRB's regional office; it was held unlawful for a supervisor to condition his willingness to suggest reinstatement upon the dischargee's dropping his complaint to the Board. Indeed, although the picketing was held not to be protected, because unsupported by any other employee, the Board stated in dictum that it would have been protected nonetheless had its purpose been to protest an employer unfair labor practice.

in the public interest by invoking the administrative procedures of the Act—a theory which suggests that the same individual should be protected against discipline for making known his complaint about working conditions to a different governmental agency or, in an effort to exhaust private channels first, directly to the employer.

One person will be protected if he enlists the support of only one other worker or if he seeks to improve working conditions by circulating a petition looking toward group protest, even if as yet he has been given little or no support by fellow employees.²²³ One person will be protected if he files a grievance in the manner expressly contemplated by the collective bargaining agreement.²²⁴ One person will be protected if, even though his own working conditions may not be directly affected, he verbalizes support for an impending strike by other company employees at another facility.²²⁵ Indeed, an individual employee is protected when expressing sympathy for the striking employees of an entirely different company,²²⁶ or when honoring their picket line there or otherwise demonstrating in their support (even, apparently, when those other workers are not even covered by the NLRA).²²⁷ Many of these precedents have been given the implied endorsement of the United States Supreme Court.²²⁸

Unless group action is to be exalted merely for its own sake, without regard for the statutory purpose—the protection of individual workers in attempting to improve their own working conditions—it is difficult to see why individual endorsement of group protests among *other* workers should be treated with greater favor under the NLRA than individual protests directed at one's own wages and working conditions. Granting protection to such protests will by no means rend the fabric of the Act; it will produce a broader and more coherent and rational interpretive pattern.

It also will result in the elimination of a number of unjust artificialities in the application of the law, some of them in the NLRB decisions and some of them in the court decisions. For ex-

²²³ NLRB v. Empire Gas, Inc., 566 F.2d 681 (10th Cir. 1977); Savin Business Mach. Corp., 243 N.L.R.B. 92, 94 (1979) (concerted activity requires "only a speaker and a listener").

²²⁴ NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217 (8th Cir. 1970).

²²⁵ Signal Oil & Gas Co. v. NLRB, 390 F.2d 338 (9th Cir. 1968).

²²⁶ NLRB v. Peter Cailler Kohler Swiss Choc. Co., 130 F.2d 503 (2d Cir. 1942).

²²⁷ Washington State Serv. Employees, 188 N.L.R.B. 957 (1971); R. GORMAN, LABOR LAW 322-25 (1976).

²²⁸ Eastex, Inc. v. NLRB, 437 U.S. 556, 564 n.13 (1978).

ample, as noted above, among the situations in which the Board will be quick to find "constructive concerted activity," with some judicial approval, is when the individual's protest finds its source in an existing collective bargaining agreement. But the Board makes no pretense that the individual's complaint must be intentionally and expressly anchored in the labor contract; it will be deemed concerted activity whether or not the individual mentions the contract, whether or not the contract actually supports the claim, and indeed whether or not the individual is even aware that a contract exists.²²⁹ On a rare occasion, injustice will be done when an administrative law judge or the Board itself, for no apparent reason, overlooks the fiction and denies protection because the complaining employee did not in fact advert to the contract or because his or her claim cannot be sustained under the contract's terms. These anomalies would be eliminated if the fiction of "constructive concerted activity" were discarded in favor of direct protection for individual claims relating to wages and working conditions. It is unjustifiably harsh to penalize the employee who, on account of insecurity or inadvertence, neglects to mention the labor contract, while protecting a fellow employee who, out of argumentativeness or chance advice from another, does mention it. This distinction is not responsive to the concerns of the NLRA.

The same can be said with respect to the court decisions which are prepared to protect the individual employee against discipline if he enlists a friend to come with him to the employer, or if he (with or without endorsement by his co-workers) relates a complaint in the first-person plural rather than the first-person singular. It trivializes the significant public policy underlying statutory protection to make it turn upon such fortuitous circumstances.²³⁰

It remains to discuss perhaps the most objectionable principle that has been derived from the cases requiring, as a condition of

²²⁹ See *supra* text accompanying notes 49-52.

²³⁰ The same criticism is justified when decisions make statutory protection for the individual turn upon mention of a union. In *Randolph Div., Ethan Allen, Inc. v. NLRB*, 513 F.2d 706 (1st Cir. 1975), an employee was discharged one week after she asked the company for financial information, stating that "she was concerned about the fact that there was no union at the plant." *Id.* 707. Even though there was no union organization drive afoot, and even though the employee went alone to management and had not discussed the matter with other employees, her reference to unionization was apparently regarded as sufficient to protect her against discipline. The court stated that: "[i]f [the company] could so extinguish seeds, it would have no need to uproot sprouts." *Id.* 708. It appears that had the employee not accomplished her request for financial information with the reference to a nonexistent union, the court would have sustained her discharge. It makes little sense to condition the application of § 7 rights upon such an inconsequential consideration.

section 7 protection, that the individual employee have actually acted in concert with others—that is, the principle that even in such group-action cases, protection against discipline will be lost unless it is proved that the employer had *actual knowledge* that the individual was acting with others.

The problem is illustrated by *Air Surrey Corp. v. NLRB*,²³¹ in which four employees drove to their employer's bank, which had previously dishonored their paychecks for insufficient funds, to inquire whether the employer had enough money in its account to meet the next payroll. Because of an inability to find a parking space, only one of the employees, Patton, left the car to enter the bank. When his inquisitiveness was brought to the attention of company management, he was discharged. The Board found Patton's inquiry at the bank to be protected activity; it disclaimed reliance on the fact that he was acting in league with three others and instead found constructive concerted activity because such inquiries "relate to conditions of employment that are matters of mutual concern to all the affected employees."²³² There was thus no need to consider whether the employer *knew* that there was group action, because under the Board's theory even an individual's action was protected through the fiction of constructive concerted activity.

The court of appeals firmly disagreed, however, and denied enforcement. The court relied, as have other courts in similar cases, upon the unexceptionable principle that to make out a violation of the Act it must be shown that the employer was aware that the employee was engaging in protected activity and that the employer discharged the employee for that reason. Because there was no substantial evidence that the employer knew that Patton was acting along with and on behalf of his three co-workers, the court reversed the Board's finding of a section 8(a)(1) violation.²³³ Although this approach is found in appellate decisions at least as far back as 1949,²³⁴ it is unwarranted for at least two reasons.

²³¹ 601 F.2d 256 (6th Cir. 1979), *denying enforcement to* 229 N.L.R.B. 1064 (1977).

²³² 229 N.L.R.B. at 1064.

²³³ Because the court concluded that the Board had erred in using the fiction of constructive concerted activity, and that actual concert and actual employer knowledge were elements of the unfair labor practice, the more appropriate disposition of the case would have been a remand to the Board to develop a record on these issues. See *Jim Causley Pontiac v. NLRB*, 620 F.2d 122 (6th Cir. 1980).

²³⁴ See *NLRB v. Westinghouse Elec. Corp.*, 179 F.2d 507 (6th Cir. 1949). In *NLRB v. Office Towel Supply Co.*, 201 F.2d 838 (2d Cir. 1953), an employee was discharged when she was reported to have said: "This is a hell of a place to work. They expect one girl to do the work of five . . ." *Id.* 839. Although this

The first reason, although the less important of the two, is that the requirement of actual employer knowledge is inconsistently applied in the cases: it frequently rests upon fictional presumptions, and frequently appears to reflect little more than the factfinder's unarticulated sympathy either for the employer or for the disciplined individual. For example, it is not unusual for the Board to find employer knowledge of concerted activity stemming from little more than a vague company awareness of inchoate employee dissatisfaction,²³⁵ or awareness that a similar complaint has been made at some time in the past by some other employee.²³⁶ The courts are generally less hospitable. In *Indiana Gear Works v. NLRB*,²³⁷ for example, the court was willing to assume that an employee who had posted cartoons ridiculing the company's recent two-cent wage increase had been aided by two other employees in suggesting captions and in posting, and that other employees were dissatisfied with the wage increase; nonetheless, the court found there was no employer knowledge that other employees had participated in the cartoon campaign or even that employees other than the dischargee were dissatisfied with the two-cent increase.

More recently, in *Tri-State Truck Service, Inc. v. NLRB*,²³⁸ employees McDonald and Kovach were both discharged after each had refused to deliver fuel oil on a Saturday after a heavy snowfall unless they were paid premium pay; McDonald had so announced over the telephone, and the same position was taken soon after by Kovach, who was known by the employer to live in the same house as McDonald and who had stated over the telephone that he was "sticking with" McDonald. The court intimated that this refusal

was said in the midst of a discussion with other employees, who were voicing their dissatisfaction and their belief in the need for a union, that fact was not known to the employer and for this reason a divided court of appeals refused to adopt the Board's finding of a section 8(a)(1) violation. An alternative ground for decision was that the employee's conduct was not section 7 activity, but rather "mere griping" in front of other employees. Judge Clark dissented, arguing that the employer should not be able to assert the defense of ignorance, lest enforcement of the NLRA be crippled in cases of incipient unionization stemming from employee complaints. *Id.* 841.

²³⁵ *E.g.*, *St. Joseph's High School*, 236 N.L.R.B. 1623, 1623 n.1 (1978) (Board holds protected an individual's writing of a letter to an accreditation association, complaining of salaries and working conditions, and finds that "[r]espondent at all times was fully aware of the continuing unsatisfied concerns expressed by members of the lay faculty"), *vacated on other grounds*, 248 N.L.R.B. 901 (1980); *Carbet Corp.*, 191 N.L.R.B. 892 (1971), *enforced*, 68 Lab. Cas. (CCH) ¶ 12,045 (6th Cir. 1972).

²³⁶ *Pink Moody, Inc.*, 237 N.L.R.B. 39 (1978).

²³⁷ 371 F.2d 273 (7th Cir. 1967). The court made much of the dischargee's habitual sarcasm and earlier reprimand for sarcasm and poor attitude.

²³⁸ 616 F.2d 65 (3d Cir. 1980).

to work was not concerted, and held that in any event these facts did not provide record evidence substantial enough to warrant an inference by the administrative law judge and the Board that the employer had actual knowledge of concert between McDonald and Kovach prior to their discharge. The result is particularly startling because the court's statement of the prevailing law contemplated that a violation could be made out even without actual knowledge that employees are engaging in concerted activity; in its general statement, the court treated it as sufficient that the employer "had reason to know" of such concert.

Even though other courts have been somewhat more sympathetic, the fact remains that the "employer knowledge" standard has been erratically and tendentiously applied, and that it thus breeds uncertainty and unfairness in litigation.²³⁹

The second and more fundamental weakness in the "employer knowledge" test is that it rests on an erroneous interpretation of the NLRA and frustrates the objectives of the statute. If an employer discharges an employee not for protected activity but for "cause" resulting from delinquencies on the job, the Act is not violated, and the employer's ignorance that the employee was in fact engaged in activity which the Act protects will conclusively negate an illicit motive. Surely, for example, if an employee is discharged for repeated and insubordinate meddling in the affairs of others beyond her job responsibilities, and not for writing an anonymous letter to the employer complaining about its proposed wage adjustments, there should be no violation.²⁴⁰

²³⁹ A rather striking example is *Walls Mfg. Co. v. NLRB*, 321 F.2d 753 (D.C. Cir. 1963), which was twice before the Board and twice before the court of appeals. In that case, the company discharged an employee for writing a signed letter to the state health department complaining about unsanitary restroom conditions. Although the Board found that the letter was concerted activity because two other employees approved it before mailing, it held, applying prevailing appellate law, that, because the employer was unaware of this fact at the time it discharged the letter-writer, there was no violation of the NLRA. 128 N.L.R.B. 487 (1960), *remanded*, 299 F.2d 114 (D.C. Cir. 1962). The court of appeals reversed, however, stating that the "employer knowledge" requirement need not be applied "in full strictness and severity," in view of the fact that the company knew this employee had previously sought to unionize, it suspected that she had been responsible for an earlier complaining letter which did refer to other employees, and the discharge immediately after her firing told the employer she had written the second letter on behalf of her co-workers as well. 299 F.2d at 116. On remand, the Board found that the employer had knowledge that the second letter was a group effort, and held that the discharge therefore was an unfair labor practice. The court of appeals enforced. 137 N.L.R.B. 1317 (1962), *enforced*, 321 F.2d 753 (D.C. Cir.), *cert. denied*, 375 U.S. 923 (1963).

²⁴⁰ *Diagnostic Center Hosp. Corp.*, 228 N.L.R.B. 1215 (1977).

The same principle explains why the employer was found not to have committed an unfair labor practice for discharging an employee who sat out of place in

If, however, the employer has imposed discipline not for some independent job-related "cause" but rather for a worker's protest or inquiry regarding wages or working conditions, that should be sufficient to find a violation, even without proof that the employer knew that a second employee was implicated. What public policy demands that the employer in the *Air Surrey* case be permitted in effect to insulate itself against statutory liability merely by neglecting to ask whether the inquisitive employee who stopped at the bank was in the company of other employees? Why should statutory protection in that case depend upon whether parking or weather conditions at the bank were such that all but one of the employees remained in the car, rather than all but two?

Although the Supreme Court decision in *NLRB v. Burnup & Sims*²⁴¹ does not squarely control the issue, its reasoning argues powerfully that actual employer knowledge of employee concert ought not be a condition of liability. In that case, the employer discharged two employees known to be soliciting for the union; the employer had been informed by another employee that these organizers had threatened to dynamite the union's way into the plant if that were necessary. In fact, the union supporters had made no such threat. Even though the employer believed in good faith that they had, and thus that their organizing activities were not protected, the employer was wrong, and the Court found the discharges to be unlawful and ordered not only reinstatement but back pay. The discharge of innocent employees *actually* engaged in protected activity was found unlawful even though the facts on which the employer reasonably based its discipline would have clearly suggested otherwise.

The same is true in the cases involving activities by individual employees. What the Supreme Court regarded as central in *Burnup* was less the employer's state of mind than the impact upon employees engaging in protected activity and upon other employees who might be inclined to do so in the future: "[T]he protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees."²⁴² Similarly, there seems

a sex-segregated dining hall when it was unknown to the employer that the purpose of doing so was to protest such segregation. *New England Fish Co.*, 212 N.L.R.B. 306 (1974) (when ordered to move by a supervisor, the employee precipitated a fight; the Board found this to be an independent and fair ground for discharge).

²⁴¹ 379 U.S. 21 (1964).

²⁴² *Id.* 23.

to be no question that the discharge of a single individual because he has protested about wages or working conditions will coercively restrain similar protest—whether by other individuals or by groups of workers—in the future. To treat such a discharge as a violation of section 8(a)(1) is wholly consistent with the long-established doctrine (exemplified by *Burnup & Sims* itself) that the key to a violation of that section is not the employer's illicit motive but rather the coercive effect upon the exercise of section 7 rights.²⁴³

Cases announcing the doctrine of "constructive concerted activity" make unnecessary the search for actual employer knowledge of concert. Even more readily can that search be discarded when the statute is construed not to require concert at all, constructive or otherwise. As a result, a significant burden of uncertainty imposed upon employers and employees by the current state of statutory construction is removed.

Under a legislative scheme in which protest by two individuals is protected but protest by one is not, it could be argued that it is unfair to the employer to impose liability unless the fact of concert is known. Otherwise, the employer will not know whether the law permits disciplinary action against an individual in a particular situation. If concerted activity were discovered only after discharge, statutory liability might thus unfairly be imposed by surprise. But if the individual who protests wages or working conditions is protected regardless of formal participation by others, the employer will know what the demands of the law are: once the employer knows the nature of the individual's protest and disciplines him or her therefor, it can expect to have such discipline overturned.

This would not undermine any significant employer interest—and that is the final reason why the interpretation of section 7 proposed here is not only more consistent with the statutory objective of justice for the individual worker but is also practicable and fair to the employer.

Employers might be inclined to believe that the proposed interpretation will significantly undermine plant discipline and productivity. Should not an employee lose the protection of the Act when he complains chronically and unreasonably? Will not the proposed interpretation coddle the incurably insubordinate? Will it not be an invitation to individual refusals to work which will interfere with production and which will, in unionized plants, undermine the status of the union and the integrity of the grievance procedures of the contract (which typically require the disen-

²⁴³ R. GORMAN, *supra* note 227, at 132-34.

chanted employee to follow the employer's directives while utilizing the contractual grievance machinery)?

The same inquiries can be raised when the complaints or work stoppages are by two employees rather than one, and all that is proposed here is that the protection of the statute be accorded in the same manner to the one as it is to the two. It has long been the law, for example, that even group action will lose its protection if it is pursued in a manner which is disloyal, insubordinate, abusive, malicious, profane, or intended to harass. The same would be true of complaints and protests undertaken by an individual employee.²⁴⁴ So, too, just as it is unprotected for a union organizer to solicit or otherwise divert the attention of a fellow employee during working time,²⁴⁵ the same would be true of importunings by an individual worker.²⁴⁶ And even if an individual employee's complaint is deemed to be protected, the employer is free to take responsive action which is designed to promote its legitimate business interests, just as the employer is privileged to react in group-action cases.²⁴⁷

Perhaps the two most troubling categories of cases for management, apart from the so-called "chronic complainer," are those in which the complaint of the individual employee is manifested in a refusal to perform work and those in which the employee chooses to avoid an available grievance procedure under a collective bargaining agreement.

When an individual's refusal to work is rooted in a belief that it is unsafe or dangerous to perform assigned duties, there is little reason to make statutory protection contingent upon being joined by another. The Supreme Court in *NLRB v. Washington Aluminum Co.*²⁴⁸ held that a spontaneous concerted walk-out on account

²⁴⁴ Richboro Community Mental Health Council, Inc., 242 N.L.R.B. 1267, 1267-68 (1979) (writing letter to third persons protesting the discharge of a fellow employee was protected activity; protection can be lost, however, when "the attitude of the employees is flagrantly disloyal, wholly incommensurate with any grievance which they may have, and manifested by public disparagement of the employer's product or undermining of its reputation") (quoting *Veeder-Root Co.*, 237 N.L.R.B. 1175 (1978)); *Hawthorne Mazda, Inc.*, 251 N.L.R.B. 313, 316 (1980) (critical comments to the company's vice-president and general-manager were not "indefensible or so out of context as to render him unfit for further service") (footnote omitted), *enforced*, 108 L.R.R.M. (BNA) 2344 (9th Cir. 1981).

²⁴⁵ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); R. GORMAN, *supra* note 48, at 179-84.

²⁴⁶ Cf. *Colonial Stores, Inc.*, 248 N.L.R.B. 1187 (1980) (employee discharged for circulating petition accusing company of failing to implement terms of bargaining agreement).

²⁴⁷ R. GORMAN, *supra* note 227, at 341-53.

²⁴⁸ 370 U.S. 9 (1962).

of extremely cold conditions in a non-union plant is protected, and the case of the individual employee who refuses to work because of excessive lint or dust or paint fumes in the air, or because the lights, brakes or tires on his truck are defective, would appear to have at least a comparable claim to statutory protection. This is true whether or not there is a collective bargaining agreement upon which the individual may rest his refusal to work.²⁴⁹ If the individual employee has a good faith belief of danger, or at least a reasonably based one,²⁵⁰ there is no significant employer interest that dictates the treatment of such a work stoppage as unprotected.

When, however, the refusal to work on the part of the individual employee is not because of unsafe conditions but is merely a form of protest, the employee's case is arguably less sympathetic. For example, in *NLRB v. Dawson Cabinet Co.*,²⁵¹ the Board overturned the discharge of a female employee who refused to perform work until she was assured that she would be paid as much for that work as would a male employee; but the court found no protected concerted activity, because no other employee had refused to work or had even shared her concern for equal pay. Had the employee in fact been urged or delegated by other employees to protest about this issue and to refuse the work assignment, *Washington Aluminum* would rather clearly point toward her statutory protection. It must be remembered, however, that that would not deprive the employer of the privilege to take responsive action consistent with the needs of the business, for example, by assigning her to some vacant lower job classification pending her willingness to accept the assignment. The same reasonable responsive action would be available to the employer had the individual's protest been deemed protected in spite of the lack of support from fellow workers. But discharge would not be available in the single-employee case, as it would not be in the group-action case.

When a collective bargaining agreement is in effect, it should be construed to render single-employee protest unprotected in those circumstances where group protest would also be unprotected. Most obviously, a no-strike provision in a labor contract, which is com-

²⁴⁹ *E.g.*, *Bay-Wood Indus.*, 249 N.L.R.B. 403 (1980) (existing labor contract), *enforcement denied*, 108 L.R.R.M. (BNA) 3175 (6th Cir. 1981); *Pink Moody, Inc.*, 237 N.L.R.B. 39 (1978) (non-union company). It must be emphasized that this view has been rejected by some courts of appeals. *E.g.*, *NLRB v. C & I Air Conditioning, Inc.*, 486 F.2d 977 (9th Cir. 1973) (individual's refusal to carry heavy air conditioning equipment onto temporary stairway believed to be unsafe).

²⁵⁰ See *supra* note 51 and accompanying text.

²⁵¹ 566 F.2d 1079 (1977).

monly understood to render unprotected a concerted stoppage during the contract term, should have the same impact on a "protest stoppage" by an individual.²⁵² And even apart from an express no-strike clause, the simple fact that there is a majority recognized union which is administering a labor agreement will in most instances render unprotected an individual's stoppages or picketing, just as with comparable group action under the decision of the Supreme Court in *Emporium Capwell Co. v. Western Addition Community Organization*.²⁵³ The *Emporium* decision would suggest that adamant insistence on the part of an individual employee that the employer engage in bargaining with him with a view toward changing working conditions should also be treated as unprotected.²⁵⁴

But it does not follow that the individual in an organized collective bargaining unit loses the protection of the Act for nothing more than a verbal complaint, protest, or insistence upon resolving his grievance consistently with the contract but without the active cooperation of the union. Some decisions have suggested that the assertion of a grievance outside of the formal grievance procedure should render the individual susceptible to discharge or other discipline.²⁵⁵ But the reasoning used to support this position—that through the recognition, no-strike, and grievance procedures of the contract, the individual makes an implied commitment to deal on grievances only through the union and only in the precise manner set forth in the contract—is totally unconvincing. The right to make individual grievances known to management is expressly granted by section 9(a) of the NLRA, and that section also clearly suggests that the union may not bargain away that right.²⁵⁶

²⁵² *Sunbeam Corp.*, 184 N.L.R.B. 950 (1970) (Board concluded that the labor agreement's no-strike clause was violated by an individual employee who, in protesting the denial of a requested transfer, distributed to employees and to the public a petition which the Board majority construed to invite picketing and boycott of the company), *aff'd in relevant part*, 459 F.2d 811 (7th Cir. 1972).

²⁵³ 420 U.S. 50 (1975). The Board recently has stated that, even where there is a bargaining agreement with grievance procedures and a no-strike clause, an individual engaging in informational picketing and leafleting will not automatically lose the protection of section 7. *Colonial Stores Inc.*, 248 N.L.R.B. 1187 (1980).

²⁵⁴ *Norfolk Conveyor*, 159 N.L.R.B. 464 (1966). In that case, the Board decided against the employee, rejecting the theory of constructive concerted activity and relying on the *Mushroom Transportation* case. This case would have been better decided on a theory akin to that in *Emporium* (which, of course, had not yet been decided).

²⁵⁵ *E.g.*, *Sunbeam Corp.*, 184 N.L.R.B. 950 (1970), *aff'd in relevant part*, 459 F.2d 811 (7th Cir. 1972); *R.J. Tower Iron Works, Inc.*, 144 N.L.R.B. 445 (1963).

²⁵⁶ Section 9(a) grants not only "the right at any time to present grievances" to an employer, but also the right "to have such grievances adjusted, without the

It is true that section 9(a) has been construed by the Supreme Court in *Emporium Capwell* not to accord an indefeasible right to an individual to secure the employer's ear; the purpose was rather "to authorize the employer to entertain [grievances] without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive representative."²⁵⁷ Although the employer may thus refuse to *entertain* an employee's presentation, nothing in the Act suggests it should be permitted to *discharge* an employee for attempting to make that presentation. Such a construction would be wholly inconsistent with the language and policy of section 9(a). In a number of recent cases, the NLRB has in fact concluded that the failure of an individual to file a formal grievance under a labor contract does not render his complaint unprotected,²⁵⁸ and that although it is section 9(a) which expressly deals with the individual's right to present grievances independently of the union, it is section 7 which accords that right and nothing in section 9(a) is intended to limit it.²⁵⁹

Finally, it could be claimed that the interpretation of section 7 proposed in this Article will unwisely inject the Board into too many discipline cases that would better be resolved through contractual grievance and arbitration procedures. It is true that the proposed interpretation results in making the Board an available forum for challenging discipline of the "uncooperative" employee who complains about his wages or working conditions. (Again, this has always been true when there are two "complainers" who act together.) It is also true that arbitrators frequently deal with disciplinary grievances centering around the insubordinate or quarrelsome employee, and that arbitral disposition will likely be faster than Board disposition, if not perhaps as substantively sophisticated and procedurally fair.

It is therefore arguable that the Board should defer a hearing on a section 8(a)(1) charge until available grievance and arbitration procedures have been exhausted, under the doctrine of *Collyer In-*

intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of' any existing labor contract. 29 U.S.C. § 159(a) (1976).

²⁵⁷ 420 U.S. at 61 n.12.

²⁵⁸ *Bay-Wood Indus.*, 249 N.L.R.B. 403 (1980), *enforcement denied*, 108 L.R.R.M. (BNA) 3175 (6th Cir. 1981) (Board recalled its firmly held rule that the complaining employee retains the protection of the Act, under the theory of constructive concerted activity, even if he or she never adverts to the labor contract at all).

²⁵⁹ *Colonial Stores, Inc.*, 248 N.L.R.B. 1187 (1980).

sulated Wire.²⁶⁰ The Board has wavered, however, on the question whether it should defer to arbitration procedures in section 8(a)(1) cases, and at the moment it does not do so, by virtue of its split decision in *General American Transportation*.²⁶¹ Without commenting on the general question of deferral in section 8(a)(1) cases, it should be noted that in many of these cases, the disciplined individual had voiced a complaint through channels other than the union, or without the cooperation or endorsement of fellow employees. It is therefore perhaps reasonable for the Board, in this particular category of cases, to be wary of the extent to which the union will devote its energy and its resources to pressing the challenge to the employer's action through an arbitration proceeding.

When there has already been a resolution of the discipline grievance before an impartial arbitrator after a fair hearing, the Board would be advised to defer to the arbitrator's determination under the *Spielberg Manufacturing Co.*²⁶² standards, provided the outcome is not repugnant to the policies of the NLRA and provided the arbitrator has considered whether the discharge was in fact for "complaining" (as distinguished from some completely different business-related motive put forward by the employer) and whether the "complaining" had become sufficiently abusive, insubordinate, or harassing as to constitute cause for discipline under traditional industrial standards.²⁶³

Because the Board may be more inclined to believe itself sensitive to statutory values in such cases, it may be less willing than arbitrators to find that persistent complaining constitutes cause for discipline.²⁶⁴ If this is an "interference" with contractual dispute-resolution procedures which is unwanted by both unions and man-

²⁶⁰ 192 N.L.R.B. 837 (1971).

²⁶¹ 228 N.L.R.B. 808 (1977).

²⁶² 112 N.L.R.B. 1080 (1955). See R. GORMAN, *supra* note 227, at 734-46.

²⁶³ Compare NLRB v. General Warehouse Corp., 643 F.2d 965 (3d Cir. 1981) with *Suburban Motor Freight, Inc.*, 247 N.L.R.B. No. 2 (1980).

²⁶⁴ *Colonial Stores Inc.*, 248 N.L.R.B. 1187 (1980), is just such a case. There, an employee was discharged for circulating a petition among other employees protesting the company's alleged failure to abide by the labor contract and for participating in a parking-lot demonstration (along with her nonemployee husband) protesting the company's alleged failure to abide by an earlier grievance settlement with her. The union took the discharge grievance to arbitration, and the arbitrator upheld the employer, concluding that the employee had improperly engaged in self-help measures inconsistent with the contractual grievance procedures. In a 2 to 1 decision, the Board refused to enforce the arbitrator's decision, finding that the employee's conduct was concerted and protected by section 7, and that the arbitrator's decision was therefore repugnant to the NLRA.

agement, it is not qualitatively different from the ordinary run of deferral cases arising under sections 8(a)(1), 8(a)(3), and 8(b)(2).²⁶⁵

In sum, the construction of the NLRA offered here works little or no qualitative legal change for either the Board or employers; but it does eliminate harshness, artificiality, and uncertainty while attending more faithfully to the history, values, and goals embraced in the Labor Act.

²⁶⁵ See *supra* notes 261-62.