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## THE PROTECTION OF ECONOMIC PRESSURE BY SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT

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### INTRODUCTION

One of the central purposes of the Wagner Act<sup>1</sup> was to counterbalance the power of employers by facilitating the use of strikes and other forms of economic pressure by employees.<sup>2</sup> To this end section 7 of the act granted to employees the right to engage in concerted activity for mutual aid or protection,<sup>3</sup> while section 8 limited the ability of employers to respond.<sup>4</sup> Although there have been many

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<sup>1</sup> National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1964).

<sup>2</sup> "The Wagner Act became law on the floodtide of belief that the conflicting interests of management and worker can be adjusted only by private negotiations, backed, if necessary, by economic weapons, without the intervention of law." Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 322 (1951) [hereinafter cited as Cox]. See H.R. REP. No. 1147, 74th Cong., 1st Sess. (1935); 78 CONG. REC. 3443 (1934) (remarks of Senator Wagner).

<sup>3</sup> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . National Labor Relations Act § 7, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

<sup>4</sup> It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

National Labor Relations Act §§ 8(a)(1), (3), added by 61 Stat. 140 (1947), as amended, 29 U.S.C. §§ 158(a)(1), (3) (1964).

changes made in the NLRA since 1935, the use of economic pressure by employees remains a highly significant factor in the scheme of labor relations contemplated by the act.

The right to utilize economic pressure was included in section 7 in order to prohibit employers from using participation in such activity as grounds for disciplinary action.<sup>5</sup> It was not intended, however, that an employer be required to yield to his employees' demands. The scheme of the act contemplates that an employer may resist employee pressure and subject the union to a test of economic power. A natural tension exists between the policy forbidding an employer to discipline employees for using economic pressure and the policy permitting him to defend his own economic interests. The National Labor Relations Board and the courts are often required to characterize particular employer responses as unfair labor practices or as legitimate steps to resist union pressure. The line between these concepts is vague; accordingly, the extent to which sections 8(a)(1) and 8(a)(3) limit employer responses to economic pressure has been a source of continual difficulty in the enforcement of the act.<sup>6</sup>

Another source of difficulty arises from the fact that the statutory scheme does not recognize economic pressure as a legitimate means of solving all disputes. The Taft-Hartley and Landrum-Griffin amendments have specifically prohibited the use of economic pressure to achieve certain purposes.<sup>7</sup> The Board and the courts have refused to protect economic pressure in other circumstances on the grounds that the nature of the dispute was such as to make its use unjustified. In areas of traditional management concern, it sometimes has been held that the employer should be able to make decisions without running the risk of economic combat.<sup>8</sup> Alternatively the employer's involvement in an issue which concerns his employees may be so slight that it is considered improper for the employees to cause him economic hardship in pursuing their own interests. In many such cases the policy

<sup>5</sup> Originally the determination that economic pressure was protected was also significant because it meant that the activity could not be declared illegal under state law. Compare *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945), with *UAW v. Wisconsin Employment Relations Bd. (Briggs & Stratton)*, 336 U.S. 245 (1949). The construction of § 7 is now less significant in limiting the application of state law since it is settled that activity need not be protected for state jurisdiction to be ousted. State law is inapplicable to activity that is arguably prohibited or protected and may be inapplicable even if the activity is neither prohibited nor protected. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

<sup>6</sup> See the discussion in Part I of this article.

<sup>7</sup> See Labor-Management Relations Act (Taft-Hartley Act) § 8(b)(4), 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(4) (1964); National Labor Relations Act § 8(b)(7), added by 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7) (1964). Section 8(b)(4) limits the use of economic pressure as a means of compelling an employer to cease dealing with another, and § 8(b)(7) limits the use of economic pressure for organizational or recognition purposes.

<sup>8</sup> See, e.g., *NLRB v. Reynolds Int'l Pen Co.*, 162 F.2d 680 (7th Cir. 1947).

of the statute, which is aimed at preventing the spread of industrial disputes, militates against holding the economic pressure protected.

From time to time the courts have also indicated that certain forms of economic pressure go beyond the purpose of equalizing economic power and give employees an unfair advantage. In other cases the Supreme Court seemingly has rejected the contention that the act provides a basis for picking and choosing among peaceful economic weapons. Moreover the ability of employers to utilize economic pressure has been expanded by recent cases.<sup>9</sup> As a result, considerable confusion exists as to the state of the law in this area.

Section 7 protects the use of economic pressure by both labor organizations and by unorganized employees. Where unorganized employees are involved, the use of economic pressure tends to be brief—a show of feeling rather than an effort to engage in economic combat. In such cases it is often difficult to assign a specific cause to the employees' conduct. Court decisions dealing with the use of economic pressure by unorganized employees often fail to show awareness of the special circumstances involved, by limiting the reach of section 7 on the basis of considerations more appropriately applied to the use of economic pressure by labor organizations.

Where a bargaining relationship is established there is less need to permit the use of economic pressure by individual employees. The existence of a recognized representative serves to counterbalance the employer's economic power. Collective bargaining agreements generally provide peaceful alternatives which make the use of economic pressure unnecessary. Moreover, the use of independent economic pressure is often inconsistent with a recognized union's status as sole bargaining representative. As a result of these considerations, pressure brought by employees independently of their recognized bargaining representative is almost always held unprotected. Generally this is a sound conclusion. However, it does not follow, as some courts have held, that independent pressure in support of a recognized union's legitimate bargaining position should be held unprotected.

The purpose of this article is to analyze the extent of the protection afforded economic pressure by section 7. Economic pressure is generally held unprotected for one of three reasons: the purpose of the pressure; the type of pressure used; the existence of a recognized union. The following discussion will attempt to deal with the major decisions defining the reach of section 7 in these areas and will also deal with problems involved in employer response to protected activity.

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<sup>9</sup> *E.g.*, *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

## I. THE MEANING OF "PROTECTED"

The extent to which conduct described in section 7 is protected by the act depends upon the construction of sections 8(a)(1) and 8(a)(3). Section 8(a)(1) makes it an unfair labor practice to "interfere with, restrain or coerce employees in the exercise of . . ." section 7 rights.<sup>10</sup> Section 8(a)(3) prohibits "discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization: . . ." <sup>11</sup> Since section 8(a)(1) is sufficiently broad to include violations of section 8(a)(3),<sup>12</sup> it is theoretically possible to analyze all cases of employer response to protected activity under section 8(a)(1). However, cases involving responses to union activity have traditionally been analyzed primarily under section 8(a)(3), and it has generally been accepted that in such cases the scope of section 8(a)(1) is limited by the scope of section 8(a)(3).<sup>13</sup>

If an employer punishes an employee for engaging in activity protected by section 7, he violates section 8(a)(1) and, if union activity is involved, section 8(a)(3) as well.<sup>14</sup> This does not mean,

<sup>10</sup> National Labor Relations Act, § 8(a)(1), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1964).

<sup>11</sup> National Labor Relations Act § 8(a)(3), added by 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1964). Section 8(a)(3) is literally applicable only to cases of employer discrimination. However, the cases indicate that discrimination in this context occurs whenever the employer treats employees differently than he would have but for their union activity. Thus, discrimination may encompass any employer response to union activity. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Allis-Chalmers Mfg. Co. v. NLRB*, 162 F.2d 435 (7th Cir. 1947). It is settled that discouragement of union membership includes discouragement of any union activity. *Radio Officers Union v. NLRB*, 347 U.S. 17, 39-40 (1954).

<sup>12</sup> See *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941).

<sup>13</sup> In *NLRB v. Burnup & Sims Inc.*, 379 U.S. 21 (1964), the Court analyzed a discharge solely in terms of § 8(a)(1), where the employer mistakenly believed that the discharged employee had engaged in serious misconduct while engaging in union activity. Although the opinion indicated that this method of analysis might be used generally to avoid problems involved in the application of § 8(a)(3), the Court has not followed this approach in subsequent cases. Thus in *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), the Court stated that certain employer conduct cannot be said to violate § 8(a)(1) unless it violates § 8(a)(3). *Id.* at 269. In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the Court referred to the unfair labor practice charge under §§ 8(a)(1) and 8(a)(3) as "grounded primarily in § 8(a)(3)." *Id.* at 32. Commentators have regarded *Burnup & Sims* as a sport in this regard, and have urged that the Court continue to evaluate problems of employer response to union activity under § 8(a)(3). *E.g.*, Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735 (1965) [hereinafter cited as Getman]; Meltzer, *The Lockout Cases*, 1965 SUP. CT. REV. 87; Oberer, *The Scierter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORN. L.Q. 491 (1967) [hereinafter cited as Oberer]; Note, *Proving an 8(a)(3) Violation: The Changing Standard*, 114 U. PA. L. REV. 866 (1966).

<sup>14</sup> Court opinions often state that an employer may discharge an employee for any reason, so long as he does not seek to interfere with the employee's right to join a union or to engage in collective bargaining. See, *e.g.*, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 254-57 (1939); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937). Such language has rarely been applied once it has been deter-

however, that an employer is helpless in the face of protected activity. In many situations, an employer acting to protect his business can legitimately respond to protected activity in such a way as to make it costly for the employees to continue such activity. Although such cases involve "interference" with section 7 rights and generally involve "discouragement" of union membership, the literal language of the act is limited to minimize interference with the employer's ability to run his business as he wishes.<sup>15</sup>

On the other hand, the mere fact that an employer's response to economic pressure is motivated by legitimate business considerations does not necessarily mean that his conduct is permitted by the act. A violation of section 8(a)(1) may be found regardless of the employer's motivation if the interference with the employee rights is considered sufficiently severe to outweigh the employer's economic interests.<sup>16</sup> Violations of section 8(a)(3) have been found on the basis of a similar balancing of interests.<sup>17</sup> Some judicial opinions, however, indicate that a violation of section 8(a)(3) almost always requires a finding that the employer was motivated by a desire to discourage union membership.<sup>18</sup> Many Supreme Court opinions contain language stressing the importance of employer motivation under section 8(a)(3). The most emphatic language is contained in *American Ship Building Co. v. NLRB*,<sup>19</sup> where the Supreme Court held that an employer may lock out his employees in order to support his bargaining position after an impasse in negotiations has been

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mined that the employer was acting in response to protected concerted activity. The fact that the employer sought to punish the employees for engaging in protected activity has been deemed sufficient to make his action a violation of the act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Indeed, in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), the Court held that since the conduct for which an employee was discharged was in fact protected, the discharge violated § 8(a)(1) even though the employer thought the employee had engaged in misconduct.

<sup>15</sup> See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), holding that absent special circumstances inhibiting communication "an employer may validly post his property against nonemployee distribution of union literature . . ." *Id.* at 112. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), holds that an employer may respond to employee collective bargaining, which is protected activity under § 7, after impasse has been reached. *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938) announced the rule that an employer may hire permanent replacements in order to continue and protect his business during an economic strike.

<sup>16</sup> See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) holding that a no solicitation rule adopted "well before any union activity" and enforced non-discriminately nevertheless violated § 8(a)(1) because it interfered unduly with the employees' organizational rights protected by § 7. See also *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

<sup>17</sup> See, e.g., *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *NLRB v. Republic Aviation Corp.*, 324 U.S. 793 (1945).

<sup>18</sup> See Getman 743-52.

<sup>19</sup> 380 U.S. 300 (1965). See Note, *Proving an 8(a)(3) Violation: The Changing Standard*, 114 U. PA. L. REV. 866 (1966).

reached. The Court stated that a violation of section 8(a)(3) could be found, in the absence of proof of improper motive, only where the employer's conduct did not serve a legitimate business purpose *and* was likely to have a severe impact on union membership.<sup>20</sup> This language was inconsistent with prior cases<sup>21</sup> and with dicta in *NLRB v. Brown*,<sup>22</sup> decided the same day. Predictably, however, the Court has in effect repudiated this broad language<sup>23</sup> and approach in *NLRB v. Great Dane Trailers Inc.*<sup>24</sup>

The *Great Dane* case arose out of a strike called over a new contract. Many of the striking employees demanded vacation pay allegedly owed them under the terms of the expired contract. The company denied the request on the ground that the contract had expired. It did, however, as a matter of company policy, grant vacation pay to non-strikers and strikers who returned to work prior to being replaced. The Board found that the company's action violated sections 8(a)(1) and 8(a)(3) because it, in effect, punished striking employees for engaging in protected activity.<sup>25</sup>

The court of appeals, relying on the Supreme Court's opinion in *American Ship Building*, denied enforcement on the grounds that "there are insufficient facts shown by the record to support an inference of unlawful motivation."<sup>26</sup> The court of appeals suggested that the employer may have acted from legitimate motives, such as the desire to reduce expenses or the desire to encourage longer tenure. The Supreme Court reversed. Purporting to distill the essence of its previous opinions dealing with section 8(a)(3), the Court announced "several principles of controlling importance":<sup>27</sup>

First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifica-

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<sup>20</sup> 380 U.S. at 313.

<sup>21</sup> *E.g.*, *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *NLRB v. Republic Aviation Corp.*, 324 U.S. 793 (1945).

<sup>22</sup> 380 U.S. 278 (1965).

<sup>23</sup> See Getman 748-50.

<sup>24</sup> 388 U.S. 26 (1967).

<sup>25</sup> *Great Dane Trailers, Inc.*, 150 N.L.R.B. 438 (1964).

<sup>26</sup> *NLRB v. Great Dane Trailers, Inc.*, 363 F.2d 130, 135 (5th Cir. 1966).

<sup>27</sup> 388 U.S. at 34.

tions for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him.<sup>28</sup>

The court of appeals was instructed to enforce the Board's order because the employer "came forward with no evidence of legitimate motives . . . ." <sup>29</sup>

The *Great Dane* case purports to do away with the necessity for establishing improper motive only in cases of "conduct . . . 'inherently destructive' of important employee rights."<sup>30</sup> In fact it provides for balancing of interests in all cases of employer response to union activity, whenever a specific finding of improper motive is not made.<sup>31</sup> The Board is required to desist from interest balancing only in cases in which the employer's conduct serves a legitimate and substantial business interest and the impact on employee rights is "comparably slight."<sup>32</sup> In such cases, almost by definition, no violation would be found on the basis of the strength of the competing interests. It is difficult to imagine a case in which the Board would find, if given the opportunity, that the employer's conduct served a legitimate and substantial business interest and that its impact on employee rights was comparatively slight; but that the employer was guilty of violating section 8(a)(3). The process of characterization called for by the *Great Dane* opinion will necessarily involve weighing the impact of employer conduct on union activity against its importance to the employer. Thus, at the very least, the *Great Dane* case provides for balancing of interests in order to determine whether this is the sort of case in which interests should be balanced.<sup>33</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> In places, however, the Court continued to use the language of motive, even for cases of conduct inherently destructive of employee rights. Describing the case in which the Board may find a violation without proof of improper motive, despite evidence of a valid business purpose, the Court stated, "the Board may nevertheless draw an inference of improper motive . . . ." *Id.* at 34. This language may possibly lead the Board to cast its conclusions in terms of improper motivations, or lead some courts of appeals to reverse Board findings which are not so phrased.

<sup>32</sup> *Id.* at 34.

<sup>33</sup> The *Great Dane Trailer* opinion states that in cases of slight impact on employee rights, interest balancing is proscribed once the employer introduces evidence of substantial business justification. It is most unlikely that the Court meant the introduction of evidence, properly rejected by the Board, to have this effect. It makes no sense to permit an employer to be exonerated from a finding of an unfair labor practice on the basis of rejected evidence. Moreover, where the Board rejects evidence of substantial business purpose, it will almost always be as a prelude to a finding of improper motive. If the Board's factual determination is accepted, a violation is automatically found. Thus, the Court's statement should be understood to refer to cases in which the employer's evidence of legitimate purpose is accepted by the Board.

The *Great Dane* case constitutes a welcome shift from the emphasis on motivation in the *American Ship Building* opinion.<sup>34</sup> Where an employer acts in response to union activity, it is fallacious to assume an inevitable distinction between conduct motivated by legitimate business considerations and that motivated by the desire to discourage union activity.<sup>35</sup> Any employer response which makes union activity costly for the employees involved can be said to serve a legitimate business purpose. Such conduct is likely to involve a reduction in costs or aid the employer in continuing to operate his business without interruption. Even the hope that the employer's action will improve his bargaining position would seem to constitute a legitimate business purpose.<sup>36</sup> It is unlikely that the employer distinguishes in his thinking between the economic benefit to be derived and the impact on union activity. If he does draw the distinction between them, it is likely that they both constitute reasons for taking the action in question. But even if it could be established that the employer was totally indifferent to the impact on union activity and acted solely in response to business motives, his conduct should not be insulated automatically from the reach of sections 8(a)(1) and 8(a)(3). The employer should not be the sole judge of whether his economic interests justify conduct which makes protected activity costly for the participants.<sup>37</sup> That determination should be made by the Board.

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<sup>34</sup> Unfortunately, the value of the opinion is reduced because the Court masks the conflict between its opinion and the opinion in the *American Ship Building* case. The Court purports to find support for its "principle of controlling importance" in the *American Ship Building* opinion and, as already noted, the opinion at one point refers to the results of interest balancing in terms of motive. It is also unfortunate that the Court ultimately rested its decision on the company's failure to "meet the burden of proof" with respect to its motivation. *Ibid.* As the dissent points out, such a conclusion "seems particularly unfair" since company counsel might well have relied on the Court's earlier statements that the Board had to find "from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus . . . ." *Labor Board v. Brown*, 380 U.S. at 288." 388 U.S. at 39. It is likely that few cases will be decided in the future on the basis of the company's failure to introduce evidence of legitimate business purpose. Any response is likely to have economic benefit to the employer either as an effect or as an arguable goal. Moreover, even if the sole justification is economic pressure in support of the employer's bargaining demands, it would constitute a legitimate business purpose under the holdings in the lockout cases and the Court's earlier decision in *NLRB v. Insurance Agents Union*, 361 U.S. 477 (1960). Accordingly, it will be a fairly easy matter for company officials to testify that such legitimate goals motivated their conduct.

<sup>35</sup> Thus in the *Great Dane* case, whatever business benefits the company sought to achieve, it knowingly chose to achieve them by penalizing only those employees who persisted in engaging in protected union activity.

<sup>36</sup> See note 34 *supra*.

<sup>37</sup> The best treatment of this issue in a judicial opinion is in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). In that case, the company argued that the grant of superseniority to strike replacements did not violate § 8(a)(3) because it was motivated by the legitimate goal of continuing operations during the strike. In rejecting this argument, the Court stated:

But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his



The remainder of this section will examine the balancing of interests approach as applied to a number of situations involving employer response to economic pressure.

### *The Replacement of Striking Employees*

As noted above, an employer may take a variety of steps in response to employee economic pressure without violating the act. He need not pay employees for the time they spend engaged in such economic pressure activity. Employee absence for union activity may be taken into account in computing bonuses,<sup>38</sup> and in certain circumstances economic pressure by employees will justify a lockout<sup>39</sup> or a unilateral subcontracting of work.<sup>40</sup> Possibly the most significant permissible response is the employer's ability to hire permanent replacements for striking employees. This employer prerogative was recognized by the Supreme Court, in dictum, in *NLRB v. MacKay Radio & Tel. Co.*,<sup>41</sup> and since has been largely unquestioned. The basis for the rule is not completely obvious. The Court in *MacKay* justified its conclusion in terms of the employer's right to "protect and continue his business."<sup>42</sup> The validity of this justification turns on the accuracy of the assumption which underlies it—that without the ability to permanently replace strikers, employers will be unable to operate during strikes. While the assumption is doubtlessly valid in some instances, it is questionable that it is valid in enough cases to justify a rule which imposes so great a risk on those who participate in activity "protected" by the National Labor Relations Act. It is unfortunate

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dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.

*Id.* at 228.

<sup>38</sup> The Board has held that time spent on strikes may not "lawfully be considered the equivalent of normal absence for purposes of determining profit-share forfeiture." *Quality Castings Co.*, 139 N.L.R.B. 928, 930 (1962); *accord*, *Pittsburgh-Des Moines Steel Co.*, 124 N.L.R.B. 855 (1959). In so holding the Board has not balanced the competing interests. However, the courts have rejected the Board's conclusion. *Quality Castings Co. v. NLRB*, 325 F.2d 36 (6th Cir. 1963); *Pittsburgh-Des Moines Steel Co. v. NLRB*, 284 F.2d 74 (9th Cir. 1960). The result reached by the courts of appeals in these cases generally was based on the absence of a finding of improper motive. However, the result is justifiable in terms of the strength of the competing interests. *Getman* 741-42.

<sup>39</sup> *NLRB v. Truck Drivers Local 449 (Buffalo Linen)*, 353 U.S. 87 (1957). See text accompanying notes 167-77 *infra*.

<sup>40</sup> *NLRB v. Robert S. Abbott Publishing Co.*, 331 F.2d 209 (7th Cir. 1964); *Hawaii Meat Co. v. NLRB*, 321 F.2d 397 (9th Cir. 1963). Of course, the employer's ability to take any of these steps may be lost if it is found that he was motivated by a desire to discourage union membership. On this, all the cases agree.

<sup>41</sup> 304 U.S. 333 (1938).

<sup>42</sup> *Id.* at 345.

that a rule of such importance was adopted without any real effort to evaluate the factual assumption on which it is based. In view of the rule's long duration, it is most unlikely that such an evaluation will be undertaken in the future or that the *MacKay* rule will be abandoned in the interest of consistent application of sections 8(a)(1) and 8(a)(3).<sup>43</sup> Such questions as exist concern the operation of the rule rather than its validity.

Theoretically, an employer's ability to permanently replace striking employees is limited to cases in which such action is taken for economic motives. An employer may permanently replace strikers in order to continue his business, but not in order to punish employees for engaging in protected activities. The difficulty, once again, is in trying to categorize the employer's conduct. Is he replacing for economic motives or discharging for punitive motives? This is not the type of determination which can be made readily with the fact-finding techniques used by the Board in the typical 8(a)(3) discriminatory discharge case. Generally there is little in the record other than the ambiguous act of replacement.<sup>44</sup> The employer is likely to have mixed motives. An employer who hires permanent replacements during a strike almost certainly is motivated in part by the desire to continue operations during the strike. But he probably is aware that his new employees are less likely to be union adherents than the strikers they

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<sup>43</sup> An attack on the *MacKay* rule is made in Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630 (1966). The Note is on solid ground in pointing out that the need for the *MacKay* rule never has been established and that the factual assumption on which it rests never has been proved. *Id.* at 636. However, it is also difficult to make the case for abandoning the rule as is attempted in the Note, without factual data about the way it operates. A study of the *MacKay* rule might be quite useful. Informal discussion with knowledgeable labor relations practitioners and scholars indicates a general feeling that the right to hire permanent replacements is rarely used except in cases of strikes by newly-installed unions. If this is true, however, it would be difficult to determine the extent to which the existence of the rule shapes the conduct of the parties in a strike, even in situations in which replacements are not hired.

<sup>44</sup> In the typical § 8(a)(3) case, the Board seeks to determine whether an employee has been discharged because of union activity or because of misconduct. In making its determination the Board looks to:

a) the timing of the discharge—did it occur during a hotly contested representation campaign? b) evidence of anti-union animus by the employer; c) the dischargee's work record; d) the nature of the alleged misconduct—were other people discharged for undertaking such action? e) was the dischargee warned? f) were the discharged employees active in the union? g) did the employer commit violations of § 8(a)(1) in responding to the union's organizing campaigns? See, e.g., *Dairy Farmers Transfer*, 158 N.L.R.B. No. 18 (April 18, 1966); *Freed Oil Co.*, 158 N.L.R.B. No. 41 (April 25, 1966); *Corrie Corp.*, 158 N.L.R.B. No. 49 (April 28, 1966). Generally in cases of replacement, none of these factors will be present unless the employer replaces selectively. The timing of replacement is set by the strike. Union leaders and rank and file are treated alike. There is no need for employer justification and since bargaining relations have already been established, there is little likelihood of substantial evidence of anti-union animus. Evidence of discriminatory motivation can be found when replacement is selective, with union activity or leadership apparently serving as the basis for selection, as was true in the *MacKay* case itself.

replaced, and that his action will have a deterrent effect on any future strike action. These are advantages which most employers will consider in evaluating whether to hire permanent replacements and which will be balanced against the risk of violence and permanent bad feelings which such a move inevitably entails. In short, an inquiry into the employer's state of mind in such situations would be difficult and the probable results equivocal.

The Board, in fact, does not seek to evaluate the employer's state of mind in order to determine the legality of his conduct. Instead, the Board has devised a fairly mechanical test to distinguish between replacement (legal) and discharge (illegal). Unless it can be demonstrated that the employer has singled out for replacement those whom he knows to be active union members, he is permitted to lay off permanently any striking employees, as long as they are not notified that they are replaced or treated as having been replaced before new employees are hired.<sup>45</sup> Employees are improperly discharged if, before replacements are hired, official action is taken to indicate that they may not return to work after the strike.<sup>46</sup> This test, which has been approved by the courts,<sup>47</sup> is related partly to the employer's reasons for acting. It is more likely to indicate whether the employer had competent counsel than to indicate his motives for acting. As long as the basic assumptions of the *MacKay* doctrine are accepted, however, the current rule is probably as good as any which can be devised. The rule prohibits flagrant attempts to punish protected activity and spells out what may be done with sufficient clarity.<sup>48</sup>

### *The Replacement of Employees for Honoring Picket Lines*

The Board and the courts are in general agreement with respect to the employer's ability to hire permanent replacements for striking

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<sup>45</sup> See, e.g., *Cranston Print Works Co.*, 115 N.L.R.B. 537, 567 (1956); *The Texas Co.*, 93 N.L.R.B. 1358 (1951).

<sup>46</sup> *Liberty Electronics Corp.*, 138 N.L.R.B. 1074 (1962); *Valley Die Cast Corp.*, 130 N.L.R.B. 508 (1961).

<sup>47</sup> See *Bonner-Vawter, Inc. v. NLRB*, 289 F.2d 133 (1st Cir. 1961); *Kansas Milling Co. v. NLRB*, 185 F.2d 413 (10th Cir. 1950).

<sup>48</sup> It is true that the clarity of the rule is reduced because an employer may lose the right to permanently replace if the strike is an unfair labor practice strike, i.e., a walkout in response to a serious unfair labor practice. See *NLRB v. Thayer*, 213 F.2d 748, 752 (1st Cir.), cert. denied, 348 U.S. 883 (1954); *Black Diamond S.S. Corp. v. NLRB*, 94 F.2d 875 (2d Cir. 1938). However, the Board has been slow to characterize strikes as unfair labor practice strikes. See, e.g., *Cranston Print Works Co.*, 115 N.L.R.B. 537 (1956); *Greenville Cotton Oil Co.*, 92 N.L.R.B. 1033 (1950). The courts take a similarly restrictive approach. *Radiator Specialty Co. v. NLRB*, 336 F.2d 495 (4th Cir. 1964); *Winter Garden Citrus Prod. Co-op. v. NLRB*, 238 F.2d 128, 129 (5th Cir. 1956). As long as a serious unfair labor practice is required, interference with the employer's ability to replace is limited, and the rule probably has the salutary effect of making employers careful to avoid coercive conduct in prestrike dealings.

employees.<sup>49</sup> There is less agreement about the related problem of an employer's ability to respond when his employees refuse to cross a picket line at the premises of another employer.<sup>50</sup> It is not clear whether such employee activity is protected. The Board has held that it is protected,<sup>51</sup> but this decision has not been reviewed by the courts.<sup>52</sup> Even if the courts accept the Board's conclusion that the activity is protected, there is some indication that they will reject, for these purposes, the distinction between replacement and discharge in evaluating the employer's response.<sup>53</sup>

Confusion in this area stems from different interpretations of the Supreme Court's opinion in *NLRB v. Rockaway News Supply Co.*<sup>54</sup> In that case, an employee was discharged for refusing to cross a picket line. The employee's refusal was a violation of the applicable collective bargaining agreement, but the Board held the agreement void. It accordingly held the activity protected and the discharge illegal.<sup>55</sup> The Board treated the refusal to cross the picket line as an economic strike and sought to apply the distinction between discharge and replacement. Since the employee had been told that he was "fired" at a time when no replacement had been hired, the Board concluded that he had been illegally "discharged," and ordered reinstatement. The court of appeals refused enforcement of the Board's order and the Supreme Court affirmed the court of appeals.<sup>56</sup> The Court held that the provision of the collective bargaining agreement giving the employer the right to discharge the employee for such behavior was valid. The employee's conduct was therefore unprotected. But the Court also analyzed the case on the assumption that the employee's conduct was protected, and it rejected the Board's

<sup>49</sup> See note 47 *supra*.

<sup>50</sup> With respect to partial work stoppages to support demands made of the primary employer, the question is whether such stoppages are protected. See text accompanying notes 147-169 *infra*. If such stoppages are held protected, they are treated like ordinary strikes. See, e.g., *NLRB v. J. I. Case Co.*, 198 F.2d 919 (8th Cir. 1952), *cert. denied*, 345 U.S. 917 (1953).

<sup>51</sup> *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545 (1962), *petition to set aside denied sub nom.*, *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

<sup>52</sup> Although the Board announced in the *Redwing Carriers* case that the activity was protected, the discharges of the employees were affirmed. The court, in enforcing the Board's order, was not required to and did not deal with the protected status of refusals to cross. *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963). However, the Second Circuit, in passing on the legitimacy of contract clauses insulating from discipline employees who honor picket lines, has indicated general agreement with the Board's conclusion that such activity is protected. *Truck Drivers Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964).

<sup>53</sup> *NLRB v. L. G. Everist, Inc.*, 334 F.2d 312 (8th Cir. 1964).

<sup>54</sup> 345 U.S. 71 (1953).

<sup>55</sup> *Rockaway News Supply Co.*, 95 N.L.R.B. 336 (1952).

<sup>56</sup> *NLRB v. Rockaway News Supply Co.*, 197 F.2d 111 (2d Cir. 1952), *aff'd*, 345 U.S. 71 (1953).

attempt to distinguish between replacement and discharge "in this context" as "unrealistic and unfounded."<sup>57</sup> Indeed, the Court acidly described the Board's analysis as "verbal ritual reminiscent of medieval real property law."<sup>58</sup>

When the Board, after some seesawing, concluded once again that refusal to cross a lawful picket line was protected, it simultaneously rejected the tests previously employed to distinguish between discharge and replacement.<sup>59</sup> In its opinion in *Redwing Carriers*, the Board stated:

[W]e are convinced that substance, rather than form, should be controlling. That is, where it is clear from the record that the employer acted only to preserve efficient operation of his business, and terminated the services of the employees only so it could immediately or within a short period thereafter replace them with others willing to perform the scheduled work, we can see no reason for reaching different results solely on the basis of the precise words, i.e., replacement or discharge, used by the employer, or the chronological order in which the employer terminated and replaced the employees in question.<sup>60</sup>

The significance of this language depends upon the nature of the evidence necessary for an employer to demonstrate that he "acted only to preserve the efficient operation of his business." If the Board, as its language suggests, meant to cast a burden upon employers to demonstrate that they acted solely for economic motives, then the effect of the *Redwing* decision would be to increase rather than decrease the likelihood of violating sections 8(a)(1) and (3). It would be difficult for an employer to "clearly" establish purity of motive in the face of the ambiguous factual record which is generally presented in such a case. The Board has indicated, however, that a respondent can prove its case by establishing two propositions:

a) that the refusal to cross the picket line constituted a substantial interference with respondent's business which could not be overcome by merely assigning another employee to do the work.

b) that replacements were in fact hired.<sup>61</sup>

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<sup>57</sup> 345 U.S. at 75.

<sup>58</sup> *Ibid.*

<sup>59</sup> In *Auto Parts Co.*, 107 N.L.R.B. 242 (1953), the Board affirmed a trial examiner's ruling based on the position that failure to cross a picket line was unprotected. The *Redwing Carriers* case was originally decided on this basis. 130 N.L.R.B. 1208 (1961). However, the Board reconsidered its opinion and, although it reaffirmed the dismissal of the complaint in the *Redwing Carriers* case, it did so on the theory that the dismissal of the employee was a proper response to protected activity, rather than on the theory that the activity was unprotected. 137 N.L.R.B. 1545 (1962).

<sup>60</sup> *Id.* at 1547.

<sup>61</sup> *Overnight Transportation Co.*, 154 N.L.R.B. 1271 (1965); *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545 (1962).

The *Redwing* decision did not mean that the Board was completely prepared to abandon the distinction between replacement and discharge in this context. Not only did the fact of and need for replacement have to be established in order to prove the legitimacy of the employer's motive, but the timing of replacement continued to be significant as well. In *L. G. Everist, Inc.*, the Board held that employees lawfully "discharged" for refusal to cross a picket line were entitled to reinstatement if they unconditionally applied for jobs before replacements were hired.<sup>62</sup> As a practical matter, the *Everist* decision means that in order to deny reinstatement, an employer must replace the discharged employee before he secures the performance of the jobs the discharged employee refused to perform. If the jobs are done without replacement, the employee can ask for his job back and it is an unfair labor practice to refuse him unless he has already been replaced. Thus the Board has made only a minor shift in its position in response to the *Rockaway News* decision. It is no longer necessary to replace before notifying the discharged employee of his dismissal. Moreover, it will not matter if the employer characterizes his action as a discharge. Nevertheless, the offending employee must still be replaced prior to his unconditional request for reinstatement.

The Board's decision in *Everist* was denied enforcement by the court of appeals. The court did not profess to challenge the Board's conclusion that refusal to cross a picket line is protected activity,<sup>63</sup> but it rejected the conclusion that a "lawfully discharged" employee has a right to reinstatement if he applies prior to the time he is replaced. The court felt that this conclusion, reaffirming the distinction between replacement and discharge, was a return to the very reasoning which the Supreme Court so vigorously condemned in *Rockaway News*. The court of appeals read *Rockaway News* to require that the Board give up the

attempt to equate [employees who refuse to cross picket lines] with the status of economic strikers and hold that by their refusal to work they might enter into a legal twilight zone from which they could return to work at any time of their own choosing, so long as it was before permanent replacements had been hired.<sup>64</sup>

It is not clear whether the Supreme Court in *Rockaway News* objected to the Board's efforts to distinguish between replacement and discharge or whether it objected only to the Board's mechanistic ap-

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<sup>62</sup> 142 N.L.R.B. 193 (1963).

<sup>63</sup> NLRB v. L. G. Everist, Inc., 334 F.2d 312 (8th Cir. 1964).

<sup>64</sup> *Id.* at 318.

plication of the distinction, *i.e.*, its reliance on the words used in notifying the employee of his dismissal and in requiring that the replacement be hired before the employee involved be dismissed. There is language in the opinion supporting each interpretation.<sup>65</sup> It is likely that this question will ultimately be resolved by the Supreme Court together with the general question of the protected status of refusals to cross picket lines.

It is hard to see why the Court would accept the conclusion that such activity is protected but insist that the employer be given the right to discharge employees for engaging in it so long as he is not discriminatorily motivated. This conclusion is tantamount to holding the activity unprotected since a discharge for unprotected activity violates the act if the employer is discriminatorily motivated.<sup>66</sup>

Although the court of appeals did not deal directly with the question, the *Everist* opinion rests on the semi-articulated assumption that a refusal to cross a picket line is an unjustified interference with the business of the employer and provides "cause" for discharge.<sup>67</sup> If this characterization is rejected, the Board's analysis appears to be entirely appropriate. A discharge for refusing to cross a picket line necessarily interferes with the exercise of section 7 rights and violates the literal language of the act. Such interference can be justified only if it is necessary for the efficient operation of the employer's business. The Board has recognized that the employer's economic interest may outweigh the employee's interest in mutual aid; it has tried to limit the right to discharge to such cases. To this end, the Board has adopted a rule which reflects the extent of interference with the employer's business. If the employer was able to manage merely by reassigning his personnel, then it should be permissible for the Board to conclude

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<sup>65</sup> The Court objected to the Board's approach "in this context." That "this context" refers to the facts of the particular case is suggested by the Court's next point: "And there is no finding that he was not replaced." 345 U.S. at 75. "In this context" could also refer, in general, to cases of refusals to cross picket lines, as is suggested by the favorable reference to the decision of the court of appeals, which for the most part seemed to reject the distinction between refusals to cross and economic strikes.

<sup>66</sup> A finding of discriminatory motivation is, of course, equivalent to finding that the unprotected activity was merely a pretext and the real reason for the discharge is union membership or activity. In the typical § 8(a)(3) case, the issue is whether the employer's alleged reason based on some form of unprotected activity was the real reason for the employee's discharge. See, *e.g.*, *Roadway Express, Inc.*, 119 N.L.R.B. 104 (1957). In light of the existing case law, the conclusion that refusal to cross a picket line is protected activity is significant, whatever scope is given to the employer to respond. If activity is protected, a contract by which the employer agrees not to punish an employee for such behavior is legal. If the activity is unprotected, such agreements would probably violate § 8(e) of the act. National Labor Relations Act § 8(e), added by 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (1964). See *Drivers Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966).

<sup>67</sup> "However, we see no difference between the refusal to cross a picket line in violation of such a bargaining contract and the refusal to cross a picket line in violation of the ordinary and implied obligations of employment." *NLRB v. L. G. Everist, Inc.*, 334 F.2d 312, 317 (8th Cir. 1964).

that the degree of interference with his economic interests was too small to justify punishing an employee for exercising his statutory right. Or, if the employee changes his mind and expresses a willingness to do the job before the employer has committed himself to another, there is no legitimate reason why his reinstatement should be denied. The analogy to an economic striker in this context is apt. Once such an employee expresses a willingness to work there is no legitimate interest which the employer can invoke to refuse him employment unless his place has been filled. Neither the employer's displeasure with his actions nor the possibility of similar conduct in the future should afford a basis for discharging him. The only permissible employer justification for dismissing an employee who is engaged in protected conduct should be the desire to avoid interference with current operations.

## II. LIMITATIONS ON THE REACH OF SECTION 7 BASED ON THE PURPOSE FOR WHICH ECONOMIC PRESSURE IS USED

The purposes for which concerted activity may be undertaken are broadly stated. In particular, the statutory phrase, "mutual aid or protection" can be read to encompass almost any goal-oriented group action.<sup>68</sup> However, the reach of section 7 has been reduced by finding limitations suggested not by its language but by other sections and policies of the act. Section 8(b) prohibits various types of concerted activity. Such specifically prohibited activity properly falls outside the protection of section 7.<sup>69</sup> It would make little sense to hold that section 7 protects that which section 8(b) prohibits.

One of the central unanswered questions about the scope of section 7 is the extent to which lawful economic pressure for a legitimate purpose may be held unprotected. In *NLRB v. Washington Aluminum Co.*,<sup>70</sup> the Supreme Court rejected the position that eco-

<sup>68</sup> An individual who participates in group action does so either because he hopes to profit personally from the effort or because he seeks to aid some or all of the others who participate. Either motive will bring the activity within "mutual aid or protection." See *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942). Many of the activities conceivably encompassed by this phrase are already included in §7—the right of self-organization; the right to "form, join, or assist labor organizations;" the right to "bargain collectively." Perhaps the most significant addition which the phrase, "other mutual aid or protection," makes to the scope of §7 is to emphasize that employee activity which is not related to conventional union organization or activity is nonetheless protected. *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948); *NLRB v. Schwartz*, 146 F.2d 773 (5th Cir. 1945). Thus the phrase, "mutual aid or protection," grants to unrepresented employees the right to protest against working conditions and the right to make common cause with others outside of the bargaining unit. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Signal Oil & Gas Co.*, 160 N.L.R.B. No. 51 (Aug. 24, 1966).

<sup>69</sup> See *Cox* 325-28.

<sup>70</sup> 370 U.S. 9 (1962).



conomic pressure could be held unprotected if its use was deemed unwise or unreasonable. In that case, the Court held that a walkout by employees to protest cold working conditions was protected. The company argued that the activity was unprotected since it was already taking steps to alleviate the trouble and the employees had not presented a specific demand to which the company could respond. The Court rejected this argument:

The fact that the company was already making every effort to repair the furnace and bring heat into the shop that morning does not change the nature of the controversy that caused the walkout. At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not.<sup>71</sup>

Although the Court was construing the term "labor dispute," its ultimate conclusion was that the employees were engaged in "concerted activities which Section 7 of the Act protects."<sup>72</sup>

In *Washington Aluminum*, economic pressure was used to protest working conditions—an area of traditional employee concern. In subsequent cases, the courts of appeals also have found the use of economic pressure for traditional purposes protected without regard to its reasonableness.<sup>73</sup> But the courts have not necessarily held economic pressure protected in all cases where employees have acted for mutual aid or protection. They have indicated, without really addressing themselves to the problem, that on the outer boundaries of the concept of mutual aid or protection, there are subjects with respect to which the act will protect expressions of employee sentiment, but not the use of economic pressure.

#### *Economic Pressure in Areas of Traditional Management Prerogatives*

The conclusion that economic pressure for a legitimate purpose is unprotected has been adopted most often with respect to employee action to protest changes in supervision. The Board usually holds such activity protected by section 7<sup>74</sup> but the courts have generally

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<sup>71</sup> *Id.* at 16.

<sup>72</sup> *Id.* at 17.

<sup>73</sup> See, e.g., *NLRB v. Phaostron Instrument & Electronic Co.*, 344 F.2d 855, 858 (9th Cir. 1965); *NLRB v. Holcombe*, 325 F.2d 508 (5th Cir. 1963).

<sup>74</sup> See *Dobbs Houses, Inc.*, 135 N.L.R.B. 885 (1962). Theoretically the Board decides each case on its facts; only when "the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on their performance of the work they are hired to do" are the employees "legitimately concerned

held it unprotected.<sup>75</sup> Some of the early opinions suggested that employees do not have a legitimate interest in the selection of supervision, so that no concerted activity for the purpose of protesting the employer's actions in this area would be protected. The leading case is *NLRB v. Reynolds International Pen Co.*<sup>76</sup> in which employees staged a short walkout to protest a change in foremen. The court simply announced that the change of foremen was a "prerogative of management"<sup>77</sup> and therefore held the activity unprotected. The court did not explain why a "prerogative of management" could not also be the basis of activity for mutual aid or protection and subsequent cases have added little or nothing by way of satisfactory explanation.

It would be difficult to defend the position that protests over changes in supervision do not come within the literal definition of "mutual aid or protection."<sup>78</sup> Presumably the justification for holding protests about supervision outside section 7 is that management should be free to choose its own representative without interference. Labor should not even be permitted to make common cause with those whose responsibility it is to deal with requests about working conditions.<sup>79</sup> In order for the system of industrial relations contemplated by the act to operate properly, a separation between management and labor must be

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with his identity." *Id.* at 888. However, as the Seventh Circuit Court of Appeals pointed out, "it is difficult to imagine a case in which the identity and capabilities of a supervisor cannot be said to have a direct impact on the employees' job interest and work performance." *American Art Clay Co. v. NLRB*, 328 F.2d 88, 90 (7th Cir. 1964). In any event, the Board has found protests over changes in supervision protected in *Dobbs Houses, Inc., supra*; *American Art Clay Co.*, 142 N.L.R.B. 624 (1963); *Plastilite Corp.*, 153 N.L.R.B. 180 (1965). The Board applies the same rule to employee protests about other personnel matters. See *Hagopian & Sons, Inc.*, 162 N.L.R.B. No. 12 (Dec. 20, 1966).

<sup>75</sup> See *American Art Clay Co. v. NLRB*, 328 F.2d 88 (7th Cir. 1964); *Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963); *Cleaver-Brooks Mfg. Corp. v. NLRB*, 264 F.2d 637 (7th Cir.), *cert. denied*, 361 U.S. 817 (1959); *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457 (2d Cir. 1958); *NLRB v. Coal Creek Coal Co.*, 204 F.2d 579 (10th Cir. 1953) (dictum); *NLRB v. Wallick*, 198 F.2d 477 (3d Cir. 1952) (dictum); *NLRB v. Reynolds Int'l Pen Co.*, 162 F.2d 680 (7th Cir. 1947); *cf. Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949). In cases in which other employees were discharged along with supervisors, protests have been held protected. See *NLRB v. Puerto Rico Rayon Mills Inc.*, 293 F.2d 941 at 946 (1st Cir. 1961); *cf. Summit Mining Corp. v. NLRB*, 260 F.2d 894 (3d Cir. 1958).

<sup>76</sup> 162 F.2d 680 (7th Cir. 1947).

<sup>77</sup> *Id.* at 684.

<sup>78</sup> Protests over changes in supervision are generally attempts to make common cause with others who might aid the employees and also to affect working conditions. See *NLRB v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941 (1st Cir. 1961); *Summit Mining Corp. v. NLRB*, 260 F.2d 894 (3d Cir. 1958).

<sup>79</sup> As a rule of thumb, it is fairly clear that where employees protest the hiring, firing, or demotion of a foreman or other management official, they are not acting within the province of mutual aid or protection. The policy behind the rule is evident. It demonstrates a recurrent caution on the part of the courts lest they place an employer in a position which would enable his employees to dictate their own terms of employment. A foreman's interests are properly aligned with management. To paraphrase a notorious statement, labor should not be allowed to choose its own watchdog.

Note, 1955 ILL. L.F. 129, 134. See also Note, 44 ILL. L. REV. 234 (1949).

maintained. This is explicitly recognized in the statute. It is for this very reason that supervisors are excluded from the definition of "employee" and accordingly, from the bargaining unit under section 2(3).<sup>80</sup> The discharge of a supervisor because of his union sympathies is not necessarily an unfair labor practice.<sup>81</sup> The policy separating management and labor is recognized also in section 8(b)(1)(B) which makes it an unfair labor practice for a labor organization to "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."<sup>82</sup>

The argument is reasonable and persuasive when it applies to union interference with the selection of top or middle level management. The cases, however, have almost all concerned protests by unorganized employees about the identity of working foremen. It is in such circumstances that the case for a legitimate employee interest is strongest. Certain practical aspects of industrial life lead to the conclusion that the selection of foremen is within the legitimate interests of employees. The identity of the foreman is a significant aspect of the employee's working conditions. This is true in a more personal way when a foreman rather than a higher level supervisor is involved. The impact of high level supervision is largely felt in terms of broad managerial decisions. But the moods, interest and personality of a foreman, quite apart from managerial decisions, will significantly affect an employee's feelings about his job.

Secondly, foremen often have little authority. They usually are not in a position to exercise discretion or to "let employees dictate their own terms of employment." Foremen often occupy a position midway between management and the employees. Although foremen are not protected by the act, they generally have considerable common interest with the rank and file. Their hours, pay, retirement and benefits are often similar to and are generally shaped by those of the employees. It is not uncommon for foremen to consider themselves as workers rather than management. Top management may share this conception of the position of the foremen.<sup>83</sup> This ambiguity in the role of the foreman is attested to by the steady number of close cases

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<sup>80</sup> "Section 2 . . .

(3) The term "employee" . . . shall not include . . . any individual employed as a supervisor. . . ." National Labor Relations Act § 2(3), as amended, 61 Stat. 137 (1947), 29 U.S.C. § 152 (1964).

<sup>81</sup> Such a discharge may be held to violate § 8(a)(1) because of the impact on the other employees. *NLRB v. Talladega Cotton Factory, Inc.*, 213 F.2d 209, 217 (5th Cir. 1954).

<sup>82</sup> Labor-Management Relations Act (Taft-Hartley Act) § 8(b)(1)(B), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(B) (1964).

<sup>83</sup> See generally Roethlisberger, *The Foreman: Master and Victim of Double-talk*, 23 HARV. BUS. REV. 283 (1945).

in which the Board is asked to distinguish between a working foreman and a leadman.<sup>84</sup>

Thus there is a legitimate employee interest in the identity of the foreman. Furthermore, it is difficult to see how the foreman's role in the collective bargaining process is jeopardized by employee protests in favor of or against a particular foreman. As will be noted below, the existing cases demonstrate that protests about changes in supervision cannot easily be divorced from protests about working conditions.

The existence of a legitimate employee interest in first level supervision has been recognized in a few cases<sup>85</sup> and the question has been whether the economic pressure is permitted.<sup>86</sup> The Court of Appeals for the Fifth Circuit held in *NLRB v. Dobbs Houses* that a protest-walkout over the ouster of a supervisor was unprotected. The court announced a two-step test for determining whether activity is protected. "First it is necessary to determine the legitimacy of the employee's interest."<sup>87</sup> The court conceded that in the case before it and in most cases involving protests over supervision, the employees have a legitimate concern. But the court found the walkout unprotected on the basis of "the other test which must be met to determine the protected character of the employee's activity . . . that the means be reasonably related to the ends sought to be achieved."<sup>88</sup>

The court did not explain why the walkout was unrelated to the ends sought to be achieved. In light of the Supreme Court's language in *Washington Aluminum*, an effort to analyze the reasonableness of economic pressure should be carefully explained. The court in *Dobbs Houses* offered no such explanation. It distinguished *Washington Aluminum* on the ground that the issue there was whether the presence of alternative courses of action made otherwise protected conduct unprotected. In *Dobbs Houses* the court noted that "the reasonableness of the conduct had to be determined to ascertain whether in fact it is protected."<sup>89</sup> The distinction is purely verbal. It fails to explain why

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<sup>84</sup> Mr. William T. Little, NLRB Regional Director for the 25th region and one of the Board's leading experts on the NLRA, has told me that the determination of foreman status is the most difficult question with which he has to deal.

<sup>85</sup> *NLRB v. Guernsey-Muskingum Elec. Co-op Inc.*, 285 F.2d 8 (6th Cir. 1960); *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983 (7th Cir.), cert. denied, 335 U.S. 845 (1948).

<sup>86</sup> Protests not involving walkouts were found to be protected in *Phoenix Mutual and Guernsey-Muskingum Elec. Co-op*. Walkouts were held unprotected in *Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963) and *American Art Clay Co. v. NLRB*, 328 F.2d 88 (7th Cir. 1964).

<sup>87</sup> 325 F.2d at 538.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Id.* at 539.

reasonableness of economic pressure was used to determine whether the activity was protected in one case but not in the other.

It is possible to defend a different rule for cases involving economic pressure to protest changes in supervision, than for cases involving efforts to change general working conditions. A similar distinction is drawn in collective bargaining between mandatory and permissive subjects of bargaining. The Supreme Court's opinion in *NLRB v. Wooster Division of Borg-Warner Corp.*<sup>90</sup> established that there are certain topics which are appropriately under the exclusive control of one side or the other in a collective bargaining relationship. While each party may suggest a change with regard to these permissive subjects of bargaining, it cannot bargain to an impasse or use economic pressure in support of its position.<sup>91</sup>

Management's choice of supervisors is probably a permissive rather than mandatory subject of bargaining.<sup>92</sup> Where bargaining relationships are established, the employer may act as he chooses without prior consultation with the union. Although the union may express its position with respect to selection of foremen, it may not strike to support this position. The cases dealing with protests over changes in supervision draw the same distinction. Employees are protected in stating their position but not in exerting economic pressure.<sup>93</sup>

It is reasonable to apply the same distinction to the use of economic pressure by unrepresented employees. It makes no sense to say that these employees are protected for engaging in activity which would be an unfair labor practice if undertaken by a recognized union. Under the scheme of the act, a bargaining representative has more, not less, power than individual employees in proposing and supporting changes in working conditions.

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<sup>90</sup> 356 U.S. 342 (1958). The employer insisted that the collective agreement contain two clauses: one requiring a secret pre-strike vote by the employees on the company's last offer; the other, a recognition clause excluding the international union, which had been certified, as a party to the contract. The Supreme Court held that these matters fell outside the statutory definition of those matters about which the parties were required to bargain under § 8(d): "wages, hours, and other terms and conditions of employment." Although the union could bargain about these issues if it chose to, it was not required to and, therefore, the company's insistence upon them violated § 8(a)(5).

<sup>91</sup> The case did not deal with union pressures over matters within the economic control of management, but its reasoning made clear that it would be improper for a union to insist on a matter not within the statutory phrase and normally considered to be a subject for management prerogative. See *Douds v. International Longshoremen's Ass'n*, 241 F.2d 278 (2d Cir. 1957); *Detroit Resilient Floor Decorators Union (Mill Floor Covering, Inc.)*, 136 N.L.R.B. 769 (1962).

<sup>92</sup> See *NLRB v. Retail Clerks Int'l Ass'n*, 203 F.2d 165 (9th Cir. 1953), cert. denied, 348 U.S. 839 (1954).

<sup>93</sup> See note 86 *supra*. See Comment, 11 VILL. L. REV. 655, 658-59 (1966).

On the other hand, the *Borg-Warner* decision has been criticized for imposing limitations on the process of collective bargaining.<sup>94</sup> It is difficult to fathom the reason for the rule and so it is difficult to justify limitations on its application. It is reasonably clear, however, that the Court was moved to limit freedom of action with respect to permissive subjects in order to make the duty to bargain over the mandatory subjects more meaningful.<sup>95</sup> Where no bargaining relationship exists, this justification for the application of the rule is not available. In most of the cases in which employees have sought to influence the employer's choice of supervisor, there was no established pattern of collective bargaining. In the majority of cases there was no union activity of any kind but merely a spontaneous action by employees.<sup>96</sup> It is difficult to see why a doctrine designed to facilitate collective bargaining should be applied outside a bargaining situation to limit the rights of unorganized employees to engage in concerted activity about a matter of legitimate concern.

In response it may be argued that although the *Borg-Warner* doctrine is inapplicable, as such, where no collective bargaining relationship exists, some of the reasons which support it apply with greater or equal force to the problem of protection of economic force by section 7. There are subjects with respect to which management interests are clearly paramount. In order that the act recognize the right of management to operate its business, management should be permitted to make decisions in these areas without having to worry about strikes and work stoppages. The choice of management personnel is one of the most obvious examples of such a subject. It may be true that low level supervision is of sufficient interest to employees that an expression of views should be protected. The difference between the strength of employee interest and management interest is sufficiently great, however, that the act should not be construed to make decisions in this area subject to a test of economic power.<sup>97</sup>

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<sup>94</sup> Cox, *Labor Decisions of the Supreme Court at the October Term 1957*, 44 VA. L. REV. 1057, 1074-86 (1958).

<sup>95</sup> "Such conduct is in substance a refusal to bargain about the subjects that are within the scope of mandatory bargaining." 356 U.S. at 349.

<sup>96</sup> The employees were unorganized in: *American Art Clay Co. v. NLRB*, 328 F.2d 88 (7th Cir. 1964); *Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963); *NLRB v. Guernsey-Muskingum Elec. Co-op, Inc.*, 285 F.2d 8 (6th Cir. 1960); *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457 (2d Cir. 1958); *NLRB v. Reynolds Int'l Pen Co.*, 162 F.2d 680 (7th Cir. 1947). In *Cleaver-Brooks Mfg. Corp. v. NLRB*, 264 F.2d 637 (7th Cir.), *cert. denied*, 361 U.S. 817 (1959) and *NLRB v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941 (1st Cir. 1961), the employees were about to be organized. In *NLRB v. Coal Creek Coal Co.*, 204 F.2d 579 (10th Cir. 1953), the employer had recognized a company union in order to thwart outside organization.

<sup>97</sup> See Note, 1955 ILL. L.F. 132; Note, 44 ILL. L. REV. 234 (1949).

In evaluating the argument just made, it should be kept in mind that this problem will almost always arise in unorganized plants. In organized plants, the use of economic pressure is subject to special limitations—economic pressure by individual employees will almost always be unprotected and economic pressure by the union will be limited by the *Borg-Warner* doctrine and the contract.<sup>98</sup> In unorganized plants the use of pressure can rarely be assigned a specific cause. The cases indicate that when unorganized employees walk out, ostensibly to protest changes in supervision, it is likely to be because general dissatisfaction with working conditions has come to a head.<sup>99</sup> In a large majority of the cases it would be inaccurate to describe the concerted activity as being solely for the purpose of protesting changes in supervision.<sup>100</sup> The change in supervision represented a possible change in working conditions, which mobilized existing feelings of dissatisfaction and enabled the employees to develop sufficient cohesion to undertake group action.

It is likely that such group action would not have occurred were it not for existing feelings of dissatisfaction. Otherwise satisfied employees are not likely to undertake concerted activity to protest a change in supervision. Furthermore, in those reported cases in which the employees did not belong to a union, the concerted activity was hardly

<sup>98</sup> See generally Part IV of this article.

<sup>99</sup> The Board has recognized in its decisions that concerted activity about changes in supervision are often related to unhappiness with current or proposed working conditions. In some cases the Board has found as a fact that dissatisfaction with working conditions was the cause of the concerted activity. *Dobbs Houses, Inc.*, 135 N.L.R.B. 885 (1962); *American Art Clay Co.*, 142 N.L.R.B. 624 (1963). The courts have refused to find that the walkout was caused by dissatisfaction with working conditions, on the ground that the employees would not have walked out on the basis of such conditions alone and because the stated aim and the action which would have put a stop to the walkout was revocation of the supervisory change. *American Art Clay Co. v. NLRB*, 328 F.2d at 91; *Dobbs Houses, Inc. v. NLRB*, 325 F.2d at 537. As noted above, the Board has adopted the doctrine that concerted activity to protest a change in supervision is protected: "Where . . . such facts establish that the identity and capability of the supervisor involved has a direct impact on the employees own job interest and on their performance of the work they are hired to do." *Dobbs Houses, Inc.*, *supra*. Conceivably the Board's rule was meant to select out those cases in which unhappiness over a change in supervision reflected more general dissatisfaction with working conditions. If so, however, the Board's phrasing of the rule is unfortunate because it would cover cases in which the change in supervision is objected to by the employees solely on the basis of the personality of the supervisor.

<sup>100</sup> In *NLRB v. Coal Creek Coal Co.*, 204 F.2d 579 (10th Cir. 1953), the protest over the ousting of a foreman was related to employee unhappiness over the establishment of a company union. In *American Art Clay Co. v. NLRB*, *supra* note 99, the protest over a change in foremen was related to a fear that a change in working conditions would accompany the change in supervision. In *Dobbs Houses, Inc. v. NLRB*, *supra* note 99, the restaurant supervisor whose ouster was protested was viewed by the protesting waitresses as their only protection against the admittedly improper treatment by the manager. In *NLRB v. Reynolds Int'l Pen Co.*, 162 F.2d 680 (7th Cir. 1947), the discharge of the foreman was thought by the employees to be an indication of future wage cuts. As was true in several other cases, the protest here sparked an overall effort to organize the employees. See also *NLRB v. Puerto Rico Rayon Mills Inc.*, 293 F.2d 941 (1st Cir. 1961) and *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948).

more than an expression of employee sentiment.<sup>101</sup> Walkouts to protest changes in supervision have generally been short—an effort to dramatize the strength of employee sentiment, rather than an effort to use economic coercion. Thus cases distinguishing between protest and pressure are likely to treat differently two forms of behavior which are essentially the same.

Because the use of economic pressure by unorganized employees is likely to be the result of general dissatisfaction and may well be the prelude to formal organization, the impact of holding it unprotected is likely to be very great. The employer will discharge those employees likely to take the lead in organization or protest. Since, in most cases, the protest is in fact a protest against undesirable working conditions, it follows that any retaliation will be seen as a response to protest over working conditions. Whatever the employer's motive, the discharges are likely to cause the remaining employees to think that any concerted activity or attempts at organization will lead to retaliation. Thus the discharge of employees for protesting about a change in supervision is likely to inhibit the exercise of section 7 rights generally, and will have the type of impact which sections 8(a)(1) and (3) were intended to prevent.

### *Economic Pressure in Situations in Which Management Interest Is Limited*

Several cases raise the question of whether management's interest in a subject might be so remote and tangential that economic pressure about the subject ought to be unprotected. Two situations raise the question: those involving demands made of third parties<sup>102</sup> and instances where employees of one employer seek to support employees of another.<sup>103</sup>

#### Cases Involving Attempts to Influence Third Parties

It has long been recognized that employee efforts to influence parties other than their own employer may be for "mutual aid or protection."<sup>104</sup> There is, however, language in the opinion in *G. & W.*

<sup>101</sup> See cases cited in note 96 *supra*; *NLRB v. Phoenix Mut. Life Ins. Co.*, *supra* note 100; *NLRB v. Kennametal Inc.*, 182 F.2d 817 (3d Cir. 1950); *Ace Handle Corp.*, 100 N.L.R.B. 1279 (1952). Real strikes resulted only in the situations in which the incident was part of a major drive for union organization. *NLRB v. Puerto Rico Rayon Mills, Inc.*, *supra* note 100; *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457 (10th Cir. 1953).

<sup>102</sup> See, e.g., *NLRB v. Bretz Fuel Co.*, 210 F.2d 392 (4th Cir. 1954).

<sup>103</sup> *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942); *Bethlehem Ship Bldg. Corp. v. NLRB*, 114 F.2d 930 (1st Cir., 1940), *dismissed on motion of petitioner*, 312 U.S. 710 (1941).

<sup>104</sup> See, e.g., *Redwing Carriers Inc.*, 137 N.L.R.B. 1545 (1962), *petition to set aside denied sub nom. Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).



*Electric Specialty Co. v. NLRB*,<sup>105</sup> which suggests that only matters "subject to some control or influence by the employer"<sup>106</sup> give rise to employee response for mutual aid or protection.

In *G. & W.*, an employee was discharged for circulating a petition protesting the operation of the company credit union. Although employment by the company was a prerequisite to membership in the credit union, the credit union was completely independent of the company management. The company argued that "in order to qualify as a protected activity the activity must . . . relate to a condition of employment."<sup>107</sup> The Board found the activity protected. A majority concluded that "the protection afforded by section 7 is not strictly confined to activities which are immediately related to the employment relationship or working conditions but extends to the type of indirectly related activity involved herein."<sup>108</sup> The majority pointed out that to limit protection to activity designed to improve working conditions would be to give no meaning to the phrase "or other mutual aid or protection."<sup>109</sup> The Seventh Circuit Court of Appeals disagreed. The court laid great stress on the fact "the activity involved no request for any action upon the part of the Company and did not concern a matter over which the Company had control."<sup>110</sup> The court's emphasis on these facts limits the definition of "mutual aid or protection" by the use of concepts which are used to regulate the process of collective bargaining. This assumption is made fairly explicit by the court's statement:

The sweep of the broad interpretation inherent in the Board's application of the "or other mutual aid or protection" clause to the facts of the instant case gives to that clause a meaning and effect which in our opinion is out of harmony with the immediate context in which the clause appears . . .<sup>111</sup>

Undoubtedly the word "context" here refers to the fact that the phrase "collective bargaining" immediately precedes the phrase "mutual aid or protection" in the statutory language.

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<sup>105</sup> 360 F.2d 873 (7th Cir. 1966).

<sup>106</sup> *Id.* at 876.

<sup>107</sup> *G. & W. Elec. Specialty Co.*, 154 N.L.R.B. 1136, 1147 (1965).

<sup>108</sup> *Id.* at 1137. Member Jenkins dissented. He argued that "by virtue of the doctrine of *ejusdem generis* other mutual aid and protection" should be "construed to apply only to matters of the same general kind or class as the preceding specifically mentioned matters," matters directly related to collective bargaining or the employment relationship. *Id.* at 1140.

<sup>109</sup> *Id.* at 1138.

<sup>110</sup> *G. & W. Electric Specialty Co. v. N.L.R.B.*, 360 F.2d 873, 876 (7th Cir. 1966).

<sup>111</sup> *Id.* at 876.

The *G. & W.* case is not easy to reconcile with earlier cases. Honoring a picket line,<sup>112</sup> assisting organizing efforts at another employer's business,<sup>113</sup> agitating for new legislation,<sup>114</sup> protesting to a government agency<sup>115</sup> and expressing solidarity with striking milk producers,<sup>116</sup> have all been held protected, although involving matters outside the control of the employer. In *Bethlehem Ship Bldg. Corp. v. NLRB*,<sup>117</sup> an employer objected to employee activity "to give public endorsement to a bill pending in the Massachusetts legislature increasing weekly benefits under the Workmen's Compensation Act."

Judge Magruder, speaking for the First Circuit, concluded that such employee activity was protected:

But the right of employees to self-organization and to engage in concerted activities, now guaranteed by Section 7 of the National Labor Relations Act, is not limited to direct collective bargaining with the employer, but extends to other activities for "mutual aid or protection" including appearance of employee representatives before legislative committees.<sup>118</sup>

It is difficult to see why legislative lobbying for such matters, which do not constitute "working conditions" as that term is used in sections 8(d) and 9(a), is protected, while activity to protest operation of an employee credit union is not. The Board's interpretation of "mutual aid or protection" seems more consistent with the language and policy of the act than the interpretation of the court in *G. & W.* The fact that the employer's interest and power were minimal does not militate in favor of holding the activity unprotected. It must be remembered that the decision whether the activity is protected determines whether the employer may use the activity as a basis for discipline. In large part the court used the employer's lack of interest in such activity as a basis for holding that he was free to fire an employee for engaging in it.

It is true that the court also sought to justify its conclusion on the ground that the employees as such did not have a legitimate in-

<sup>112</sup> *Truck Driver's Union Local 413 v. NLRB*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964).

<sup>113</sup> *NLRB v. J. G. Boswell Co.*, 136 F.2d 585 (9th Cir. 1943).

<sup>114</sup> *Bethlehem Ship Bldg. Corp. v. NLRB*, 114 F.2d 930 (1st Cir. 1940), *dismissed on motion of petitioner*, 312 U.S. 710 (1941).

<sup>115</sup> *Socony Vacuum Tanker Men's Ass'n v. Socony Mobil Oil Co.*, 369 F.2d 480 (2d Cir. 1966).

<sup>116</sup> *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942).

<sup>117</sup> 114 F.2d 930 (1st Cir. 1940), *dismissed on motion of petitioner*, 312 U.S. 710 (1941).

<sup>118</sup> *Id.* at 937.

terest in the operation of the credit union. But this argument was hardly more than a makeweight. The credit union was only open to employees of G. & W. Electric Specialty Co. It was an advantage of employment which was recognized and exploited by the company.

The argument that the employer's lack of interest or control affords a legitimate basis for holding that a subject does not come within "mutual aid or protection" is unconvincing. The argument that economic pressure should be unprotected in such cases is more convincing. Where there is a dispute between groups of employees or when the employees are seeking to influence legislation, the employer is not a party to the controversy and there is no reason why he should be forced to permit his business to be used as a battleground. Of course, it is most unlikely that economic pressure will be directed specifically at the employer in such cases, but it is possible that he will be indirectly subject to pressure. On occasion, for example, employees have left work without permission to attend a legislative hearing, to attend a union meeting or to put pressure on the union's bargaining committee. The extent to which such activity is protected by section 7 is unclear from the reported cases.<sup>119</sup> Certainly the employer should be able to protect himself against such pressure. The question is whether the employer's interests are adequately protected by his ability to replace the employees involved. Such walkouts are generally brief. If the Board's conclusion in *Everist*, that employees are entitled to reinstatement if they apply before being replaced, is followed, the employer will often not be able to dismiss employees involved because of the difficulty in finding replacements during the short time the employees are away from work. The process of hiring replacements is likely to be as costly as continuing to employ the errant employees. The real advantage to the employer is that discharging these employees may deter similar conduct in the future. There are strong reasons for permitting him to do so. Such walkouts cause economic damage to the employer who is generally not a party to the controversy. In most cases the employees can achieve the same results

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<sup>119</sup> The Board sometimes has held that it is a violation of the act to discharge an employee who leaves work, without permission, to attend a Board hearing. *Pearson Corp.*, 138 N.L.R.B. 910 (1962); *Chautauqua Hardware Corp.*, 103 N.L.R.B. 723, *enforced*, 208 F.2d 750 (2d Cir. 1953). However, in each of these cases the respondent was to some extent motivated by a general hostility to unions. In other cases, where the testimony of the witness was not needed, the Board has found leaving work to attend a hearing unprotected. *Standard Packaging Corp.*, 140 N.L.R.B. 628 (1963). While the Board would hold that leaving work without permission to attend hearings of other government agencies is protected, one court of appeals has taken the position that absent proof of anti-union motive, a discharge for such activity does not violate the act. *NLRB v. Superior Co.*, 199 F.2d 39 (6th Cir. 1952). In *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953), the court of appeals reversed the Board and found that leaving work to put pressure on the union bargaining committee was not protected activity.

without resorting to such tactics. Walkouts of this type are less likely to be the result of general dissatisfaction than are those protesting changes in supervision. It is easier in these situations to distinguish cases involving economic pressure from those involving an expression of opinion.

The extent to which discharges in such cases will have a coercive impact on future union organization will depend upon the nature of existing labor-management relations. If there is a well established union, there probably will be little impact. If organization is non-existent or just beginning, the impact may well be severe. Since the truth of many of the generalizations made above is also subject to variation in particular cases, it is difficult to establish a rule which will always reflect a proper accommodation of the conflicting interests. Arguably, the Board should decide on a case-by-case basis whether the activity is protected, by taking into account the nature of the issue about which the employees are concerned, the state of labor relations, the number of employees who walk out, the length of the walkout, the degree to which the employer was damaged economically and similar factors. The difficulty with case-by-case adjudication is that it makes it very difficult to predict in advance what action the employer may take. Since reinstatement with back pay is likely to be the remedy, a wrong guess can be quite costly to an employer. Counsel should be able to determine how the Board will evaluate putative action.<sup>120</sup> Since the employer's interest is likely to outweigh the factors which favor holding the activity protected, it should be held unprotected unless it is determined that the activity was in substantial part a protest against existing conditions by unorganized workers and, thus, the first step towards self organization.

#### Making Common Cause with Other Employees: Refusals to Cross Picket Lines

It is generally accepted that employee activity in support of employees of another employer who are involved in a labor dispute is activity for "mutual aid or protection." The reasons for this were expressed by Judge Learned Hand in a characteristically compelling

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<sup>120</sup> Where Board hearings are involved, a mass walkout to attend the hearing is likely to be a reflection of dissatisfaction either with general conditions (if the hearing is a representation hearing) or with the actions which gave rise to an unfair labor practice complaint. The action of the employees may represent an awakening sense of group solidarity. When the writer was with the N.L.R.B., the General Counsel decided to issue a complaint in a case in which a group of employees who had been the victims of a sweetheart contract left work *en masse* to support a new union at a Board hearing. The General Counsel properly decided that the employer was not a neutral party who was being injured by the concerted activity, but that the employees' action represented an effort to protest the previous situation.

passage in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*<sup>121</sup> The case arose when the chocolate company fired an employee who called a meeting of the local union to encourage employees of the company to express support for a union of milk suppliers. The Board held that the activity was protected.<sup>122</sup> The Second Circuit affirmed. Judge Hand rejected the argument that the activity was unprotected because the members of the milk union were not members of the bargaining unit and were not "employees" under the act.

Certainly nothing elsewhere in the act limits the scope of the language to "activities" designed to benefit other "employees"; and its rationale forbids such a limitation. When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts. So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in "mutual aid or protection." . . . It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained . . . , but it seems to us that the act has put an end to this.<sup>123</sup>

As indicated, the Wagner Act embraced the philosophy that employees should be free to support each other. The Taft-Hartley and Landrum-Griffin amendments, however, severely limited the extent to which economic pressures can be used to make common cause with employees of other companies. The policy that employees should be free to engage in secondary pressure was largely replaced by a policy against the spread of industrial disputes.<sup>124</sup> Most traditional forms

<sup>121</sup> 130 F.2d 503 (2d Cir. 1942).

<sup>122</sup> *Peter Cailler Kohler Swiss Chocolates Co.*, 33 N.L.R.B. 1170 (1941).

<sup>123</sup> 130 F.2d at 505-06 (citations omitted).

<sup>124</sup> See H.R. REP. No. 245, 80th Cong., 1st Sess. (1947) in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292 (1948).

of secondary pressure were declared unfair labor practices by the additions of sections 8(b)(4)<sup>125</sup> and 8(e)<sup>126</sup> and hence are unprotected.

The refusal of employees to cross a primary picket line at another employer's premises in the course of their work is not prohibited by section 8(b)(4).<sup>127</sup> The Board has held that this is protected activity

<sup>125</sup> Labor Management Relations Act (Taft-Hartley Act) § 8(b), 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b) (1964):

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

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

(A) forcing or requiring any employer . . . to enter into any agreement . . . prohibited by [§ 8(e)]. . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of [§ 9]. . . .

<sup>126</sup> National Labor Relations Act § 8(e), added by, 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (1964).

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

<sup>127</sup> There is a proviso to § 8(b) which states:

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

Labor Management Relations Act (Taft-Hartley Act) § 8(b), 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b) (1964).

The purpose of this proviso was largely to make clear that refusals to cross picket lines are not the type of secondary pressure covered by § 8(b)(4). See, *e.g.*, 73 CONG. REC. 6859 (1947) (remarks of Senator Taft) in 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1623 (1948). It is possible to read the proviso as implying that all refusals which do not come within its terms violate § 8(b)(4). This would be an unfortunate interpretation and contrary to the scheme of the amendment, which was to distinguish the spread of industrial disputes through secondary strikes from the indirect secondary pressure brought about by refusals to cross picket lines.

As Judge Prettyman stated in *Seafarers Union v. NLRB*, 265 F.2d 585, 591 (D.C. Cir. 1959):

No matter how great the pressure on a neutral employer may be when somebody else's place of business is picketed, it is essentially different from the pressure such a neutral feels when his own business is being picketed.

This . . . is the rationale which must govern the interpretation of § 8(b)(4). In *Truck Drivers Union (Patton Warehouse)*, 140 N.L.R.B. 1474 (1963), the Board concluded that an agreement by which an employer agreed not to punish an employee for refusing to cross a picket line violated § 8(e), insofar as it went beyond the proviso to § 8(b)(4). Implicit in the Board's decision is the conclusion that such refusals are unprotected activity and probably themselves violate § 8(b)(4). The Board's

because it comes within the literal meaning of section 7.<sup>128</sup> It is activity for mutual aid or protection of another union and is concerted activity, even when undertaken by an individual employee on his own.<sup>129</sup> By definition, the employee who honors a picket line does not act alone. He is in concert of action with the pickets. There is no reason why the policy of permitting employees to make common cause with each other is any less applicable when a single employee honors a picket line than when two employees together do so.

conclusion in this regard based on the statutory language and legislative history was set aside in *Truck Drivers Union v. NLRB*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964). The Court held that the refusal to cross any lawful primary picket line was protected and an agreement not to punish for it was lawful under § 8(e). Both the Board and the courts relied heavily on the legislative history of the 1947 and 1959 amendments in order to support their conclusion. The best that can be said is that the legislative history is inconclusive. Most of the comments cited were individual opinions directed to other questions.

It is fairly clear that Congress did not really direct itself to whether § 8(b) (4) covered refusals outside the proviso. Indeed, for these reasons, legislative history is of only minor value in solving any of the questions concerning the protected status of refusals to cross. However, the scheme of the act, as Judge Prettyman pointed out, supports the conclusion that only refusals related to secondary strikes or inducements at the employer's own premises run afoul of § 8(b) (4). There is no doubt that employees who honor a lawful picket line at their own employer's premises are engaged in protected activity. See *NLRB v. John S. Swift Co.*, 277 F.2d 641, 646 (7th Cir. 1960); *Cooper Thermometer Co.*, 154 N.L.R.B. 502 (1965). In a recent case the Board and the courts agreed that the proviso did not protect refusals to cross unlawful picket lines. Any attempt to provide that such refusals will not be punished violates § 8(e). See *Drivers Union 695 v. NLRB*, 361 F.2d 547 (1966).

<sup>128</sup> The Board's analysis of this issue in *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545 (1962), *petition to set aside denied sub nom. Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964), is astonishingly brief:

Such activity is literally for "mutual aid or protection," as well as to assist a labor organization, within the meaning of Section 7. Contrary to the language of the Board's former decision, therefore, we find that the employees of Redwing engaged in protected concerted activity when they refused to cross the Virginia-Carolina picket line.

137 N.L.R.B. at 1546-47.

<sup>129</sup> Read literally, the term "concerted" suggests that two or more employees must take part in the activity and possibly even that they must be conscious of working together. There is one case in which a court adopted this position. In *NLRB v. Illinois Bell Tel. Co.*, 189 F.2d 124 (7th Cir.), *cert. denied*, 342 U.S. 885 (1951), the court held that the decision made by individual employees to honor a picket line was not protected by § 7 because the employees were each acting individually. "There is no evidence that these eight employees acted in combination or concert." *Id.* at 127. Subsequent cases have not accepted this interpretation of § 7, and it is well settled that concerted activity may be undertaken by an individual employee. So long as the employee is seeking to make common cause with others or to organize the employees or to protest general working conditions, his actions have been held to come within § 7. See, e.g., *NLRB v. Kit Mfg. Co.*, 335 F.2d 166 (9th Cir. 1964), *cert. denied*, 380 U.S. 910 (1965); *Farmers Union Co-op. Marketing Ass'n*, 145 N.L.R.B. 1 (1963). Thus, when a single employee has sought to begin union organization or has sought to arouse his fellows in protesting working conditions, the Board and the courts have held this to be concerted activity. *NLRB v. Martin*, 207 F.2d 655 (9th Cir. 1953); *NLRB v. Schwartz*, 146 F.2d 773, 774 (5th Cir. 1945). This interpretation is consistent with the basic approach of § 7 which is to permit employees to protest and to organize. Any other interpretation of § 7 would make the first employee who seeks to begin organization or protest vulnerable to discharge until he is able to attract support. None of the decisions dealing with refusals to cross picket lines, including *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953), have dealt with this question, although the analysis of the Court in *Illinois Bell* was strongly urged by the respondent in the *Rockaway News* case. Brief for respondent, pp. 10-17, *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953).

Although the Board is correct in finding that honoring a picket line is within the literal language of section 7, its conclusion that such activity is protected does not automatically follow.<sup>130</sup> The Board apparently did not consider the statutory policy which aims at preventing the spread of labor disputes. The Board's opinion indicated that it thought it was unnecessary to consider the interests of the neutral employer, since he has the option of replacing the employee who refused to cross the line.

Since, as noted above,<sup>131</sup> the right to replace is limited, its existence does not justify the Board's failure to consider the employer's interest in determining whether the activity is protected. Thus, the Board should have considered the desirability of holding that employees who honor picket lines are entitled to reinstatement if they apply prior to actually being replaced. The Board also failed to consider whether an employer should be able to discharge employees who honor picket lines in order to forestall similar conduct in the future from the same employees and to deter others.

It has been argued that the employee who refuses to cross a picket line in the course of his assigned work should be treated no differently than an employee who, contrary to company rules, engages in union solicitation during working hours. Although union solicitation is normally protected by section 7, this protection is subordinated to the employer's right to insist that working time be spent in accordance with his instructions. Employees who solicit for a union during working hours may be discharged with no right of reinstatement.<sup>132</sup> Union organization is a more significant right than the right to make common cause with other employees. Since activity designed to achieve union organization is subordinated to the employer's interest in having work done as he requests, there is no reason for treating differently refusals to work because of a picket line. Although the Seventh Circuit in *Everist* did not specifically decide that honoring a picket line is unprotected activity, the court's opinion indicated that it would view such arguments with favor.<sup>133</sup>

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<sup>130</sup> There are many examples of this phenomenon given throughout this article in Parts II, III and IV. One closely in point is the conclusion that union solicitation in violation of a valid no-solicitation rule is not protected activity. Such activity meets the literal language of § 7, but it is held unprotected because of the employer's interest in having his work done when he requests. See, e.g., *Delta Sportswear, Inc.*, 160 N.L.R.B. No. 30 (Aug. 5, 1966).

<sup>131</sup> See text accompanying notes 41-67 *supra*.

<sup>132</sup> *NLRB v. USW*, 357 U.S. 357 (1958).

<sup>133</sup> "Such refusal was no more and no less than a refusal to work, a violation of their contract to continue hauling for which they could be and were validly discharged." 334 F.2d at 317-18. The refusal to cross a picket line may also be analogized to a partial work stoppage. Partial work stoppages or slowdowns are sometimes held unprotected. See text accompanying notes 152-77 *infra*. For reasons there indicated,



However the Board's conclusion can be convincingly supported. The analogy to no-solicitation cases is misleading because rules limiting solicitations are premised on the assumption that adequate opportunity exists for solicitation during non-working time.<sup>134</sup> If there is to be a right to honor picket lines, it must be exercisable during working hours. It should also be noted that with respect to solicitation rules, the employer's economic interest cannot be protected by the right to replace.

The NLRA defines "labor dispute" quite broadly, to include almost any possible labor objective, "regardless of whether the disputants stand in the proximate relation of employer and employee."<sup>135</sup> The term is used only in section 2(3) which defines the term employee to "include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute."<sup>136</sup> The impact of the two sections is to make clear that an employee who quits work because of a labor dispute involving employees of another employer cannot be treated as one who has given up his job and his protection under the statute by refusing to work. As Judge Hand pointed out in the *Peter Cailier Kohler Co.* case, it was generally understood that the Wagner Act protected economic pressure in support of the employees of another employer.<sup>137</sup> There is nothing to suggest that the Taft-Hartley or Landrum-Griffin amendments removed that protection from refusals to cross picket lines.

Sections 8(b)(4) and 8(e) represent a hard fought, carefully hammered-out compromise. Their provisions indicate the limits to

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I believe such partial work stoppages should almost always be held protected. In any case, the theory by which such stoppages are held unprotected is primarily their serious impact on the employer. See *UAW v. Wisconsin Employment Relations Bd.* (Briggs & Stratton), 336 U.S. 245 (1949). The typical partial work stoppage involves an effort to maximize the degree of economic hardship caused the employer. Refusals to cross picket lines are generally not efforts to harm the employer except as necessary to help other employees. Therefore, such cases do not come within the reasons which led the Supreme Court to indicate that in some situations the use of intermittent work stoppages is unprotected. Where partial work stoppages do not involve serious economic dislocation, they are generally held protected. See *NLRB v. Solo Cup Co.*, 237 F.2d 521 (8th Cir. 1956); *NLRB v. J. I. Case Co.*, 198 F.2d 919 (8th Cir. 1952), *cert. denied*, 345 U.S. 917 (1953).

<sup>134</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962).

<sup>135</sup> National Labor Relations Act § 2(9), as amended, 61 Stat. 138 (1947), 29 U.S.C. § 152(9) (1964).

<sup>136</sup> National Labor Relations Act § 2(3), as amended, 61 Stat. 137 (1947), 29 U.S.C. § 152(3) (1964).

<sup>137</sup> See also *Fort Wayne Corrugated Paper Co. v. NLRB*, 111 F.2d 869, 873-74 (7th Cir. 1940); *Cyril de Cordova & Bro.*, 91 N.L.R.B. 1121 (1950). The Taft-Hartley Act debates indicated the belief of Congress that secondary economic pressure, as well as refusals to cross picket lines, were protected activity under the Wagner Act. See H.R. REP. No. 245, 80th Cong., 1st Sess. (1947) in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 297 (1948); S. MINORITY REP. No. 105, 80th Cong., 1st Sess. (1947) in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 463, 481-82 (1948).

which Congress was willing to restrict the policy of permitting employees to make common cause with each other.<sup>138</sup> Although there were efforts to limit the scope of section 7 prior to the 1947 amendments, at no time did these efforts attempt to remove the protection of section 7 from refusals to cross picket lines.<sup>139</sup> There was considerable Congressional concern that the Taft-Hartley and Landrum-Griffin amendments not interfere with the ability of employees to engage in traditional activity.<sup>140</sup> In several places the statutory language reflects this concern.<sup>141</sup> Refusals to cross picket lines have long been considered an integral part of primary strike activity.<sup>142</sup> Accordingly, it would be inconsistent with the language of the statute and the understanding of its sponsors to hold that section 8(b)(4) limited

<sup>138</sup> See S. MINORITY REP. No. 105, 80th Cong., 1st Sess. (1947), in 1 LEGISLATIVE HISTORY OF LABOR MANAGEMENT RELATIONS ACT, 1947 463, 481-82 (1948). Thus Senator Taft in his discussion of § 8(b)(1)(A) explained one of its purposes as leaving it up to the employees to determine whether "to participate in a strike or a picket line." 93 CONG. REC. 6859 (1947) in 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1623 (1948). "Section 13 has been amended . . . (1) By a clause which makes clear that the Wagner Act has diminished the right to strike only to the extent specifically provided by the new amendments to the act . . ." S. REP. No. 105, 80th Cong., 1st Sess. (1947) in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 434 (1948). Senator Kennedy, in a report on the Conference which agreed on the 1959 amendments, stated, "We have protected the right of employees of a secondary employer, in the case of a primary strike, to refuse to cross a primary strike picket line." 105 CONG. REC. 16255 (1959) in 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1389 (1959). See remarks to the same effect by Senator Douglas, 105 CONG. REC. A8372 in 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1834.

<sup>139</sup> H.R. 3020 as originally reported provided that § 7 did not protect unfair labor practices under § 8(b) "unlawful concerted activities" under a new § 12, and violations of collective bargaining agreements. The language of § 12 and its legislative history indicate the type of changes in § 7 which Congress considered making. They were concerned with unlawful and clearly improper tactics. The type of improper tactics mentioned, such as sitdown strikes, were much different from refusals to cross a picket line. See H.R. REP. No. 510, 80th Cong., 1st Sess. (1947) in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 505. See also *id.* at 49, 80, 176, 207, 318, 355 (remarks of individual Congressmen). Eventually, however, this language was left out, as were the categories of unlawful concerted activities, and § 7 remained essentially the same.

<sup>140</sup> See the discussion in note 138 *supra*. For an accurate history of the efforts to make certain that the 1959 amendments did not make refusals to cross a picket line unlawful, see the discussion in *Truck Drivers Local 413 v. NLRB*, 334 F.2d 539, 543-45 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964).

<sup>141</sup> In addition to the proviso to § 8(b) quoted above, there is a proviso to § 8(b)(4)(B) which provides that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . ." Most significantly § 13 provides:

Nothing in this subchapter except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualification on that right. National Labor Relations Act § 13, as amended, 61 Stat. 151 (1947), 29 U.S.C. § 163 (1964).

<sup>142</sup> See *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675, 687 (1951), in which the Court described the effort to influence employees not to cross a primary picket line as "no more than was traditional and permissible in a primary strike." See also *Printing Specialties Union v. Le Baron*, 171 F.2d 331, 334 (9th Cir. 1948), *cert. denied*, 336 U.S. 949 (1949).

the reach of section 7 with respect to employees who refuse to cross picket lines. Moreover, if honoring a picket line is held unprotected, there is bound to be a deterrent effect on other, less controversial union activity. The employer has shown himself to be willing to retaliate against the union and the number of strong union adherents has been reduced. Thus the Board's position is tenable. The reasons in favor of it are at least as strong as those opposed, and there is no reason why it should be overturned.

### Honoring Unlawful Picket Lines

Until recently, it has been accepted without discussion or analysis that a refusal to cross a picket line is protected only where the picket line itself is lawful.<sup>143</sup> The reasons for such a rule are not readily apparent. It cannot be justified in terms of the interests of the employer who, according to the rule, may legitimately discharge the employee. The discharging employer is likely to be acting from one of three motives: to get the job done; to deter similar conduct in the future; to express his displeasure with union activity. The first motive is proper whether the activity is protected or not, and the illegal nature of the picket line is likely to be irrelevant to the other two.

Where an employer punishes an employee for honoring a picket line because of his displeasure with union activity, it would be far-fetched to assume that his displeasure is related to the unlawfulness of the picket line. In such cases the employer is motivated by a desire to punish an employee for demonstrating solidarity with other employees. This motive is in conflict with the basic policies of the act and with the principles which underlie section 7. Similarly, an employer who acts in order to deter is likely to want to deter his employees from honoring any picket lines. Indeed, at the time he acts, he will probably not know whether the picket line is lawful or not. The legality of the picket line is likely to be a matter of indifference to the discharging

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<sup>143</sup> In *Drivers Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966), the court held, as did the Board, that a refusal to cross a prohibited picket line "is unprotected." The court's analysis was directed primarily to the question of whether refusal to cross a secondary picket line called by a recognized union was protected. The court based its conclusion on the basis of the legislative history of both the proviso to § 8(b) and the 1959 amendments which indicated that Congress was concerned with protecting refusals to cross "primary picket lines" or a "legitimate strike picket line." The legislative history which the court cites is too fragmentary to be very meaningful. At most, it indicates that Congress was concerned with the legality of refusals to cross primary lawful picket lines. *Id.* at 550-51. There is no indication that Congress, in any sense, addressed itself to the question of refusals to cross unlawful picket lines. The language of the act is broad enough to protect such refusals if the Board or a court concludes that such protection would be consistent with the policies of the NLRA.

employer, and so it seems unfortunate that the determination of unlawfulness months later may decide the legality of his conduct.

Moreover, whatever the employer's motive is in discharging employees for honoring an illegal picket line, his action is likely to deter employees from honoring any picket line in the future. Selective deterrence is only possible if employees are capable of distinguishing between lawful and unlawful picket lines. Anyone familiar with the realities of industrial strife and the behavior of employees faced with a picket line would agree that employees are not likely to attempt such a distinction; anyone familiar with the law concerning the legality of picket lines would consider it a cruel task to require of them. This is an issue with which the Board and the courts have wrestled continually and have failed to resolve with consistency.<sup>144</sup> The danger of replacement provides a great inducement to employees to cross picket lines. It, therefore, takes a commitment and a strong sense of union solidarity for an employee to refuse to cross a picket line. The feeling which will permit employees to run such a risk can only be maintained by developing a sense of the importance of picket lines, and creating a feeling of shame and betrayal in employees who cross them. To the extent that the selective crossing of picket lines is encouraged, the feeling of solidarity is undermined.<sup>145</sup>

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<sup>144</sup> With respect to the legality of organizational picketing, see Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78 (1962). For some idea of the difficulties involved in determining the legality of secondary activity, see *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58 (1964); *NLRB v. Amalgamated Lithographers*, 309 F.2d 31 (9th Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). In *Drivers Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966), the court argues that the problems of determining legality are not great enough to warrant holding the refusals to be protected. "However, recent decisions promise clarification. Moreover, employees and employer will generally be advised by counsel and will not have to rely on their own judgment." *Id.* at 551. The court's optimistic appraisal of the trend of the cases is a matter difficult to refute without another article. It might be sufficient to state that after several years with the NLRB and several years teaching labor law, the author would not like to be faced with the problem. It is probably significant that Judge Bazelon limited his praise of the recent cases to a future "promise" of clarification. The judge's comment that employees will generally be "advised by counsel" is wrong. Rarely are employees able to call upon counsel. Indeed, at a recent International Executive Board meeting of the United Steel Workers of America, a proposal to permit local unions to retain counsel was rejected. See *Steel Labor*, Feb. 1967, p. 4. Furthermore, even if local counsel were available, it would often be difficult to tell in advance when advice about the legality of another union's picket line was necessary. Of course, if it were established that the employee who honored the picket line knew of its illegality, it would be proper to hold the refusal unprotected. But such cases are not likely to arise often.

<sup>145</sup> "From the point of view of union morality, a good union man never crosses a picket line no matter whose picket line." BARBASH, *LABOR UNIONS IN ACTION* 129 (1948). The explanation for the rule may be that it serves to diminish the effectiveness of unlawful picket lines and that this result justifies the impact on lawful picket lines and the risk to the employees. However, if a peaceful picket line is unlawful at all, it is generally unlawful by virtue of §§ 8(b)(7) or 8(b)(4). It is possible to get speedy injunctive relief if either section is violated, and a violation of § 8(b)(4) makes a union liable in damages. If a picket line is unlawful because it is violent, injunctive relief is also available. Under both §§ 8(b)(4) and 8(b)(7), the burden is sometimes put on the picketing employees to see to it that their picket line is not hon-

### III. LIMITATIONS BASED ON THE NATURE OF THE ECONOMIC PRESSURE

If read literally, the term "concerted activity" would encompass almost all economic pressure applied by two or more employees.<sup>146</sup> However, as is true with respect to practically all of the broad language of the act, its meaning has been limited by other recognized policies. Thus, violence, threats of violence, efforts to seize or destroy company property<sup>147</sup> and conduct which violates the policy of other federal statutes<sup>148</sup> are all unprotected activities.<sup>149</sup> As to these there is little or no theoretical dispute. The only important questions concern the degree of misconduct necessary to make conduct unprotected.<sup>150</sup> It is only slightly less apparent that strikes in breach

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ored at the risk of its becoming unlawful and subject to being enjoined. This would seem to be the proper way to handle this problem. If it is deemed wasteful to society to have employees honor certain picket lines, the burden should be put on the striking employees and the law should attempt to encourage them to limit the effectiveness of the picket line. Thus the rule that picket lines must be lawful to make honoring them protected is not needed to cope with problems arising under §§ 8(b) (4), 8(b) (7) or strikes involving violence. The justification for the rule would then have to be made by reference to its impact on strikes which violate § 8(b) (3). All of these are likely to involve highly technical questions and do not justify permitting an employer to discharge his employee for reasons which have nothing to do with the issue on which the legality of the strike will turn.

<sup>146</sup> As already noted, an individual may engage in concerted activity within the meaning of § 7. See note 129 *supra*.

<sup>147</sup> *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1939); *NLRB v. Indiana Desk Co.*, 149 F.2d 987, 995 (7th Cir. 1945); *NLRB v. Clinchfield Coal Corp.*, 145 F.2d 66, 73 (4th Cir. 1944).

<sup>148</sup> *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942); *NLRB v. Indiana Desk Co.*, *supra* note 147.

<sup>149</sup> *W. T. Rawleigh v. NLRB*, 190 F.2d 832, 839-40 (7th Cir. 1951); *NLRB v. Perfect Circle Co.*, 162 F.2d 566, 568 (7th Cir. 1947).

<sup>150</sup> Where employer unfair labor practices cause a strike, the Board is less likely to find that minor misconduct made the strike activity unprotected. See, e.g., *John Kinkel & Sons*, 157 N.L.R.B. No. 64 (March 16, 1966); *Golay & Co. (Lee Cylinder Division)*, 156 N.L.R.B. 1252, *enforced* 371 F.2d 259 (7th Cir. 1966); *Louisiana Mfg. Co.*, 152 N.L.R.B. 1301 (1965); *Laney & Duke Storage Warehouse Co., Inc.*, 151 N.L.R.B. 248 (1965), *enforced* 369 F.2d 859 (5th Cir. 1966). Moreover, even if the activity is unprotected, the employee may be ordered reinstated in order to remedy the original unfair labor practice. See *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954); *Oneita Knitting Mills, Inc.*, 153 N.L.R.B. 51 (1965). Even where the employer's conduct is blameless, the Board may conclude that minor non-violent misconduct which occurred as part of a general course of protected activity did not make an employee liable to discharge. Thus, an employee who became angered in discussing the company's wage offer and called the employer a liar was held to have engaged in protected activity. *The Bettcher Mfg. Corp.*, 76 N.L.R.B. 526 (1948). The stated standard by which the Board has judged such cases is whether the misconduct is so severe as to "render the employee unfit for further service." *Id.* at 527. It has been applied in a variety of situations. The Board has held the following activity protected: drawing cartoons of the boss to protest a low wage and posting them on the bulletin board, *Buehler Corp. (Indiana Gear Works Div.)*, 156 N.L.R.B. 397 (1965), *enforcement denied*, 371 F.2d 273 (7th Cir. 1967); taking company cards which the employees objected to signing, *Laney & Duke Storage Warehouse Co.*, *supra*; interrupting a company meeting to talk on behalf of the union, *Leece-Neville Co.*, 159 N.L.R.B. No. 29 (June 14, 1966); calling the employer a "social clod," *Dr. J. C. Campbell, Dentist*, 157 N.L.R.B. No. 87

of a no-strike clause should be unprotected since such strikes conflict with the federal policy favoring the establishment of orderly procedures for resolving disputes in an established bargaining relationship.<sup>151</sup>

Considerable confusion exists, however, concerning the extent to which unorthodox pressure tactics—neither violent nor unlawful—may be held unprotected in circumstances in which traditional forms of economic pressure would be held protected. In some of its early decisions construing the reach of section 7, the Supreme Court held unorthodox activity unprotected. In its more recent decisions, however, the Court has apparently rejected the concept of picking and choosing among lawful economic weapons. It has also indicated a willingness to read section 7 more broadly. As a result, the continued vitality of the older cases is subject to question. A brief review of the cases indicates the nature of the conflict between the older and more recent decisions.

The first case in which the Court held the use of otherwise lawful but unorthodox economic pressure unprotected was *UAW v. Wisconsin Employment Relations Bd. (Briggs & Stratton)*.<sup>152</sup> In support of its bargaining demands, the union called a series of intermittent work stoppages in the guise of union meetings to disrupt the employer's production and delivery schedule. The Court held that such activity was unprotected by section 7. Distinguishing this conduct from a total strike, the Court held that it constituted an improper bargaining weapon. The conclusion of impropriety was supported by three considerations: 1) it is unfair to draw pay from a man while applying pressure against him;<sup>153</sup> 2) such conduct is much more effective than

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(March 23, 1966). The standard is at its best a vague one. It is not easy to determine when misconduct brands an employee as "unfit for further service." Why should an employee who throws rocks through a window or who seizes a machine be more unfit than an employee who ridicules his boss? It is not necessarily true that "serious" misconduct is more likely to be repeated or that it will necessarily be more offensive to the employer.

The fact is, there is no necessary connection between the seriousness of the offense and potential impact on future service. The Board is probably not making an estimate as to future impact, but rather, an evaluation of how improper the conduct was and how much damage it caused. If one were to try to estimate future impact, one might well consider that name calling can be more coercive than physical abuse. But, even if the Board's standard is unclear, its approach is understandable. Labor disputes are likely to be emotionally laden and a certain amount of misconduct must be tolerated so that employees will feel free to exercise the rights granted them. On the other hand, where minor misconduct is involved, the Board is more likely to find that the activity was not for the purpose of mutual aid or protection. See, *e.g.*, *Karat, Inc.*, 162 N.L.R.B. No. 39 (Dec. 23, 1966); *Continental Mfg. Corp.*, 155 N.L.R.B. 255 (1965). The courts show a similar tendency. See *Indiana Gear Works v. NLRB*, 371 F.2d 273 (7th Cir. 1967).

<sup>151</sup> *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

<sup>152</sup> 336 U.S. 245 (1949).

<sup>153</sup> *Id.* at 257. The Court cited with approval *C. G. Conn, Ltd. v. NLRB*, 108 F.2d 390, 397 (7th Cir. 1939) in which the 7th Circuit used the axiom that one could not "be on a strike and at work simultaneously" in order to hold similar tactics unprotected.

a total strike, since the employer is helpless to protect himself against it;<sup>154</sup> and 3) the employer was not given adequate notice of how he could respond to prevent or to stop the activity.<sup>155</sup>

The proposition that certain lawful techniques are improper and hence, unprotected was more fully articulated in *NLRB v. Local No. 1229 I.B.E.W. (Jefferson Standard)*.<sup>156</sup> The case arose in the context of bargaining negotiations between the Jefferson Standard Radio Station and the union. During their own time, a group of technicians, not on strike, distributed leaflets which attacked the quality of the company's broadcast operations. The employer discharged these employees, and the Board sustained the discharge on the ground that the conduct was "indefensible" (a word which the Board plucked from the court's opinion in *Briggs & Stratton*). The court of appeals reversed, stating that so long as the object was legitimate and the means lawful, the Board could not declare the conduct in question to be unprotected.<sup>157</sup> The court properly pointed out that on several occasions the Board had found activity to be protected which might be classified as disloyal or disobedient. The Supreme Court reversed the court of appeals, holding that the conduct involved was disloyal, that disloyalty constitutes "cause" and that, therefore, the conduct was unprotected.

Section 10(c) of the Taft-Hartley Act expressly provides that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." There is no more elemental cause for discharge of an employee than disloyalty to his employer. . . .

Congress, while safeguarding, in § 7, the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," did not weaken the underlying contractual bonds and loyalties of employer and employee.<sup>158</sup>

For some time the Board and the courts largely followed the language of *Jefferson Standard*,<sup>159</sup> and held that concerted activity was

<sup>154</sup> 336 U.S. at 264.

<sup>155</sup> *Id.* at 249. The conclusion that activity which is unprotected and unprohibited by the federal act can always be regulated by the states has since been rejected by the Court. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245-48 (1959).

<sup>156</sup> 346 U.S. 464 (1953).

<sup>157</sup> 202 F.2d 186 (D.C. Cir. 1952).

<sup>158</sup> 346 U.S. at 472-73. This drew a strong dissent from Mr. Justice Frankfurter. *Id.* at 478-81.

<sup>159</sup> *John S. Swift Co.*, 124 N.L.R.B. 394 (1959), *enforced*, 277 F.2d 641 (7th Cir. 1960); *Patterson-Sargent Co.*, 115 N.L.R.B. 1627 (1956); *Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806 (1954).

unprotected so long as it was not a conventional strike and could be characterized in such a way as to suggest a legitimate basis for discharge. Since so much union activity could be characterized as disobedient or insubordinate, this method of analysis could not endure for long.

The Supreme Court rejected the position that "cause" necessarily operates as a limitation on section 7 in *NLRB v. Washington Aluminum Co.*<sup>160</sup> In that case, seven employees were discharged after they left work, without permission, to protest the extreme cold in the machine shop. Although such conduct constituted a violation of a company rule and could have been characterized as "cause," the Court held that the policy of section 7 outweighed employer interests and limited the concept of "cause" to instances of violence, physical interference, unlawful conduct, breach of contract and disloyalty.<sup>161</sup> Holding the activity protected, the Court stated:

Section 10(c) of the Act does authorize an employer to discharge employees for "cause" and our cases have long recognized this right on the part of an employer. But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects. And the plant rule in question here purports to permit the company to do just that for it would prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission of the company's foreman was obtained.

It is of course true that § 7 does not protect all concerted activities, but that aspect of the section is not involved in this case. The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract. Nor can they be brought under this Court's more recent pronouncement which denied the protection of § 7 to activities characterized as "indefensible" because they were there found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities. The activities of these seven employees cannot be classified as "indefensible" by any recognized standard of conduct.<sup>162</sup>

It is noteworthy that the Court did not cite *Briggs & Stratton* in its opinion in *Washington Aluminum*. The Court had in the meantime dealt with the type of conduct involved in *Briggs & Stratton* in

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<sup>160</sup> 370 U.S. 9, 16-17 (1962).

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*



a slightly different context. In *NLRB v. Insurance Agents' Union* the Supreme Court held that the use of intermittent economic pressure by a union during bargaining negotiations does not violate the union's duty to bargain under section 8(b)(3).<sup>163</sup> While the Court was willing to "agree arguendo" that the activity was unprotected by virtue of the "decision in the *Briggs & Stratton* case," the force of its reasoning suggests that the use of such pressure tactics does not violate the standards later set forth in *Washington Aluminum*. In *Insurance Agents'*, the Court described the use of the economic pressure involved as "part and parcel" of the system of collective bargaining contemplated by the labor act, and denied to the Board the power to "introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons . . . ." <sup>164</sup> It is hard to see how conduct can be simultaneously within the scheme of bargaining sanctioned by the act and "indefensible." It is also hard to see why the Board is denied the power to "pick and choose" among economic weapons for purposes of section 8(b)(3), while it is granted that power for purposes of section 7. If the one is an unwarranted intrusion on collective bargaining, then the other must be as well. As the Court stated: "We see no indication here that Congress has put it to the Board to define through its processes what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."<sup>165</sup> In its recent opinions broadening the employer's ability to utilize the lockout as a bargaining weapon, the Court reaffirmed its denial of the Board's claimed power to pick and choose among the economic weapons available in bargaining situations.<sup>166</sup>

It might be argued that the Court's reasoning can be used to justify the opposite conclusion. The effect of holding activity to be protected is to limit the employer's ability to respond. The use of economic force is most free when activity is not protected and not unlawful. In such cases the Board is unavailable as a referee. The issue is then won by the side with the greatest economic power. This argument applies with equal force to all concerted activity. It has no special relevance to intermittent work stoppages and it is

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<sup>163</sup> 361 U.S. 477 (1960).

<sup>164</sup> *Id.* at 497.

<sup>165</sup> *Id.* at 499-500.

<sup>166</sup> Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of the assessment of that party's bargaining power.

*American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965); *accord*, *NLRB v. Brown*, 380 U.S. 278, 283 (1965).

irrelevant to the determination of whether particular conduct may be described as indefensible. If it is thought desirable to permit employers to respond to economic pressure, it would be better to hold the response lawful rather than the activity unprotected. Moreover, even if the evaluation of economic weapons which is improper in applying sections 8(b)(3) and 8(a)(5) were proper in determining the reach of section 7, the reasons given by Mr. Justice Jackson to support the holding in the *Briggs & Stratton* case would not support the conclusion that intermittent work stoppages should be held unprotected. It is no longer true, if it ever were true, that an employer is helpless in the face of such bargaining tactics. As noted above, the employer's ability to use economic pressure has been increased. Not only may he replace the employees involved, but he is free to lock them out or subcontract the work they have been doing. At the time of the *Briggs & Stratton* decision, this was not clear. A bargaining lockout, in particular, would seem to be an appropriate defensive measure against the unique aspects of the pressure used in *Briggs & Stratton*—employees attacking the employer at the same time they continued to draw pay.<sup>167</sup> So long as the employer may, in effect, choose to turn the conduct into a total strike, there is no reason why it should be held unprotected because it is different than a total strike. In view of the approach taken and the legal situation created by its recent decisions, the Court should, if the occasion is presented, overrule the holding in the *Briggs & Stratton* case.<sup>168</sup>

The determination that unorthodox forms of economic pressure during bargaining negotiations are protected would not necessarily

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<sup>167</sup> Even before the decision in *American Ship Building*, which permitted an employer to use the lockout as an offensive bargaining weapon, it was accepted that a lockout was a legitimate response in order to protect against particularly effective employee pressure. See *Pepsi Cola Bottling Co.*, 145 N.L.R.B. 785 (1964); *H. H. Zimmerli*, 133 N.L.R.B. 1217 (1961); *Associated General Contractors*, 105 N.L.R.B. 767 (1953). In *NLRB v. Brown*, 380 U.S. 278 (1965), it was held that replacements could be hired and operations continued as long as the "continued operations . . . were wholly consistent with a legitimate business purpose." *Id.* at 285.

The position announced in *C. G. Conn, Ltd. v. NLRB*, 108 F.2d 390, 397 (7th Cir. 1939), that employees cannot "be on strike and at work simultaneously" is either tautological or a statement of conclusion. See also *Home Beneficial Life Ins. Co. v. NLRB*, 159 F.2d 280 (4th Cir.), *cert. denied*, 332 U.S. 758 (1947). The statement in the *Conn* case does not explain why or when forms of economic pressure short of a total strike should be held unprotected. In many instances, lesser forms of economic pressure have been permitted. See, e.g., *NLRB v. J. I. Case Co.*, 198 F.2d 919 (8th Cir. 1952), *cert. denied*, 345 U.S. 917 (1953); *Edir, Inc.*, 159 N.L.R.B. No. 72 (June 20, 1966).

<sup>168</sup> As noted above, the fact that no previous demand has been made of the employer was a factor in the *Briggs & Stratton* decision. However, the Court in *Washington Aluminum* specifically held that a previous demand was not essential for the use of economic pressure to be protected. "The language of section 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." 370 U.S. at 14.

mean that such pressures are protected under all other circumstances. During the life of an agreement, the use of any economic pressure is almost always unprotected because of the presence of grievance machinery. The question is closer when unorthodox economic pressure is used to protest specific employer conduct where there is no established grievance machinery. Some of the cases holding unorthodox economic pressure unprotected involve protests by unorganized employees or employees in the process of being organized.<sup>169</sup> It is not uncommon for employees in such situations to use unorthodox tactics short of a total strike. In *Washington Aluminum*, the Supreme Court indicated that considerable leeway would be granted to unorganized employees.<sup>170</sup> This approach is sound since the use of economic pressure by unorganized employees is generally part of the process of organization. In such situations, the use of economic pressure is rarely prolonged, although it is often disorderly and unorthodox.<sup>171</sup> Where union organization is in progress, economic pressure is likely to be, in part, a protest against working conditions and a manifestation of support for the organizing union, even if employed primarily to protest specific employer conduct.<sup>172</sup> To permit an employer to discharge the employees involved in such cases would have a serious coercive impact on employee freedom of choice.<sup>173</sup> Logically, there is no reason why any partial work stoppages should be held unprotected where a total strike is permissible, so long as the employer may, by use of the lockout, choose to treat the employees as being on strike. This would mean the employees involved could be laid off and replacements hired, unless they agree to return to work and to accept the employer's action in the matter in dispute without resort to further economic pressure. The only difficulty with this solution is that employers in unorganized plants might not know of the rules, since they probably do not employ experienced labor counsel. It would be inappropriate to require such an employer, faced with intermittent economic pressure over a long period of time, to follow

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<sup>169</sup> See *NLRB v. Blades Mfg. Co.*, 344 F.2d 998 (8th Cir. 1965); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946); *NLRB v. Mt. Clemens Pottery Co.*, 147 F.2d 262 (6th Cir. 1945).

<sup>170</sup> "The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could." 370 U.S. at 14.

<sup>171</sup> See, e.g., *NLRB v. Blades Mfg. Co.*, 344 F.2d 998 (8th Cir. 1965); *NLRB v. J. I. Case Co.*, 198 F.2d 919 (8th Cir. 1952); *NLRB v. Mt. Clemens Pottery Co.*, 147 F.2d 262 (6th Cir. 1945). See discussion in text accompanying notes 96-101 *supra* and cases cited therein.

<sup>172</sup> In addition to cases cited in note 171 *supra*, see *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946); *C. G. Conn, Ltd.*, 108 F.2d 390 (7th Cir. 1939).

<sup>173</sup> See text following note 101 *supra*.

precisely the steps suggested above in all cases. Where particular grievances are involved, the use of economic pressure is a particularly costly way of settling a problem. If, for example, the employer indicates a willingness to settle the matter through negotiation, the legitimate interests of the employees can be advanced without the economic disruption involved in the use of economic pressure.<sup>174</sup> In such cases, an employer, in order to protect his business, should be able to discharge employees who engage in continuous or extremely disruptive pressure tactics. In non-bargaining situations, all unorthodox pressure should not automatically be protected whenever a total strike would be protected. In deciding whether the activity is protected, the Board should look to the general state of employer-employee relations, including such factors as whether union organization is involved, whether the particular issue indicates general dissatisfaction with working conditions, the nature of the demand being made of the employer, the economic result of the tactics used, the availability of alternative means for the employees to present their grievance and the likely impact on future organization of holding the activity unprotected.

The current status of the *Jefferson Standard* case is also unclear. The Court in *Washington Aluminum* sought to distinguish it on the ground that it involved disloyalty to the worker's employer, which the Court deemed unnecessary to carry on the workers' legitimate concerted activities.<sup>175</sup> Any suggestion that the legitimacy of concerted activity turns on the necessity for the activity is inconsistent with the refusal of the Court in *Washington Aluminum* to consider whether the walkout there was necessary.

Disloyalty cannot serve as a basis for distinguishing the cases. It is fairly clear that in a very real sense almost all types of economic pressure are disloyal, in that they seek to hurt the employer's business; a strike is always most effective if done at a time when the workers are most needed by the employer. Moreover, it has been argued that the very organization of a union is disloyal. If "disloyalty" is to be used as a basis for explaining *Jefferson Standard*, the word must be read, in the context of the case, to refer to an attack on the employer which is not directly related to his labor policy—an attack intended to bring him into disrepute for reasons other than his labor policy. In its opinion, the Court stressed the

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<sup>174</sup> In *NLRB v. Condenser Corp.*, 128 F.2d 67 (3rd Cir. 1942), the court held that an employee could not use economic pressure during the working day when the employer had agreed to negotiate with the employees as a group at the end of the day.

<sup>175</sup> 370 U.S. at 17.

fact that the leaflets in no way indicated the existence of a labor dispute.<sup>176</sup> Since the Court offered no explanation, one can only speculate as to why such an attack is "indefensible." Possibly, the conclusion is based on the assumption that while traditional labor appeals to the public not to patronize are likely to lose their effectiveness once the strike is over, attacks on the product may continue to be effective afterwards. It might be argued that employees, being privy to information concerning the operation of the business, are in a position to make a more telling attack upon the employer.

The accuracy of these assumptions is questionable, as is the primary assumption on which they must rest: namely, that the public will not understand that the charges spring from a labor dispute and react to them accordingly. Nor can *Jefferson Standard* be explained satisfactorily in terms of the disruptive effect which such disloyalty is likely to have upon future employer-employee relationships. It is difficult to accept, without further evidence, the conclusion that attacks against the product—unrelated to the employer's labor policies—are more likely to be disruptive of future good relationships than attacks upon the employer's labor policies. Certainly, the kinds of attacks upon the employer for his labor policies, which have been permitted under the act and which are recognized as commonplace in labor disputes, are often bitter and intense. They include attacks upon the employer's morality, the basic nature of his relationships with people and his treatment of subordinates. In many cases such comments would be more likely to lead to bad feelings than the statement made in *Jefferson Standard* that the employer's programming policy was not highly creative or imaginative. But even if one assumes that such statements are likely to be very effective, is it possible to say that the harm to the employer which will be caused thereby is likely to be greater or less justifiable than the harm which will befall the employees if they are locked out during bargaining negotiations? Once the Court has accepted the principle that free use of economic pressure is the keystone of collective bargaining, it becomes increasingly difficult to delineate the degrees of impact which various forms of economic pressure are likely to have upon the adversaries.

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<sup>176</sup> The fortuity of the coexistence of a labor dispute affords these technicians no substantial defense. While they were also union men and leaders in the controversy, they took pains to separate those categories. In contrast to their claims on the picket line as to the labor controversy, their handbill of August 24 omitted all reference to it.

346 U.S. at 476. The Board's decision in *Patterson-Sargent Co.*, 115 N.L.R.B. 1627 (1956), that leaflets which suggested that paint made by strike replacements might be of lower quality than that made by strikers, does not have this justification available, and for reasons discussed *infra*, represents an unfortunate application of the *Jefferson Standard* decision.

It may be that the Court should not rigidly insist on pursuing a policy which favors the free use of economic pressure. There may be types of economic pressure which are so inconsistent with a continuing employer-employee relationship that their use should be considered legitimate grounds for discharge. The special kind of disloyalty involved in *Jefferson Standard* may be one example, although, for reasons indicated above, this is debatable.<sup>177</sup> In any case, reevaluation of this area would be most desirable. The Court has thus far failed to consider the significance of its holdings with respect to sections 8(a)(1), (3) and (5) and 8(b)(3) on the reach of section 7. It should utilize the first available opportunity to consider the impact of its recent decisions increasing the ability of employers to use economic pressure on its earlier holdings denying the protection of section 7 to types of employee pressure.

#### IV. THE IMPACT OF RECOGNITION ON THE USE OF ECONOMIC PRESSURE

##### *Economic Pressure by a Labor Organization*

When no collective agreement is in force, the use of economic pressure by an incumbent union in support of its bargaining demands is protected if the subject matter of the demand constitutes a mandatory subject of bargaining.<sup>178</sup> However, once the agreement is negotiated, the use of economic pressure is normally unprotected. Most collective bargaining agreements contain no-strike clauses in which the union agrees not to use economic pressure for any purpose during the term of the agreement. If such a pledge is not explicit, it will be implied to cover matters which are subject to grievance machinery.<sup>179</sup> Moreover, it is an unfair labor practice to strike in order to "terminate or modify" the agreement during its term.<sup>180</sup>

<sup>177</sup> An informal survey of students and colleagues indicates strong support for the *Jefferson Standard* decision. In many cases this support has remained unshaken by the arguments made herein and for this reason, a more tentative conclusion has been stated than the one originally drafted.

<sup>178</sup> By reason of the decision in *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), strikes in support of the union's position on a non-mandatory subject may violate § 8(b)(3). See notes 90-91 *supra*.

<sup>179</sup> *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *NLRB v. Dorsey Trailers, Inc.*, 179 F.2d 589 (5th Cir. 1950); *W. L. Mead Inc.*, 113 N.L.R.B. 1040 (1955).

<sup>180</sup> . . . Where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract unless the party desiring such termination or modification—

(4) continues in full force and effect, without resorting to strike or lock out, all the terms and conditions of the existing contract for a period of sixty days after . . . notice is given or until the expiration date of such contract, whichever occurs later.

The Supreme Court held in *Mastro Plastics Corp. v. NLRB*,<sup>181</sup> that a strike in response to an employer unfair labor practice should not be held to violate the no-strike clause without a "compelling expression" that the clause was meant to apply to such strikes.<sup>182</sup> The decision was unfortunate because it apparently applied to any strike in protest of any unfair labor practice. When an employer commits a minor unfair labor practice, the ability to strike is largely unnecessary. A statutory remedy is always available and there is usually a remedy available under the contract. By reading exceptions into the no-strike clause, the Court in *Mastro* unnecessarily limited the possibility of achieving industrial stability through the use of orderly procedures in settling disputes. The Board, however, has held that the *Mastro* doctrine applies only to "flagrant or serious unfair labor practices."<sup>183</sup> This is a sound approach. When a serious unfair labor practice is committed, there is less possibility of obtaining adequate relief through the Board or arbitration and, as a result, there is more justification for striking. Moreover, whether a strike is held protected or not in such cases is largely immaterial. The Board will order the discharged strikers reinstated as a means of remedying the unfair labor practice which caused the strike, whether or not the discharge of strikers is an independent unfair labor practice.<sup>184</sup>

There is some indication that, in rare situations, a union may strike in support of a bargaining demand made during the life of an agreement. The Board held in *Jacobs Manufacturing Co.*,<sup>185</sup> that the duty to bargain continues with respect to matters not referred to or discussed during negotiations and not "contained" in the contract. Accordingly, if the subject concerns wages, hours or other terms or conditions of employment, and if it is not covered by a "waiver of bargaining" clause, the union may insist that the company bargain about it; if the contract does not contain a general no-strike clause, the union may strike in support of its demands.

There are few reported cases of this type, probably because the vast majority of collective bargaining agreements prohibit all strikes during the life of the agreement. In many cases the union waives the right to bargain over matters not contained in the agreement. Matters

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Labor-Management Relations Act (Taft-Hartley Act) § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1964). See *Milk Drivers Local 783*, 147 N.L.R.B. 264 (1964); *Wollet, The Duty to Bargain Over Unwritten Terms and Conditions of Employment*, 36 TEXAS L. REV. 863, 873-76 (1958).

<sup>181</sup> 350 U.S. 270 (1956).

<sup>182</sup> *Id.* at 279-84.

<sup>183</sup> *Arlan's Department Store Inc.*, 133 N.L.R.B. 802 (1961).

<sup>184</sup> See *NLRB v. Golay*, 371 F.2d 259 (7th Cir. 1966); *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954).

<sup>185</sup> 94 N.L.R.B. 1214 (1951).

not specifically dealt with are often committed to the employer under a management prerogative clause. Thus the *Jacobs* case did not make a significant change in the general rule that strikes during the term of a collective bargaining agreement are unprotected. Moreover, *Jacobs* is of doubtful value as precedent. It was decided by a sharply divided Board—all of whose members have since been replaced.<sup>186</sup> It has been criticized by commentators as inconsistent with the understanding of the parties as to the meaning of their agreement and as contrary to the statutory policy of promoting industrial peace.<sup>187</sup> Certainly the narrow approach taken by the Board as to the scope of the collective bargaining agreement is inconsistent with the expansive reading later suggested by the Supreme Court in its arbitration trilogy and other cases stressing the significance of collective bargaining agreements in providing industrial stability.<sup>188</sup>

*Economic Pressure by Employees Acting Independently of the Union*

The use of economic pressure by employees acting independently of the union is usually held to be unprotected. During bargaining negotiations, any attempt by employees to bargain independently violates the scheme of exclusive representation set forth in section 9(a) of the act.<sup>189</sup> As the Supreme Court stated in *Medo Photo Supply Corp. v. NLRB*:<sup>190</sup>

That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours, and working conditions was recognized by this Court . . . . The statute guaran-

<sup>186</sup> There were four different opinions. Members Houston and Styles concluded that § 8(d) applied only to items specifically set forth in the contract. Chairman Herzog was willing to imply terms on the basis of the contract negotiations. Member Reynolds took the position that a contract should be held to cover all working conditions during its term. The fourth opinion by Member Murdoch never reached the § 8(d) problem.

<sup>187</sup> See Wollet, *supra* note 180, at 877. See also Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1110-16 (1950).

<sup>188</sup> See in particular *USW v. Warrior & Gulf Navigation*, 363 U.S. 574 (1960): The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship.

*Id.* at 578-79.

<sup>189</sup> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .

National Labor Relations Act § 9(a), as amended, 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964). This policy is subject to a proviso discussed at text accompanying note 201 *infra*.

<sup>190</sup> 321 U.S. 678 (1944).



tees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found.<sup>191</sup>

The *Medo* case held that an employer who bargained with individual employees violated section 8(a)(5). In order to prevent the employer from being faced with economic pressure to which he cannot lawfully yield, it follows that economic pressure in support of separate bargaining demands should be unprotected. Moreover, since the process of collective bargaining is so intimately connected with the use of economic pressure, independent employee pressure contrary to the wishes of the union—even in support of the union's bargaining position—should be treated as a form of independent bargaining and, hence, unprotected.<sup>192</sup>

Indeed it has been held that any independent economic pressure during the course of negotiations is unprotected. The leading case in this area is *NLRB v. Draper Corp.*<sup>193</sup> In that case, a group of employees quit work briefly to protest the company's delaying tactics in bargaining negotiations with the union. There was no evidence of a split between the union and the men engaging in concerted activity. The Board held this to be protected concerted activity; the court reversed.

The employees must act through the voice of the majority or the bargaining agent chosen by the majority. Minority groups must acquiesce in the action of the majority and the bargaining agent they have chosen. Just as a minority has no right to enter into separate bargaining arrangements with the employer, so it has no right to take independent action to interfere with the course of bargaining which is being carried on by the duly authorized bargaining agent chosen by the majority.<sup>194</sup>

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<sup>191</sup> *Id.* at 684.

<sup>192</sup> *Cf.* *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963); *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953).

<sup>193</sup> 145 F.2d 199 (4th Cir. 1944); *accord*, *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963); *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953). *Contra*, *NLRB v. R. C. Can Co.*, 328 F.2d 974 (5th Cir. 1964), taking the position that a walkout not sponsored by the union was protected because it supported the union's position. If a strike or other use of economic pressure is aimed at the union rather than the employer, it presents a problem similar to those where the employer should not be forced to endure pressure about a matter with respect to which he is essentially neutral. See *Harnischfeger Corp. v. NLRB*, *supra*.

<sup>194</sup> 145 F.2d at 202-03.

For authority, the court in *Draper* relied on a decision holding unprotected a strike to force an employer to bargain with a minority union.<sup>195</sup> The court assumed the answer to the most difficult question in the case—that minority activity was equivalent to a demand for minority bargaining. Once this assumption was made, the rest of the opinion followed naturally and the court's description of the dangers of minority bargaining was both pertinent and persuasive. But the policy which requires acceptance of the bargaining agent as the representative of the employees, does not automatically rule out the possibility of independent economic pressure in support of the bargaining agent. So long as the employees are not raising separate demands concerning wages and hours,<sup>196</sup> but seek only to support the union, their activity is no more than unsolicited bargaining support. Indeed, in many cases, the possibility of independent action supporting the union demands is part of the pressure which a union uses to seek compliance with a demand. Moreover, the court invoked a policy aimed at protecting the status of the incumbent union for the benefit of the employer, over the objection of the union which not only did not express disapproval of the strike, but which filed charges in behalf of the discharged employees. Thus much of the court's discussion and its analogy to a minority strike for recognition was irrelevant.

The court in *Draper* partly premised its conclusion on what it assumed to be the understanding of the parties. It stated:

When the union was selected by the employees and recognized by the company as bargaining agent, it was understood and agreed on all sides that bargaining with respect to wages, hours and conditions of work would be carried on between the union and the company in accordance with the above quoted statutory provision, that the employees would acquiesce in action taken by the union and that they would not undertake independent action with respect to the matters they had committed to it as their authorized agency. Not only did the company agree to bargain only with the union, but the employees agreed to bargain only through the union. Those who engaged in the "wild cat" strike violated this agreement.<sup>197</sup>

One may speculate as to the source of this agreement. The court's comment that it was understood and agreed on all sides that

<sup>195</sup> NLRB v. Brashear Freight Lines, 119 F.2d 379 (8th Cir. 1942).

<sup>196</sup> Compare Plasti-Line Inc. v. NLRB, 278 F.2d 482 (6th Cir. 1960).

<sup>197</sup> 145 F.2d at 204. The employees in the *Draper* case hindered their own case by labeling their strike a "wildcat." *Id.* at 201. "Wildcat" is a vague concept which is used primarily to describe strikes in breach of a no-strike clause or strikes to which the union is opposed.

the employees would act only through the union is mere conjecture. There is no evidence that the court accurately described the state of mind of the employees at the time of negotiation. The court's assumption was probably meant to be normative rather than descriptive. The feeling which permeates the opinion is that for collective bargaining to work, and for the employer's interests to be adequately protected, bargaining must be limited to the actual bargaining representative, and strikes and economic pressure should also emanate from that source. In brief, the holding in *Draper* rests on a concept of orderly collective bargaining. But, a desire for orderly bargaining is a questionable basis on which to hold economic pressure unprotected, in view of the cases rejecting inconsistency with orderly bargaining as a standard for holding activity unlawful under sections 8(a)(5) and 8(b)(3).<sup>198</sup> So long as the activity is in support of the incumbent union, it is not inconsistent with the concept of single representation set forth in section 9(a) and the Court's decision in *Medo Supply*.

The court assumed in *Draper* that collective bargaining will work better if the union or the bargaining committee is required to be the sole source of pressure. This is not necessarily true. As long as the employer knows that the union is capable of having the walkout ended, it may well be that independent activity will enhance the prospects for success of the collective bargaining negotiations. Indeed, the very fact that the employees are sufficiently stirred up to take action on their own, may suggest to both the employer and the union the desirability of quickly concluding negotiations. Both parties may negotiate more rapidly to prevent employee sentiment from reaching the point where a negotiated agreement is rejected by the membership.

However, where independent bargaining pressure is employed, the employer may not know whether or not it is opposed by the union. In order for the company to adequately evaluate its position, it should be able to require the union to either adopt or disavow the employees' action. If the union does the latter, the conduct would be unprotected; if it adopts the employee's action, the company should be able to respond as it would to union sponsored pressure. This means that the company may be able to shut down operations and subcontract the work.

A similar issue is raised when a dispute arises about a substantive issue with respect to which the union, as an institution, does not take a position, although it does not object to the employees pursuing their interests on their own.<sup>199</sup> In such circumstances, a case can be made

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<sup>198</sup> *E.g.*, *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960).

<sup>199</sup> In *NLRB v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965), two employees were discharged for picketing during non-working hours to force the

for holding the use of economic pressure protected if the union itself could strike about the disputed matter. Arguably, if the union has no objection to the action taken by the employees, their separate demand and their use of economic pressure does not violate the scheme of exclusive representation set forth in section 9(a). Section 9(a) is intended to protect the majority choice against interference by minority action. This policy favoring the incumbent union should not be turned to the advantage of the employer when the union is indifferent. Indeed, such cases should be treated as though the union has delegated to the employees directly involved—those who feel particularly strongly about the matter—the union's ability to use economic pressure in support of its demands. As noted above, the position that all economic pressure must emanate from the union is based on concepts of orderly bargaining which have been rejected by the Court in the *Insurance Agents'* and *American Shipbuilding* cases.

However, this argument should be rejected. A union is an institution in which employee sentiment can be crystallized and expressed. If the union adopts a position, the employer knows that he may legally yield to the pressure and he may assume that a majority of his employees would want to see him do so. Where concerted activity is undertaken without support of the union, the employer has no way of knowing whether the position advanced has substantial support among the employees. He probably has cause to suspect that it does not, and that granting the request would raise more problems for him than it would solve. One of the significant functions which a union performs is providing a forum in which employee sentiment may be expressed and consensus reached. Consequently, it is reasonable to require an employee who seeks to bring about a change to first direct his attention to winning the support of his fellow employees and the union.<sup>200</sup>

As noted above, an employer faced with a bargaining demand from an independent group runs the risk of committing an unfair labor practice if he grants the demand or even if he negotiates with

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employer to hire Negroes. The Board held the activity protected on the ground that the employer's hiring policy affected working conditions. The court of appeals affirmed this conclusion but remanded the case to the Board to consider whether the existence of a collective bargaining relationship including a grievance procedure made the activity non-protected. Since the Board had not considered the issue, the court's disposition was sound. This is a difficult issue, on which a careful Board opinion would be most helpful.

<sup>200</sup> This principle should not be obscured by the fact that the employees in *Tanner* were picketing on behalf of a highly desirable objective. *NLRB v. Tanner Motor Livery Ltd.*, *supra* note 199. In order to bring their efforts within § 7 they should have tried to enlist the union's support. This might have led to more fruitful negotiations between the union and the employees. If the union were unwilling, other legal steps were available under federal civil rights laws. See generally SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* (1966).

the employees. Even if the incumbent union could absolve the employer of the unfair labor practice charge by declaring itself neutral, it is uncertain what action would be sufficient to establish the union's neutral position. In order to protect the employer from being faced with economic pressure, a response to which may be an unfair labor practice, it should be held that unless there is official designation of bargaining authority by the incumbent union, the independent activity is unprotected.

It is true that the policy of exclusive representation set forth in section 9(a) is subject to an exception in a proviso to section 9(a) which states that

any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect. . . .<sup>201</sup>

However, the decision that an employee request constitutes a grievance within the meaning of the proviso should not mean that independent economic pressure in support of the grievance is protected. The language of the proviso contemplates a peaceful presentation and a voluntary adjustment of grievances. Since grievances are typically minor disputes involving only a fraction of the employees, it would be inefficient and costly to permit the major disruption potentially involved in strikes and picket lines to be used as a basis for demanding concessions over these matters. Certainly where interpretation of the collective bargaining agreement is involved, a mechanism generally exists for the peaceful settlement of the grievance, either under the grievance machinery or through a suit under section 301.<sup>202</sup>

The Supreme Court has held that an individual does not automatically have the right to utilize the grievance machinery or section 301 on his own, if the union refuses to espouse his cause.<sup>203</sup> The basis

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<sup>201</sup> National Labor Relations Act § 9(a), as amended, 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964).

<sup>202</sup> Labor-Management Relations Act (Taft-Hartley Act) § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1964). Where there is an established grievance machinery, the use of economic pressure either by a union or by individual employees with respect to a matter subject to the grievance machinery is generally held unprotected. See *NLRB v. Sunset Minerals, Inc.*, 211 F.2d 224 (9th Cir. 1954); *NLRB v. Dorsey Trailer, Inc.*, 179 F.2d 589 (5th Cir. 1950).

<sup>203</sup> *Vaca v. Sipes*, 386 U.S. 171 (1967). Compare *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

for that holding is a desire to enhance the status of the union as sole bargaining representative under the act.<sup>204</sup> The arguments in favor of so holding cut strongly in favor of having disputes between the employees and the employer resolved through the union, and in maintaining a single source of employee sentiment which the employer can rely on. It makes no sense to couple a rule premised on such policies with a rule permitting individual employees to utilize economic pressure on their own.

There are additional arguments which support the conclusion that the use of economic pressure by individual employees during the life of an agreement should not be protected when the union itself could not strike. The same reasons which would make union-called strikes unprotected apply to action by individual employees. If the union is precluded from striking by the no-strike clause, all forms of pressure should be unprotected.<sup>205</sup> The employer typically makes concessions in order to obtain the assurance of industrial peace, contained in the no-strike clause. It would be fairly easy to subvert the meaning of this assurance and to upset the employer's reasonable expectations, if the union could, by declaring itself neutral, grant to individual employees the right to use the very economic pressure which the union has foresworn. The same reasons which have led the courts to infer a no-strike pledge because of the existence of a grievance machinery, would suggest that individuals should not be able to strike over anything which could be settled through the grievance machinery.<sup>206</sup> Similarly the provisions of section 8(d)(4) express the policy that an employer should not be forced by economic pressure to make additional concessions with respect to matters covered by an agreement, during its life.<sup>207</sup> Strikes or other forms of economic pressure by individual employees seeking a change in the agreement are as destructive of the statutory purpose as strikes called by a union and, accordingly, should be held unprotected.<sup>208</sup>

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<sup>204</sup> The argument for permitting a union to obtain by agreement the ability to compromise or waive an employee grievance is stated in *Cox, Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 618-19, 625-27 (1956). This position was apparently adopted by the Supreme Court. *Vaca v. Sipes*, *supra* note 203.

<sup>205</sup> Often work stoppages by employees acting independently of the union will be specifically covered and made unprotected by the no-strike clause.

<sup>206</sup> See *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953).

<sup>207</sup> Labor-Management Relations Act (Taft-Hartley Act), § 8(d)(4), 61 Stat. 143 (1947), 29 U.S.C. § 159(d)(4) (1964).

<sup>208</sup> If the employees do not engage in a strike but use harassing tactics or if they limit their picketing to non-working hours, the applicable principles are nevertheless the same. The employer is being economically injured by his own employees contrary to the policy of § 8(d)(4) and the collective bargaining agreement.

## SUMMARY AND CONCLUSION

Although section 7 grants employees the right to utilize economic pressure for certain broadly stated purposes, the employer, acting to protect his economic interests, is often in a position to make the exercise of this right costly for the participants. The question of an employer's ability to respond to concerted activity has been confused by recent Supreme Court opinions indicating that employer response to such activity does not violate the NLRA, unless the employer is motivated by the desire to punish the employees for exercising their rights. These statements emphasizing motive are inconsistent with earlier opinions and represent an unsound approach to the enforcement of the act. It should be for the Board and the courts, rather than the employer, to determine whether his economic interests justify making economic pressure costly for those who engage in it.

It is settled, however, that an employer may permanently replace economic strikers. If strikers are told that they may not return to work before a replacement is hired, they are discharged in violation of sections 8(a)(1) and (3). The distinction between discharge and replacement works fairly well in the context of an economic strike. Its application is more confused with respect to employees who refuse to cross picket lines. The Board holds that such refusals are protected, but also holds that an employer may, without violating the act, notify the employee that he is discharged before a replacement is hired. However, the employee is entitled to his job if he offers to return to work before a replacement has been hired or before the employer has taken action to eliminate the job. The Eighth Circuit has rejected the Board's conclusion that an employee who refuses to cross a picket line may be entitled to reinstatement once he has been properly notified of his discharge.<sup>209</sup> The Board's conclusion is more consistent with the concept of protected activity than is the conclusion of the court.

Courts have sometimes held that economic pressure is not a legitimate way of achieving a purpose which comes within the concept of mutual aid or protection. This conclusion has been reached several times with respect to economic pressure to protest changes in supervision. The theory that such changes are a management prerogative about which employees should not be able to use economic pressure fails to take into account the fact that such activity almost always occurs in unorganized plants. The employee's action in such a case should not be treated as an attempt to use economic pressure in support of a bargaining demand. Such action is much more likely to constitute

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<sup>209</sup> *NLRB v. L. G. Everist, Inc.*, 334 F.2d 312 (8th Cir. 1964).

a dramatic expression of general displeasure with working conditions and, as such, it should be held protected. On the other hand, economic pressure should generally be unprotected when it is in support of a demand made by the employees against someone other than their employer. In such cases, the employees' interests can be served in other ways and there is little reason to subject the employer to economic harassment.

The Board's conclusion that refusal to cross a picket line is protected activity has not been adequately explained, but it is a reasonable one. Part of the policy of the Wagner Act was to permit employees to make common cause with employees of other employers. Although this policy has largely been overshadowed by the policy against the spread of industrial disputes, the new policy was not intended to and should not apply to refusals to cross picket lines. The Board holds that for the refusal to be protected, the picket line must be lawful. This conclusion is unfortunate because it increases the power of an employer to discharge an employee on the basis of circumstances having no real relevance to their own interests or conduct.

The Supreme Court has held certain forms of economic pressure unprotected, including intermittent work stoppages and public attacks on the employer's product. These conclusions should now be re-evaluated in light of the employer's increased ability to use economic pressure and the court's seeming rejection, in unfair labor practice cases, of the process of picking and choosing among types of economic pressure. The use of such tactics during bargaining negotiations does not represent a serious threat to industrial stability nor is it unfair to the employer, since his ability to respond has been increased. Such tactics are not likely to be used at other times because unorganized employees rarely use sophisticated forms of economic pressure and because strikes during the term of an agreement are generally unprotected.

Once a union is recognized, separate bargaining by individual employees is contrary to the scheme of exclusive representation contemplated by the act. However, in certain circumstances, independent bargaining pressure in support of the union should be held protected. Once an agreement is signed, economic pressure either by the union or by the individual employees is generally and properly held unprotected.