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THE THIRD CIRCUIT'S NEW STANDARD FOR STRIKE MISCONDUCT DISCHARGES: *NLRB v. W. C. McQuaide, Inc.*

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I. INTRODUCTION

IN *NLRB v. W. C. McQuaide, Inc.*[1] the Court of Appeals for the Third Circuit enunciated a new legal standard of great consequence in the field of labor relations law. The *McQuaide* court rejected the longstanding test of the National Labor Relations Board (Board) for determining whether an employee's strike activity constitutes sufficient grounds for his discharge,[2] and established a set of criteria which broadens an employer's right to terminate recalcitrant strikers.[3] This new standard can be expected to have a significant impact, within the Third Circuit as well as in other circuits, on the nature of picket-line conduct.

Traditionally, the Board has adhered to the principle that a striking employee cannot be legally discharged from his job for uttering threats or other abusive language during the course of a strike unless these statements are accompanied by physical acts or gestures that provide added emphasis or meaning to the verbal remarks.[4] Where a striking employee has been discharged merely because of oral threats, the Board has consistently ordered his reinstatement with backpay, regardless of the context in which the

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Mr. Cabot was counsel for respondent in NLRB v. W. C. McQuaide, Inc., 552 F.2d 519 (1977), the case which is discussed in this article.

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1. 552 F.2d 519 (3d Cir. 1977). The case was heard before Circuit Judges Gibbons and Garth and District Judge Cohen, sitting by designation. Judge Garth wrote the opinion of the court.

2. For a discussion of the Board's test, *see* notes 4-6 and accompanying text *infra*.

3. For a discussion of the Third Circuit's new standard, *see* notes 77-81 and accompanying text *infra*.

4. *See, e.g.*, W. C. McQuaide, Inc., 220 N.L.R.B. 593 (1975); Valley Oil Co., 210 N.L.R.B. 370 (1974); Federal Prescription Serv., Inc., 203 N.L.R.B. 975 (1973); Capital Rubber & Specialty Co., 201 N.L.R.B. 715 (1973); Davis Wholesale Co., 166 N.L.R.B. 999 (1967).

threats were made.[5] In rejecting the Board's test, the Third Circuit in *McQuaide* substituted an "objective" standard, which turns upon whether, under all of the circumstances surrounding the strike, the misconduct "reasonably tend[s] to coerce or intimidate" other employees.[6]

The importance of the *McQuaide* standard for strike misconduct discharges has already been demonstrated by its acceptance in another circuit. In *Associated Grocers of New England, Inc. v. NLRB,*[7] the United States Court of Appeals for the First Circuit relied upon the *McQuaide* standard and reversed a Board order to reinstate striking employees who had been discharged for strike misconduct.[8]

This article will review the factual and procedural history of *McQuaide* and assess the impact of the Third Circuit's decision. In order to fully comprehend and appreciate the importance of the new standard announced by *McQuaide,* however, the rights and responsibilities of an employer with respect to striking employees must first be understood.

II. AN EMPLOYER'S OBLIGATION TO STRIKING EMPLOYEES

Both the Board and the federal courts distinguish among various types of strikes based upon the purposes for which they are instigated and maintained.[9] Work stoppages are usually precipitated by a dispute over economic issues, by an employer's commission of an unfair labor practice, or by a desire on the part of employees and/or an organizing union to gain collective bargaining status. Each of these purposes has given rise to a different form of strike.

A strike is "economic" if employees strike for the purpose of securing higher wages and other favorable contract provisions.[10] Another form of an economic strike is a "recognitional" strike, which is usually initiated as part of a union organizational effort, and is designed to pressure the employer into recognizing the union as the employees' representative.[11] An "unfair labor practice" strike

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5. *See, e.g.,* W. C. McQuaide, Inc., 220 N.L.R.B. 593 (1975); Valley Oil Co., 210 N.L.R.B. 370 (1974); Capital Rubber & Specialty Co., 201 N.L.R.B. 715 (1973).

6. 552 F.2d at 528. *See* notes 77-81 and accompanying text *infra.*

7. 562 F.2d 1333 (1st Cir. 1977).

8. *Id.* at 1336. For a discussion of *Associated Grocers, see* notes 90-95 and accompanying text *infra.*

9. *See* R. GORMAN, BASIC TEXT ON LABOR LAW 339 (1976).

10. NLRB v. Thayer Co., 213 F.2d 748, 750 (1st Cir.), *cert. denied,* 348 U.S. 883 (1954). *See* R. GORMAN, *supra* note 9, at 339.

11. R. GORMAN, *supra* note 9, at 339. *See* 552 F.2d at 528.

occurs where the employees' work stoppage is motivated, at least in part, by the employer's commission of an unfair labor practice.[12]

Since the nature of a strike dictates an employer's obligation to striking workers who wish to return to their jobs, the distinction between these various types of strikes is important. Employees participating in an unfair labor practice strike cannot be permanently replaced because an employer is obligated to reinstate all unfair labor practice strikers who unconditionally apply for reinstatement.[13] Moreover, any replacements hired during an unfair labor practice strike must be discharged at the end of the work stoppage, if necessary, to make room for returning strikers.[14] In contrast, an employer may permanently replace employees who are involved in an economic strike.[15] Economic strikers who unconditionally apply for reinstatement are entitled to return to work only if and when a vacancy occurs, but they must be placed on a preferential hiring list until they secure other employment that is regular and substantially equivalent.[16]

For the purposes of *McQuaide,* the most essential principle is that in any type of strike — economic, unfair labor practice or recognitional — an employer may not be obligated to reinstate striking employees who engage in activity that amounts to "strike misconduct."[17] Therefore, an employer's duty to reinstate employees

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12. R. GORMAN, *supra* note 9, at 339.

13. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956).

14. *Id.* at 277-78. *See* R. GORMAN, *supra* note 9, at 341.

15. NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938). *See* R. GORMAN, *supra* note 9, at 431-32.

16. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381 (1967). *See* Laidlaw Corp. v. NLRB, 414 F.2d 99, 103 (9th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970); R. GORMAN, *supra* note 9, at 343-49.

17. *See* NLRB v. Cambria Clay Prod. Co., 215 F.2d 48, 54 (6th Cir. 1954); NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874, 888 (1st Cir. 1941); NLRB v. Elkland Leather Co., 114 F.2d 221, 225 (3d Cir. 1940); Republic Steel Corp. v. NLRB, 107 F.2d 472, 479 (3d Cir. 1939); NLRB v. Stackpole Carbon Co., 105 F.2d 167, 176 (3d Cir. 1939). The rationale for not compelling an employer to reinstate employees who participate in "strike misconduct" was explained by the Supreme Court in NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939). The Court noted: "To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundation of society." *Id.* at 253. *See* NLRB v. Drivers Local 639, 362 U.S. 274, 281 (1960).

It should be noted that an employer's right to refuse reinstatement to a striker who engages in strike misconduct may not be automatic. If the misconduct occurs during an unfair labor practice strike, the Board must balance the striker's misconduct with the employer's initial unfair labor practice before deciding whether the striker can be discharged. *See* R. GORMAN, *supra* note 9, at 349-50. Likewise, an employer may be required to reinstate an economic striker who engaged in strike misconduct under the doctrine of condonation. *See id.* at 350-53. According to this doctrine, if an employer demonstrates its willingness to condone the misconduct of striking employees, they are entitled to reinstatement. *Id.* at 350-51. However,

frequently depends upon whether the strikers engaged in strike misconduct. In an effort to clarify the employer's obligation with respect to striking employees who wish to return to their jobs, the Third Circuit in *McQuaide* addressed the issue of what type of conduct is sufficiently egregious to constitute "strike misconduct."[18]

III. THE BACKGROUND OF *McQuaide*: THE STRIKE AND ITS AFTERMATH

The circumstances which led the Third Circuit to examine the issue of strike misconduct serve to explain the new standard articulated by the court. W. C. McQuaide, Inc. (Company) operated a trucking business in Johnstown, Pennsylvania and employed nearly 300 workers.[19] Early in 1974, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 110 (Union) initiated an organizational campaign among the Company's employees.[20] Claiming that it represented a majority of the employees, the Union demanded recognition on April 1, 1974.[21] Upon the Company's refusal to grant recognition,[22] between 120–150 employees went on strike and began picketing.[23] According to the findings of the Board, the purpose of the strike was to obtain recognition for the Union or a representational election, and to improve wages and working conditions.[24]

During the course of the strike, the operation of the Company's trucking business was seriously impaired.[25] Due to the labor

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"condonation may not be lightly presumed from mere silence or equivocal statements, but must clearly appear from some positive act by an employer indicating forgiveness and an intention of treating guilty employees as if their misconduct had not occurred." NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409, 414 (5th Cir. 1955).

18. 552 F.2d at 527. For a discussion of the Third Circuit's holding, *see* notes 58–89 and accompanying text *infra*.

19. 552 F.2d at 523.

20. *Id.*

21. *Id.*

22. *Id.* After its request for recognition had been denied, the Union filed a representation petition with the Board in order to secure an election. *Id.*

23. *Id.* Most of the picketing occurred at the Company's trucking terminal in Johnstown, Pennsylvania, but the Union also maintained roving pickets at the Company's delivery points. *Id.* Specifically, the Board found that the strikers "began to picket the entrances to the terminal . . . and at other locations. The Union also employed roving pickets whose object it was to picket McQuaide trucks at various delivery points." W. C. McQuaide, Inc., 220 N.L.R.B. 593, 596 (1975).

24. W. C. McQuaide, Inc., 220 N.L.R.B. 593, 596 (1975). Although the Board made no specific determination as to the type of strike the employees had participated in, the Third Circuit concluded that the work stoppage was "an economic strike to secure union recognition." 552 F.2d at 528. *See* text accompanying notes 10–11 *supra*.

25. 552 F.2d at 523.

shortage caused by the strike, the Company hired additional workers and transferred other employees to the jobs held by the strikers in an effort to continue business on a limited basis.[26] The strike was also marked by a substantial degree of violence. In addition to frequent physical confrontations and verbal assaults between striking and nonstriking employees,[27] the Company's property sustained substantial damage.[28] Although the violence could not be directly traced to the Union,[29] these events provide an important backdrop for viewing the parties' conduct throughout the strike.

On April 24, 1974, the Company obtained a temporary restraining order in the Court of Common Pleas of Cambria County, Pennsylvania, directed against the Union, certain named union officers and twenty-six named strikers.[30] Shortly thereafter the Company petitioned the Court of Common Pleas to hold seven of the striking employees in contempt of the temporary restraining order.[31] On May 7, 1974, the court found these seven individuals in violation of the injunction, held them in contempt and levied fines against each, ranging from $50 to $100.[32]

The seven employees who had been held in contempt were advised by the Company on May 19, 1974 that they were discharged.[33] The Company based the terminations on the strikers' unlawful conduct, which was proved in part by the contempt citations issued by the Court of Common Pleas.[34] The validity of three of these discharges became the central issue in *McQuaide*.[35] Harry Lavely was discharged for directing threats of physical injury

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26. 220 N.L.R.B. at 596, 597-98.
27. *Id.* at 603-06.
28. 552 F.2d at 523. Describing the damage to the Company's property, the Third Circuit stated: "Truck windshields were smashed, air hoses were cut and a warehouse, airplane and hangar was burned . . . ." *Id.*
29. *Id.*
30. *See* 220 N.L.R.B. at 596-97. The Board described the terms of the temporary restraining order as follows:

> This order forbade unlawfully inducing or unlawfully causing any individual to engage in picketing in the course of the labor dispute in progress; forbade mass picketing at specified locations; forbade causing injury to the person of any individual or to McQuaide's property in connection with the labor dispute; and forbade the threatening of individuals with personal injury or threatening injury to McQuaide's property, or the blocking of the ingress or egress of McQuaide's place of business.

Id. at 597.
31. *See id.*
32. *See id.*
33. *Id.* at 598.
34. *Id.*
35. *See* 552 F.2d at 526-28. For a discussion of the Third Circuit's resolution of this issue, *see* notes 58-89 and accompanying text *infra*.

at three of the Company's nonstriking employees.[36] The misconduct which resulted in John Geisel's termination consisted of a series of hostile acts and verbal threats.[37] Similarly, Frank Petrosky was discharged for verbally threatening two nonstriking employees while they were making deliveries for the Company.[38]

In October 1974, after the conclusion of the strike,[39] the Union filed unfair labor practice charges against the Company.[40] The Union alleged, *inter alia*,[41] that the Company violated sections 8(a) (1)

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36. 220 N.L.R.B. at 605-06. Specifically, Lavely was accused of following a nonstriking employee, attempting to stop his vehicle and then accosting the worker at a delivery site, where Lavely shook his fist and stated that the strikers would "get him." *Id.* at 605. Lavely also shook his fist at another Company employee and called him a "f... ing scab," warning that the strikers would "knock the goddamn s... out of [him] . . . ." if he continued to drive. 552 F.2d at 526. Finally, Lavely threatened a third employee with "[s]cab, you're going to get yours," and then temporarily positioned his truck in a manner which prevented the employee from leaving a delivery site. 220 N.L.R.B. at 605-06.

37. 220 N.L.R.B. at 604, 605. Geisel was accused of suddenly swerving his truck in front of an oncoming Company vehicle. *Id.* at 604. On this occasion, a collision was barely avoided when Geisel maneuvered his truck away from the Company vehicle at the last moment. *Id.* It was also alleged that Geisel twice verbally threatened a nonstriking employee. 552 F.2d at 526. During one of these encounters, which occurred a few days after the windshield of a Company truck operated by the employee had been shattered by a rock, Geisel asked if he had been injured. *Id.* When the nonstriking employee replied that he had not been harmed, Geisel retorted, "Maybe next time you won't be so lucky." *Id.* In another instance, it was reported that Geisel stood in the background shouting "scab" and similar epithets, while two other strikers hammered on the windshield of a Company truck. *Id.*

38. 555 F.2d at 526. Petrosky called one of the employees a "goddamned rotten scab," and asked him, "What the hell are you doing in this goddamned truck, I thought you were coming with us." *Id.*

39. In addition to discharging the seven individuals for strike misconduct, the Company took other action during the course of the strike. The Company's major actions included: 1) permanently replacing 19 striking dockworkers; 2) making repeated offers of reinstatement to the strikers, which included the Company's requirements for reinstatement; and 3) interviewing all employees who indicated a desire to return to work before reinstating them. *Id.* at 523-24. *See* 220 N.L.R.B. at 598-600. As a result of these efforts only 25 out of the 120-150 striking employees were reinstated to their jobs. 552 F.2d at 524.

40. *See* 552 F.2d at 524-25.

41. The Union also charged that the Company violated § 8(a) (1) and (3) of the National Labor Relations Act (Act), 29 U.S.C. § 158(a) (1), (3) (1970), by failing to reinstate 19 dockworkers and other striking employees. 552 F.2d at 525. *See* note 39 *supra*. In addition, the Union alleged that the Company violated § 8(a) (1) of the Act by coercively interrogating employees who applied for reinstatement. 552 F.2d at 525. *See* note 39 *supra*. For the text of the pertinent sections of the Act, *see* note 42 *infra*.

The Board found the Company guilty of these charges, and, as a remedy, ordered the Company to reinstate the 19 dockworkers and other striking employees with backpay. 220 N.L.R.B. at 613. On appeal, the Third Circuit remanded the issue of the 19 replaced dockworkers to the Board for further factual findings in support of the order of reinstatement. 552 F.2d at 532. As to the other striking employees, the Third Circuit directed the Board to modify the order requiring reinstatement so that it applied only to the strikers who had complied with the Company's requirements for returning to work. *Id.* at 531. *See* note 39 *supra*.

and (3) of the National Labor Relations Act (Act)[42] by discharging the seven strikers.[43] As a result of these charges, a hearing was held before an Administrative Law Judge (Judge) of the Board.[44] Subsequent thereto, the Judge issued a recommended decision which largely sustained the Union's charges.[45] Specifically, the Judge determined that six out of the seven discharges, including the discharges of Lavely, Petrosky and Geisel,[46] were motivated by the employees' union activities, rather than strike misconduct, and were therefore unlawful.[47] As to these six employees, the Judge recommended that they be reinstated to their jobs with backpay.[48] The discharge of the seventh striker was deemed justified, based upon a finding that he had perpetrated serious strike misconduct.[49]

The Board reviewed the Judge's recommended decision and concluded that the Judge erred in finding that six of the terminated employees had been unlawfully discharged.[50] With respect to three of these individuals — Geisel, Lavely and Petrosky — the Board agreed with the Judge that their firings were invalid.[51] As to the three other strikers, however, the Board found sufficient evidence of violent conduct to justify their terminations.[52]

The Board's determination that Geisel, Lavely and Petrosky were unlawfully discharged was based upon a longstanding policy concerning strike misconduct discharges.[53] In ruling that these three employees did not engage in strike misconduct which would deprive them of the Act's protection, the Board stated:

> Although there are indications of instances in which they verbally abused or threatened replacements, this language was

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42. 29 U.S.C. § 158(a), (1), (3) (1970). Sections 8(a) (1) and (3) of the Act provide in pertinent part:

> It shall be an unfair labor practice for an employer—
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> (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 . . . .

Id.

43. *See* 552 F.2d at 524-25.
44. *See* 220 N.L.R.B. at 595.
45. *See id.* at 595-614.
46. *See* notes 31-38 and accompanying text *supra.*
47. *See* 220 N.L.R.B. at 593.
48. *See id.* at 613.
49. *See id.* at 606. This employee's failure to appear at the hearing contributed in part to the Judge's ruling that he had been properly terminated. *Id.* at 593.
50. *Id.* at 594.
51. *Id. See* notes 36-38 and accompanying text *supra.*
52. 220 N.L.R.B. at 594.
53. For a discussion of this policy, *see* text accompanying notes 4-6 *supra.*

> not accompanied by any physical acts or gestures that would provide added emphasis or meaning to their words sufficient to warrant finding that they should not be reinstated to their jobs at the strike's conclusion.[54]

Consequently, the Board ordered the Company to reinstate Geisel, Lavely and Petrosky with backpay.[55]

The Company refused to comply with the Board's order, contending that the findings were not based upon substantial evidence on the record as a whole.[56] Therefore, the Board petitioned the Third Circuit for an enforcement order.[57]

IV. THE THIRD CIRCUIT'S RESOLUTION OF THE STRIKE MISCONDUCT ISSUE

The paramount issue considered by the Third Circuit in *McQuaide* concerned the discharges of Geisel, Lavely and Petrosky for strike misconduct.[58] It was in the resolution of this issue that the Third Circuit articulated a new legal standard to test the validity of discharges based upon strike misconduct.

The court began its discussion by rejecting the standard used by the Board to review strike misconduct discharges — verbal threats accompanied by physical acts or gestures[59] — as simply erroneous.[60] In explaining the difficulties with the Board's standard, the court stated:

> We recognize that some confrontations between strikers and non-strikers are inevitable and that not every impropriety is grounds for discharge. Moreover, we recognize that it is the primary responsibility of the Board and not of the courts "to strike the proper balance between the asserted business justifications and the invasion of employer rights. . . ." Yet, we do not believe that an employer must countenance conduct that amounts to intimidation and threats of bodily harm. Threats are not protected under the Act, and we fail to see how a threat acquires protected status simply because it is unaccompanied by

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54. 220 N.L.R.B. at 594.
55. *Id.*
56. 552 F.2d at 526.
57. *Id.* at 522-23.
58. *Id.* at 526-28. For a discussion of the Third Circuit's disposition of the other issues in *McQuaide*, *see* note 41 *supra*.
59. *See* text accompanying notes 4-6 *supra*.
60. 552 F.2d at 527.

> physical acts or gestures. The question is whether a threat is sufficiently egregious not whether there is added emphasis.[61]

Having rejected the Board's standard, the Third Circuit considered several approaches used by other circuits for evaluating strike misconduct discharges.[62] The court first examined *NLRB v. Efco Manufacturing, Inc.*,[63] where the First Circuit ruled that a striker's threat to punch a plant manager did not constitute adequate grounds for his discharge.[64] The basis of the First Circuit's holding was the manager's lack of any real fear of physical harm.[65] The Third Circuit also discussed *NLRB v. Trumbull Asphalt Co.*[66] In *Trumbull*, the Eighth Circuit used the same "victim's fear" standard to hold that threats that placed a nonstriker in such fear of bodily harm that he did not work for five weeks were sufficiently egregious to warrant discharge of the perpetrator.[67] The Third Circuit concluded that this "victim's fear" standard was not satisfactory because "it focuses on the effect on the non-striker rather than on the conduct of the striker."[68]

The court then considered an approach that evaluates the discharged striker's subjective intent.[69] It noted that in *NLRB v. Pepsi Cola Co.*,[70] the Fourth Circuit denied reinstatement to a striker who was discharged for warning a prospective strike replacement, "I know where you live and if you go in there to work, I'll come looking for you."[71] The Fourth Circuit concluded that this remark constituted a veiled threat which crossed the line from mere persuasion to actual threats and intimidation.[72] The Third Circuit then noted that the Sixth Circuit, applying the same "striker's intent" standard, reached a result contrary to *Pepsi Cola*.[73] In *NLRB v. Hartman Luggage*

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61. *Id.* (footnotes omitted), *quoting* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967).
62. 552 F.2d at 527.
63. 227 F.2d 675 (1st Cir. 1955), *cert. denied*, 350 U.S. 1007 (1956). *See* 552 F.2d at 527.
64. 227 F.2d at 676.
65. *Id.*
66. 327 F.2d 841 (8th Cir. 1964). *See* 552 F.2d at 527.
67. 327 F.2d at 846.
68. 552 F.2d at 527.
69. *Id.*
70. 496 F.2d 226 (4th Cir. 1974). *See* 552 F.2d at 527.
71. 496 F.2d at 228-29.
72. *Id.* at 229. The "striker's intent" standard adopted by the Fourth Circuit implicitly recognizes that some confrontations between striking and nonstriking employees is inevitable. *See id.* at 228. However, when the striker's conduct shifts from mere argumentative and persuasive support of his position to intentional threats and intimidations, the striker commits strike misconduct which disqualifies him from a right to reinstatement. *Id.*
73. 552 F.2d at 527.

Co.,[74] the Sixth Circuit enforced a Board order of reinstatement, ruling that a striker's remark to a supervisor that it would be a shame for strikers to kill him amounted to mere picket-line rhetoric rather than an actual threat.[75] After examining both of these decisions, the Third Circuit also rejected the "striker's intent" standard.[76]

Instead of adopting either of these two approaches, the Third Circuit decided to invoke a test it had previously enunciated for violations of section 8(b)(1)(A) of the Act.[77] In *Local 542, International Union of Operating Engineers v. NLRB*,[78] the Third Circuit set forth its section 8(b) (A) standard, stating:

> That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.[79]

The *McQuaide* court concluded that this test was "equally applicable" to the "analogous" situation of strike misconduct.[80] The court described the standard adopted in *McQuaide* as "an objective standard to determine whether conduct constitutes a threat sufficiently egregious to justify an employer's refusal to reinstate."[81]

Applying this standard to the three discharges declared unlawful by the Board,[82] the Third Circuit concluded that the Board properly ordered the reinstatement of Geisel and Petrosky.[83]

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74. 453 F.2d 178 (6th Cir. 1971).
75. *Id.* at 184-85.
76. 552 F.2d at 527.
77. 29 U.S.C. § 158(b) (1) (A) (1970). Section 8(b) (1) (A) makes it an unfair labor practice for a union to restrain or coerce the exercise of the right of employees to organize and bargain collectively. *Id.*
78. 328 F.2d 850 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964).
79. 328 F.2d at 852-53.
80. 552 F.2d at 528.
81. *Id.* at 527.
82. For a discussion of the Board's holding, *see* text accompanying notes 53-55 *supra*.
83. 552 F.2d at 528. With respect to Petrosky, the court found that he merely used abusive language which did not deprive him of the Act's protection. *Id. See* note 38 and accompanying text *supra*. The finding is consistent with other decisions on strike misconduct discharges. *See, e.g.*, Linn v. United Plant Guard Workers, 383 U.S. 53, 60-61 (1966) (absent a deliberate intention to falsify, epithets such as "scab," "unfair" and "liar" do not remove strikers from the Act's protection); NLRB v. Cement Transport, Inc., 490 F.2d 1024, 1030 n.7 (6th Cir.), *cert. denied*, 419 U.S. 828 (1974) (employee's reference to company president as a "son-of-a-b . . ." was not egregious or out of context in a labor struggle); Crown Central Petroleum Corp. v. NLRB, 430 F.2d

However, using the same test to evaluate Lavely's strike activities,[84] the court held that "substantial evidence on the record indicates . . . that Lavely's conduct constituted threats which could reasonably tend to coerce or intimidate."[85] Therefore, the court ruled that the Board erred in ordering his reinstatement.[86]

The Third Circuit noted that Lavely physically followed one employee to a delivery point and threatened to "get him," shook his fist at and verbally threatened to harm another employee, and threatened and blocked the egress of a third employee.[87] The court concluded that "[i]n the context of the strike, which was marked by incidents of vandalism and harassment, and under the circumstances in which the statements were made, Lavely's conduct was not merely spontaneous picket-line activity."[88] Consequently, the Board's request for enforcement of the order to reinstate Lavely was denied.[89]

V. CONCLUSION: THE PROGENY OF *McQuaide*

The significance of *McQuaide* has already become quite evident. In September 1977, the First Circuit, in *Associated Grocers of New England, Inc. v. NLRB*,[90] rejected the Board's strike misconduct standard and replaced it with the test enunciated in *McQuaide*.[91] The Board in *Associated Grocers* ordered reinstatement of an employee who was discharged for verbally threatening the lives of

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724, 730-31 (5th Cir. 1970) (statement that plant manager operated the plant in a totalitarian manner similar to Castro was not egregious).

Turning to Geisel, the Third Circuit ruled that his statement to a nonstriking employee that he might not be so lucky the next time was "too ambiguous to reasonably tend to coerce or intimidate." 552 F.2d at 528. *See* note 37 and accompanying text *supra*.

84. *See* note 36 and accompanying text *supra*.

85. 552 F.2d at 528.

86. *Id. See* text accompanying notes 53-55 *supra*.

87. 552 F.2d at 528. *See* note 36 *supra*.

88. 552 F.2d at 528.

89. *Id.*

90. 562 F.2d 1333 (1st Cir. 1977). *Associated Grocers* arose from the circumstances surrounding an economic strike by 189 employees. *Id.* at 1335. The strike, which continued for three months, was marked by sporadic violence throughout its duration. *Id.* After the strike ended, the employer discharged four employees and suspended five others for alleged strike misconduct which included verbal threats and acts of intimidation. *Id.* Unfair labor practice charges were filed against the employer, and the Board eventually ordered reinstatement with backpay for all nine employees. *Id.* The Board's decision was based upon findings that three of these individuals had made no threats at all and that each of the other employees had merely uttered threats which were not accompanied by any physical acts or gestures. *See id.* at 1335-36. The First Circuit disagreed with the Board as to the validity of two of the nine discharges in light of the *McQuaide* test. *Id.* at 1336. *See* text accompanying notes 92-95 *infra*.

91. 562 F.2d at 1336.

three job applicants during the strike.[92] Noting that these threats were made approximately twenty-five feet from a picket line comprising forty to fifty strikers, the First Circuit refuted the Board's reliance upon the absence of any accompanying physical acts or gestures and ruled that the discharge was valid.[93] Citing *McQuaide*, the court concluded that this conduct, "which was clearly such as would reasonably tend to coerce or intimidate," was not protected by the Act.[94] The First Circuit also remanded for further factual findings in light of the *McQuaide* standard a Board order to reinstate another employee who had been discharged for making verbal threats.[95]

By not requiring the presence of physical acts or gestures to find strike misconduct sufficient to support the discharge of a striking employee, the Third Circuit in *McQuaide* took a major step in the direction of reducing picket-line violence and strengthening the employer's hand in dealing with recalcitrant strikers. In the future, employers within the Third Circuit and other circuits that adopt the *McQuaide* strike misconduct standard will have far broader authority to discharge and otherwise discipline strikers who resort to verbal threats and intimidation.

In addition, *McQuaide* provides administrative law judges, as well as the Board and the reviewing courts, with a simpler and more objective method for adjudging picket-line misconduct. Rather than attempting to assess the striker's intent to harm or the victim's fears,[96] administrative law judges and reviewing tribunals need only apply the *McQuaide* "reasonableness" standard to the circumstances of the particular case. In the words of the Third Circuit, where "'the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act,'"[97] discharge or other disciplinary measures are appropriate.

It is hoped that decisions such as *McQuaide* and its progeny will help to eliminate the volatile atmosphere that frequently pervades labor disputes. If this is indeed a result of *McQuaide,* the field of labor relations in the United States will have been well-served.

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92. *See id.* at 1337.
93. *Id.* at 1336.
94. *Id.* at 1337.
95. *Id.* at 1336.
96. *See* text accompanying notes 63-76 *supra.*
97. 552 F.2d at 528, *quoting* Local 542, Int'l Union of Operating Eng. v. NLRB, 328 F.2d 850, 852-53 (3d Cir. 1964).