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Walkaround Rights for Miners' Representative under MSHA: A Compatible Statutory Scheme

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WALKAROUND RIGHTS FOR MINERS' REPRESENTATIVE UNDER MSHA: A COMPATIBLE STATUTORY SCHEME

ROBERT H. STROPP, JR.*

I.	INTRODUCTION	796
II.	MINERS' RIGHTS UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977	799
III.	THE NLRA MUST BE INTERPRETED TO ACCOMMODATE RIGHTS GRANTED TO MINERS UNDER THE MINE ACT . . .	801
IV.	THE DESIGNATION OF A WALKAROUND MINERS' REPRESENTATIVE UNDER THE MINE ACT DOES NOT CONFLICT WITH THE PRINCIPLES OF EXCLUSIVITY OF REPRESENTATION UNDER THE NATIONAL LABOR RELATIONS ACT	802
V.	DESIGNATION OF A MINERS' REPRESENTATIVE UNDER THE MINE ACT IS CONSISTENT WITH THE NLRA'S SECTION 7 PROTECTION OF CONCERTED ACTIVITY	807
VI.	THE NLRA DOES NOT PROHIBIT A NON-EMPLOYEE MINERS' REPRESENTATIVE FROM ACCESS TO A COAL OPERATORS' PROPERTY FOR THE LIMITED PURPOSES PROVIDED FOR UNDER THE MINE ACT	813
VII.	CONCLUSION	816

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I. INTRODUCTION

In an article in last Spring's coal issue,¹ industry lawyers Rosemary Collyer and Michael Klise argued that the Mine Safety and Health Administration's (MSHA) "laissez faire" approach to the designation of a miners' representative under the Federal Mine Safety and Health Amendments Act of 1977 (Mine Act)² conflicted with the National Labor Relations Act's (NLRA)³ scheme of exclusive majority based representation, and that such conflict must be resolved so that the Mine Act conforms to the "NLRA's framework of exclusive representation."⁴ They argue that unless MSHA revises its approach to employee designation of a walkaround miners' representative, mine operators will be put in the untenable position of having to comply with one statute at the peril of violating another.⁵ The argument presumes that the NLRA is the transcendent federal labor statute to which all other federal labor statutes must bow.

Under MSHA's regulations, any two employees can designate someone to carry out the various functions accorded to the representative of miners under the Federal Mine Safety and Health Act.⁶ Ms. Collyer and Mr. Klise contend that this approach undermines the NLRA, which provides that a majority of employees can select a representative who has the right to act as the exclusive agent for collective bargaining purposes, and prohibits an employer from dominating or interfering with the formation or administration of a labor organiza-

1. Rosemary Collyer & Michael Klise, *Rights of Mine Access for Miners' Representatives: Has a Walk Around the Mine Become a Run Around the Law?*, 95 W. VA. L. REV. 617 (1993).

2. Pub. L. No. 95-164, 91 Stat. 1290 (1977) (codified as amended at 30 U.S.C. §§ 801-962 (1988)).

3. 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1988)) (also known as the Wagner Act) was amended by the Labor-Management Relations Act, 61 Stat. 136 (1947) (also known as Taft-Hartley), by the Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959) (also known as the Landrum-Griffin Act), and by other minor enactments. References in this article are to the statutory sections of the NLRA, as amended.

4. Collyer & Klise, *supra* note 1, at 661.

5. *Id.*

6. 30 C.F.R. § 40.1(a)(1) (1993).

tion.⁷ Essentially, they assert that in a non-union setting, employees should be restricted to concerted activities to protect their workplace safety interests through the designation of a fellow employee, and none other, as their representative under the Mine Act.

The authors are particularly indignant that under MSHA's rules, an employer can be required to provide access to its property to a non-employee union official, who accompanies the federal inspector as the miners' representative.⁸ It is this attempted use of non-employee union representatives at non-unionized mines which, they contend, "squarely presents the conflict between the NLRA's principles of employee free choice, exclusive representation, and majority rule, and MSHA's inclusive definition of, and procedures for designating, a representative of miners under the Mine Act."⁹ They express concern that this approach jettisons an imagined employer's private property rights under the NLRA and exposes the company to charges of dealing with a minority union.

Although Ms. Collyer and Mr. Klise claim to be examining the interplay of the NLRA and the Mine Act, their discussion selectively focuses on Section 9 of the NLRA, which grants exclusive bargaining status to a representative selected by the majority of employees,¹⁰ and Section 8(a)(2), which makes it unlawful for an employer to dominate or interfere with the formation or administration of a labor organiza-

7. Collyer & Klise, *supra* note 1, at 622.

8. *Id.* at 634-36.

9. *Id.* at 654.

10. Section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1988), provides: 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 in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Id.

tion.¹¹ In pursuit of this narrow approach, little attention is given to the sweeping language of Section 7, which grants employees the right to engage in concerted activity for their mutual aid and protection. Furthermore, such activity may be exercised with or without a majority selected representative, particularly in a non-union setting.¹²

As discussed more fully below, the NLRA is not the sole federal labor statute to which all other federal or state laws must give way. Rather, it is but one legislative pronouncement, *albeit* a seminal one for collective bargaining purposes, in which Congress has guaranteed certain protections for working men and women. Accordingly, to the extent that the NLRA is to be viewed in light of the more recently enacted Mine Safety and Health Act, it must be done in a manner which accommodates Congressional guarantees of, and concern for, the rights of miners to most effectively protect their life and limb in the nation's mines.

Finally, assuming *arguendo*, that the walkaround rights of miners and miners' representatives must somehow exist in complete harmony with the exclusive bargaining principles of the NLRA, a reasoned study of both statutes reveals that they are, in fact, in harmony, as presently viewed by their respective federal agencies and the courts. Accordingly, calls for revision of MSHA's regulations are hollow and must fail.

11. Section 8(a)(2), 29 U.S.C. § 158(a)(2) (1988), provides that it shall be an unfair labor practice for an employer

[T]o dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

Id.

12. Section 7 of the NLRA, 29 U.S.C. § 157 (1988), provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3).

Id.

II. MINERS' RIGHTS UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977

Congress recognized the important role of miners in drafting the 1977 Mine Act. In the findings and purpose section of that law, Congress declared that "the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated."¹³ It further states that "the operators of such mines *with the assistance of the miners* have the primary responsibility to prevent the existence of such conditions and practices in such mines."¹⁴

Because the drafters viewed the miners as an important part of the effort to address the health and safety problems in our nation's mines, the statute affords certain rights to "the representative of miners." Thus, Congress determined that the representative of miners must have the right to obtain "an immediate inspection" when he or she believes that there is a violation or imminent danger.¹⁵ The statute provides that when a federal inspector examines the mine, a miners' representative has the right to go along.¹⁶ If the operator chooses to contest any citations, orders, or penalties which result from the inspection, it must notify the representative of miners.¹⁷

Miners or their representative can notify the Secretary of an intention to contest the issuance, modification, or termination of any withdrawal order or the reasonableness of the length of time set for abatement by a citation,¹⁸ and must be provided an opportunity to participate in hearings concerning challenges to MSHA's enforcement actions.¹⁹ Miners and their representatives can obtain copies of the

13. 30 U.S.C. § 801(d) (1988).

14. 30 U.S.C. § 801(e) (1988) (emphasis added).

15. 30 U.S.C. § 813(g)(1) (1988).

16. 30 U.S.C. § 813(f) (1988).

17. 30 U.S.C. § 815(a) (1988); *see also* 30 U.S.C. § 819(b) (1988).

18. 30 U.S.C. § 815(d) (1988).

19. *Id.*

operators' roof control plan.²⁰ To further encourage participation by miners and their representatives in the enforcement of the Act, the statute prohibits discharge or any manner of discrimination or interference with the statutory rights of any miner, representative of miners, or applicant for employment.²¹

Although the statute regularly refers to a representative of miners, it does not specify who the representative will be or how such representative will be selected. The statute does, however, contemplate that the representative may be drawn either from the employees' ranks or from *outside* their ranks, by expressly providing for pay for an employee representative. The Mine Act states that when the representative "is also an employee of the operator [he] shall suffer no loss of pay during the period of his participation in the inspection made under this subsection."²²

MSHA has further promulgated rules that allow two or more employees to designate a miners' representative. These rules also provide that the representative can be either an individual or an organization.²³ Miners can designate different representatives for different purposes.²⁴

20. 30 U.S.C. § 862(a) (1988).

21. 30 U.S.C. § 815(c)(1) (1988).

22. 30 U.S.C. § 813(f) (1988). The Tenth Circuit, affirming the Mine Safety and Health Review Commission, has found this language "dispositive" of Congressional intent to include non-employees among potential miners' representatives. *Utah Power & Light Co. v. Secretary of Labor & UMWA*, 897 F.2d 447, 450 (10th Cir. 1990), *aff'g* *Emery Mining Corp.*, 10 F.M.S.H.R.C. 276 (1988). The Court noted that "[b]y creating a subclass of representatives who are entitled to compensation while exercising walkaround rights under section 103(f), Congress clearly recognized that some miners' representatives may be employees of the operator and some may not." *Id.* It rejected the employer's argument that miners' understanding and awareness of health and safety matters would not be furthered by allowing non-employees to act as miners' representatives. The court responded that, quite to the contrary, a UMWA non-employee walkaround representative "may have greater expertise in health and safety matters than an employee representative," in light of the superior experience and training she or he received through the Union. *Id.* at 451.

23. 30 C.F.R. § 40.1(a)(1) (1993).

24. 30 C.F.R. § 40.2(b) (1993).

III. THE NLRA MUST BE INTERPRETED TO ACCOMMODATE RIGHTS GRANTED TO MINERS UNDER THE MINE ACT

It is the duty of the NLRB to construe the National Labor Relations Act so as to accommodate the purposes of other federal laws. Over fifty years ago, in *Southern Steamship Co. v. NLRB*,²⁵ the Supreme Court instructed the NLRB to construe the NLRA in a manner which duly considered other federal statutes, in that case, maritime laws concerning mutinous criminal conduct. It cautioned that,

[t]he (National Labor Relations) Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.²⁶

That principle and perspective has since been reaffirmed, and continues in full force and effect today.²⁷

As these cases indicate, the rights of miners to select a walkaround representative are not necessarily subservient to the National Labor Relations Act's provisions addressing the exclusivity of a collective bargaining agent chosen by unit employees pursuant to Section 9(a). Rather, the rights of miners to safety representation were dictated by Congress with full knowledge of the protections and restrictions of the NLRA. To the extent that an accommodation would need to be made, the NLRA should yield to the equally important objectives and provisions of the Mine Act, which addresses immediate, substantial dangers to miners, and provides protections through

25. 316 U.S. 31 (1942).

26. *Id.* at 47.

27. *See Meyers Indus. II*, 123 L.R.R.M. 1137, 1143 (1986) (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-94 (1984) (explaining that the NLRA's definition of "employee" is to be construed in a manner compatible with the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525 (1988))).

employees' selection of either an employee or non-employee representative to assist MSHA in its mine inspections.

Given the long history and impact of the National Labor Relations Act on American industry, it can hardly be thought that Congress simply overlooked the matter of collective bargaining representation in passing the Mine Act. To the contrary, one can safely assume that in light of the limited role played by a walkaround representative, the distinction between a collective bargaining representative and a walkaround miners' representative was self evident, and the two were not to be equated.

Even if one were to assume for the sake of argument that the Mine Act must accommodate the National Labor Relations Act, a meaningful review of its pertinent provisions, Section 7, Section 9(a), and Section 8(a)(2), discloses that the Mine Act's provisions for a miners' representative to assist in MSHA inspections, and the related regulations promulgated by the agency, are entirely in harmony with the NLRA's statutory scheme.

IV. THE DESIGNATION OF A WALKAROUND MINERS' REPRESENTATIVE UNDER THE MINE ACT DOES NOT CONFLICT WITH THE PRINCIPLES OF EXCLUSIVITY OF REPRESENTATION UNDER THE NATIONAL LABOR RELATIONS ACT

Where two or more miners select a representative, whether an employee or a non-union employee, such representation cannot even arguably run afoul of Section 9(a) or Section 8(a)(2) unless that individual has the status, under the NLRA, of a "labor organization," and the employer is actually or potentially supporting, dominating, or interfering with the representative's role or existence. The safeguards against such employer activity, and protections extended to employees to secure their ability to bargain collectively through a majority representative, can only be fully understood when analyzed in the context of the legislative purpose behind these provisions.

Section 9(a) of the NLRA requires that representatives selected as bargaining agents "shall be exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to

rates of pay, wages, hours of employment, or other conditions of employment"²⁸ Section 8(a)(2) provides that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."²⁹ The passage of Section 9(a) was a response to employer practices which encouraged multiple unions in a single bargaining unit, resulting in employee bargaining characterized by confusion and ineffective representation. By enacting Section 9(a), Congress intended to stabilize industrial relations, to promote harmony in the workplace, and to protect employees' ability to bargain meaningfully through a single, majority-supported collective bargaining representative.³⁰ Introducing his bill to the Senate, Senator Wagner explained:

Genuine collective bargaining is the only way to attain equality of bargaining power

The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since the enactment of (the National Industrial Recovery Act). Such a union makes a sham of equal bargaining power

. . . .

[O]nly representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees.

For these reasons the very first step toward genuine collective bargaining is the abolition of the employer-dominated union as an agency for dealing with grievances, labor disputes, wages, rules, or hours of employment.³¹

The overriding purpose of Section 9(a) was to ensure that employers could not maintain a "complacent minority group, typically a company union, so that no collective agreement might be reached at all."³²

28. 29 U.S.C. § 159(a) (1988).

29. 29 U.S.C. § 158(a)(2) (1988).

30. *Gigliotti Corp. v. Building & Constr. Trades Council*, 583 F. Supp. 396, 401 (E.D. Pa. 1984).

31. 78 Cong. Rec. 3443 (1934); LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 15-16 (1935). Senator Wagner on S.2926, March 1, 1934 (NLRB 1985), at 15-16, *cited in* *Electromation Inc.*, 309 N.L.R.B. No. 163, 142 L.R.R.M. 1001, 1005 (1993).

32. 78 Cong. Rec. 3443 (1934); LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 15-16 (1935). House Report No. 972 on S. 1958 May 21,

It is Section 8(a)(2) which prevents employer influence over bargaining representatives "to ensure that collective bargaining is truly at arms length."³³ To make certain that the "company-dominated union" would be eliminated, Congress outlawed employer interference with the right of employees to select their bargaining representatives on the basis of majority support.³⁴ Senator Wagner explained of Section 8(a)(2):

Nothing in the bill prevents employers from maintaining free and direct relations with their workers The only prohibition is against the sham or dummy union which is dominated by the employer, which is supported by the employer, which cannot change its rules and regulations without his consent, and which cannot live except by the grace of the employer's whims.³⁵

With the passage of Section 8(a)(2), Congress resolved to rid the American workplace of the bitterness, strife, and industrial instability that had marked labor relations in the earlier part of this century and to promote an orderly procedure for collective bargaining.³⁶

In the recent, highly publicized *Electromation* case,³⁷ the NLRB made clear that the key to an employer's violation of Section 8(a)(2) lies not simply in the existence of a representative who speaks for a minority of employees. It is, rather, the representatives' status as a

1935, Vol. II, p. 2976 (U.S. Govt. Printing Office, 1985). These legislative comments expressly rely on and echo a case decided one year earlier, *Matter of Houde Engineering Corp.*, 1 N.L.R.B. (old) 35 (1934), in which the NLRB rejected an employer's argument that it could choose to bargain with a minority union, where the majority of employees had chosen the United Auto Workers as their collective bargaining representative. The Board viewed the employer's refusal to recognize the exclusive bargaining rights of the majority-chosen Auto Workers as "calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks." *Id.*

33. *NLRB v. North Shore Univ. Hosp.*, 724 F.2d 269, 272 (2d Cir. 1983).

34. *Id.*; *NLRB v. Unit Train Coal Sales, Inc.*, 636 F.2d 1121, 1125 (6th Cir. 1980).

35. LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935 (1935); 79 Cong. Rec. 2371-72. Senator Wagner on S.1958, February 21, 1935, 74th Cong., 1st Sess., Vol. I at 1313 (NLRB 1985).

36. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 685 (1944).

37. *Electromation, Inc.*, 309 N.L.R.B. No. 163, 142 L.R.R.M. 1001, 1008-09 (1993). In that case, the Board condemned employee-staffed "action committees" created by the employer to address dissatisfaction with work-related issues.

labor organization or labor representative, within the meaning of Section 2(5) of the NLRA, *who is subject to the employer's domination or interference.*³⁸

Section 2(5) broadly defines the term "labor organization" to mean "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."³⁹ As the Board recognized in *Electromation*, Congress adopted this broad definition to encompass common forms of company dominated unions that had arisen following passage of the National Industrial Recovery Act and to offer maximum protection against employer activity that even tainted independent employee collective bargaining through an exclusive representative.⁴⁰ Section 2(5) was drafted not to protect employers, but to protect employees against company conduct which frustrated their workers' ability to collectively and meaningfully further work-related interests.⁴¹

Viewing both the purpose and the narrowly drawn role of the miners' walkaround representative against this background, it is clear that a miners' representative under the Mine Act cannot be equated with a labor organization under the National Labor Relations Act. The miners' representative is a creature of the Mine Act and can function only within the parameters permitted by that statute. The Mine Act enables the walkaround representative to act under relatively short-term, limited circumstances: namely, (1) to obtain an immediate inspection when he or she believes there is a violation or imminent danger; (2) to accompany an MSHA inspector on mine investigations;

38. Employer actions which may constitute support of, or domination or interference with, a labor organization include suggesting the formation of the organization, creating the organization, structuring it, articulating by-laws or other principles for its governance, or selecting its members. *See, e.g.,* Lawson Co. v. NLRB, 753 F.2d 471, 477-78 (6th Cir. 1985); Utrad Corp. v. NLRB, 454 F.2d 520, 521 (7th Cir. 1971); NLRB v. Ampex Corp., 442 F.2d 82, 84-85 (7th Cir. 1971); North Am. Van Lines, Inc., 288 N.L.R.B. 38, 47 (1988).

39. 29 U.S.C. § 152(5) (1988).

40. *Electromation, Inc.*, 142 L.R.R.M. at 1005.

41. *Id.*

(3) to notify the Secretary of an intention to contest the issuance, modification, or termination of any withdrawal order or the reasonableness of the length of time set for abatement by a citation; (4) to participate in hearings related to challenges to MSHA's enforcement action; and (5) to obtain copies of the operators' roof control plan. The miners' representative has no potential to act on matters which relate to the employees' wages, hours, or other working conditions.⁴²

The miners' representative may be designated exclusively by the miners themselves. Where miners designate a non-employee, in particular, the potential for employer domination or interference with this limited representation is virtually non-existent.⁴³ While statutorily circumscribed contact and communication between the miners' representative and the coal operator may take place, the representative's primary function is to communicate with, and deal with, MSHA and the employees.

To view the place of the miners' representative in the overall labor scheme, one must approach the matter with a modicum of common sense. It may be helpful to look to comparable representational scenarios in an employer-employee setting. For instance, if several black employees believed that a coal operator was engaged in racial discrimination and obtained the assistance of a private attorney to assist them before the EEOC and in their dealings with the employer over the charges, would that attorney be a "labor organization" with whom the employer could not deal, for fear of violating Section 8(a)(2) of the NLRA? Of course not.

Or, in another example, if several deaf employees believed that they had not been reasonably accommodated by their company and sought the assistance of a deaf activist organization in processing charges under the Americans with Disability Act and in discussing potential accommodations with their employer, would those activist-representatives suddenly become a labor organization? Any such sug-

42. See *supra* notes 10-18.

43. See *Utah Power & Light Co. v. Secretary of Labor & UMWA*, 897 F.2d 447, 452 (10th Cir. 1990) (noting that "a non-employee representative is not subject to the same pressures that can be exerted by an operator on an employee representative.").

gestion is absurd. Yet it is precisely such a notion that underlies the argument that an employer engages in a violation of the NLRA when dealing with a miners' representative under the Mine Act.

A rational analysis of the interplay between the Mine Act's provision for a miners' walkaround representative (and the related MSHA regulations), and Section 9(a) and 8(a)(2) of the National Labor Relations Act, must take into account the limited purpose and role assigned the miners' representative by Congress and the contrasting purpose and role of a collective bargaining representative under the NLRA. Viewed from a more sensible perspective, and one which looks to both the purpose and the judicial interpretation of these provisions of the NLRA, it is not surprising that Congress did not feel it necessary to extend the NLRA-like protections to employees under the Mine Act. Given the limited purposes for walkaround representation (when contrasted with the established and all-encompassing purposes of collective bargaining representation), it is self-evident that the ability of the miners' representative to act promptly and effectively on behalf of the miners would have been severely diminished, if not obliterated, had Congress imposed majority support requirements, complete with provisions for campaigning, elections, challenges, and certification, as under the NLRA.⁴⁴ Clearly, Congress did not intend such a result.

V. DESIGNATION OF A MINERS' REPRESENTATIVE UNDER THE MINE ACT IS CONSISTENT WITH THE NLRA'S SECTION 7 PROTECTION OF CONCERTED ACTIVITY

Even assuming, *arguendo*, that Congress may only create rights and protection for miners under the Mine Act that are consistent with the rights and protections created for employees under the National Labor Relations Act, the Mine Act's provision for employee designa-

44. There are certain distinctions which must be drawn between a miners' walkaround representative in a non-union setting, where the representation does not have the potential to conflict with or undermine an exclusive collective bargaining representative or the provisions of a labor agreement, and a union setting, where the potential for such conflict exists, as discussed more fully below.

tion of a miners' representative may easily be "harmonized" with the scheme of concerted activity provided for under the NLRA.

As a general rule, concerted activities are protected by Section 7 where the activities can reasonably be seen as affecting terms or conditions of employment.⁴⁵ Thus, "mutual aid and protection" has been construed to cover a large variety of subjects. In a non-union setting, these activities have been particularly significant, for they are often the vehicle for unrepresented employees to assert their rights to wages, hours of employment, and other working conditions.⁴⁶

In *Eastex, Inc. v. NLRB*,⁴⁷ the Supreme Court stressed the expansive nature of activity that fell within the ambit of Section 7's "mutual aid or protection" language:

The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of [section] 7 makes clear, to protect concerted activities for the somewhat broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.' Thus, it has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forum, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause. To hold that activity of this nature is entirely unprotected—irrespective of location or the means employed—would leave employees open to retaliation for much legitimate activity that could improve their lot as employees.⁴⁸

45. *Gatliff Coal Co. v. NLRB*, 953 F.2d 247 (6th Cir. 1992).

46. The basis for "concerted" activity is "joint action" by employees, which generally requires that two or more employees act together with regard to matters affecting terms and conditions of employment. In some instances, the action of a single employee may be construed as "concerted" if it is undertaken with the authority of other employees. *See Meyers Ind. II*, 281 N.L.R.B. 882 (1986), *aff'd*, 835 F.2d 1481 (D.C. Cir. 1987). The *Meyers* case was first decided in 1984, *Meyers Ind.*, 268 N.L.R.B. 493 (1984), *rev'd sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 474 U.S. 971 (1985). On remand, the NLRB issued *Myers II*.

47. 437 U.S. 556 (1978).

48. *Id.* at 565-67. The activity in question was employees' distribution of a newsletter, on the employer's property during nonworking time, urging employees to take action against the state's right-to-work laws and to support the union.

Protected concerted activity may include employees' invocation of rights under other labor-related statutes. For example, an employee who sought the assistance of the Labor Department's Wage and Hour Division in connection with a holiday pay matter was protected by Section 7 of the NLRA, where her action was related to group concerns over overtime pay.⁴⁹ An employee who sought the assistance of the Department of Labor in connection with her employer's lunch-hour policy was held to have engaged in protected concerted activity, where other employees had expressed concern over the matter.⁵⁰ Employee resort to assistance from safety inspectors from the Occupational Health and Safety Administration has consistently been held protected concerted activity.⁵¹ Similarly, employees who have sought assistance from human rights agencies in connection with workplace discrimination issues are protected under Section 7.⁵² Not surprisingly, safety and health-related conditions have historically been in the forefront of concerns over which employees have banded together for their mutual aid and protection.⁵³

49. *D & D Sewing, D & D Distribution v. NLRB*, 801 F.2d 636 (3d Cir. 1986), *enforcing* 277 N.L.R.B. 909 (1985).

50. *Salisbury Hotel, Inc.*, 283 N.L.R.B. 685 (1987).

51. *Ultrasystems Western Constructors, Inc.*, 1993 NLRB Lexis 397 (ALJ Dec., April 16, 1993) (two employees who sought OSHA inspection of unsafe working conditions were protected under Section 7); *Jay Metals, Inc.*, 308 N.L.R.B. 167 (1992) (employee who contacted OSHA and prompted inspection of plant's safety conditions was protected under Section 7); *American Poly-Therm Co.*, 298 N.L.R.B. 1057 (1990) (two employees who reported employer's safety violations to OSHA were protected under Section 7).

52. *Huizinga Cartage Co.*, 298 N.L.R.B. 965 (1990) (three employees who filed charges with, and sought assistance from, state department of human rights were protected under Section 7); *M & G Convoy Inc.*, 287 N.L.R.B. 1140 (1988) (contacting Equal Employment Opportunity Commission and other governmental agencies regarding race discrimination was protected concerted activity).

53. *See NLRB v. City Disposal Sys.*, 465 U.S. 822 (1984), *enforcing* 256 N.L.R.B. 451 (1981), *rev'g* 683 F.2d 1005 (6th Cir. 1982), *remanded*, 766 F.2d 969 (6th Cir. 1985) (refusal to drive a truck employee believed unsafe, and assertion of contractual right not to do so was protected); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (several machinists who walked out of their plant to protest lack of heat were protected); *NLRB v. Jasper Seating Co.*, 857 F.2d 419 (7th Cir. 1988) (two employees who walked out of non-union shop to protest drafting conditions protected, even though majority of employees did not support action); *Esco Elevators, Inc.*, 276 N.L.R.B. 1245 (1985) (safety-related complaints were protected); *Zurn Indus., Inc.*, 255 N.L.R.B. 632 (1981); *Akron Gen. Medical*

The Board and Courts distinguish between employees who are unrepresented and those who have chosen an exclusive bargaining representative in determining the extent to which a minority of employees may act on their own behalf. Activity for "mutual aid and protection" that is otherwise sheltered by Section 7 may be circumscribed where the employees are represented by a union. In *Emporium Capwell Co. v. Western Addition Community Organization*,⁵⁴ the Supreme Court affirmed this principle in finding that four employees who complained of the employer's racial discrimination did not have a protected right to: (1) refuse union representation under their collective bargaining agreement; (2) independently demand that management deal with them directly; and, (3) engage in unauthorized picketing in furtherance of that demand. The Court explained:

Central to the policy of fostering collective bargaining, *where the employees elect that course*, is the principle of majority rule (citations omitted) If the majority of a unit chooses union representation, the NLRA permits it to bargain with its employer to make union membership a condition of employment, thereby imposing its choice upon the minority⁵⁵

Nowhere in the decision did the Court suggest that employees who had *not* chosen an exclusive bargaining representative were limited to concerted activity supported by the majority of the unit. Indeed, where employers have made this argument, it has been soundly rejected. In *NLRB v. Jasper Seating Co.*,⁵⁶ two employees, in a non-union factory, walked off the job after unsuccessfully demanding that a door, which caused a draft, be shut. The majority of employees felt too hot with the door shut, and wanted it open. Faced with competing demands from two groups and the minority walk-out, the company fired the employees who walked out.

Ctr., 232 N.L.R.B. 920 (1977) (complaints about lint and dust in work area were protected); *Gibbs Die Casting Aluminum Corp.*, 174 N.L.R.B. 75 (1969) (complaints of excessive fumes in plant were protected).

54. 420 U.S. 50 (1975).

55. *Id.* at 62 (emphasis added).

56. 857 F.2d 419 (7th Cir. 1988).

The employer maintained that the majority rule recognized in *Emporium Capwell* should be extended to restrict the right of a minority of its employees, *in a non-union setting*, from engaging in concerted activity for their mutual aid or protection, except where they had the support of the majority. The Seventh Circuit dismissed the argument as “nonsense,”⁵⁷ and replied:

The majority rule of *Emporium Capwell* derives from the concept of exclusive collective-bargaining representation under Section 9(a) of the Act, which embodies the notion that, *once a majority of employees selects a bargaining agent*, that agent alone is entitled to represent the employees. *Nothing in the Act, however, limits the rights of non-unionized employees to engage in concerted conduct for their mutual aid regardless of whether or not their goal is supported by a majority of employees.*⁵⁸

The Board and Circuit Courts have repeatedly recognized that *Emporium Capwell* holds only that certain concerted activities may lose their protected character when they conflict with or undermine a union's status as exclusive bargaining representative.⁵⁹ This limited qualification of Section 7 is consistent with the legislative purpose of Section 9(a).⁶⁰

57. *Id.* at 421.

58. *Id.* at 421-22 (emphasis added).

59. *Richardson Paint Co. v. NLRB*, 574 F.2d 1195, 1206 (5th Cir. 1978); *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 326 (7th Cir. 1976). It should be noted, however, that where minority employee action for mutual aid and protection does not conflict with or impair the union's ability to represent the bargaining unit, it may be protected under Section 7. Thus even the presence of an exclusive bargaining agent will not entirely extinguish the right of a minority group of employees to act in concert to affect their conditions of employment. *See, e.g.*, *NLRB v. Bridgeport Ambulance Serv.*, 966 F.2d 725, 729 (2d Cir. 1992), *enforcing* 302 N.L.R.B. 58 (1991) (“[A]lthough—by virtue of the provision of section 9(a)—employees' attempts to bargain directly with their employer when they have a union representative are not protected activities under the Act (citing *Emporium Capwell*) . . . not all . . . concerted activity is outside the protection of the Act.”); *Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946 (3d Cir. 1981) (unionized employee was protected under Section 7 from employer retaliation for filing a racial discrimination charge with EEOC); *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998-99 (2d Cir. 1976) (no evidence that strikers were at odds with or attempting to by-pass their union); *NLRB v. Shop Rite Foods, Inc.*, 430 F.2d 786, 791 (5th Cir. 1970) (“We do not hold that there cannot be circumstances in which an employee or a minority group of employees may engage, without reference of the matter to union processes, in action which is protected under Section 7 though there is an agreement in force or in the process of negotiation.”).

60. As Senator Wagner explained, in commenting on Section 9(a) during the legis-

In analyzing the right of a minority of miners to designate a representative under the Mine Act against this NLRA backdrop, two principles clearly emerge. In a non-union setting, that right would be protected by the "mutual aid and protection" provision of Section 7 of the NLRA, and there is no requirement, in the statute or caselaw, which supports the notion that the representative requires majority support.

In a union setting, however, Section 9(a) would circumscribe the ability of bargaining unit miners to bypass the safety representatives under the collective bargaining agreement and designate an independent miners' representative. This is particularly true at a mine represented by the United Mine Workers. Article III of the National Bituminous Coal Wage Agreement expressly addresses health and safety, including the Federal Mine Safety and Health Act,⁶¹ union access to the mine for safety purposes,⁶² labor-management cooperation in the development of mining plans,⁶³ preservation of individual safety rights,⁶⁴ and the establishment and function of a mine health and safety committee.⁶⁵ In light of the bargaining unit's choice of a Section 9(a) exclusive bargaining representative to represent them in matters related to health and safety under the Mine Act, *Emporium Capwell* and subsequent caselaw indicate that minority representation under the Mine Act would not be permitted under the NLRA in a unionized setting.

lative debates:

The language of Section 9(a) . . . makes it clear that the guaranty of the right of employees to bargain collectively through representatives of their own choosing must not be misapplied so as to permit employers to interfere with the practical effectuation of that right by bargaining with individuals or minority groups in their own behalf *after representatives have been picked by the majority to represent all.*

Legislative History of the National Labor Relations Act, 1935, Statement by Senator Robert F. Wagner concerning H.R. 6288, March 13, 1935, Vol II, p. 2490 (NLRB, 1935) (emphasis added).

61. See National Bituminous Coal Wage Agreement of 1993, Article III, Section (b).

62. *Id.* § (e).

63. *Id.* § (h).

64. *Id.* § (i).

65. *Id.* § (d).

VI. THE NLRA DOES NOT PROHIBIT A NON-EMPLOYEE MINERS' REPRESENTATIVE FROM ACCESS TO A COAL OPERATORS' PROPERTY FOR THE LIMITED PURPOSES PROVIDED FOR UNDER THE MINE ACT

In determining whether an individual employee in a non-union workplace is entitled to representation in dealing with the employer in work-related matters, the National Labor Relations Board engages in a balancing act. It has found that the "mutual aid and protection" language of Section 7 may be interpreted to allow an employer to deny an unrepresented employee's request for a representative at a disciplinary hearing.⁶⁶ In so doing, the Board has attempted to strike a "fair and reasoned balance" between the constraints that such a request would place on the employer in an unorganized setting and the benefit to the employee if such a representative were present and has determined that the balance tips in favor of the employer.⁶⁷

A balancing test also determines whether a non-employee union representative may have access to the private property of a non-union employer. In *NLRB v. Babcock and Wilcox*,⁶⁸ the Supreme Court limited the right of union organizers to enter company property for the purpose of distributing literature to organize the workforce by balancing the union's interest in reaching employees on company property against the employer's interest in barring non-employee access to its private property. The union's ability to reach employees through other available channels weighed heavily in the decision. The employer's refusal to allow union access was upheld because the balance in those circumstances tipped in the company's favor, and more importantly, because the employer's bar against union access *did not discriminate* against the union by allowing other non-employee distribution.⁶⁹

66. E.I. Dupont & Co., 289 N.L.R.B. 627 (1988), *on remand from* 733 F.2d 296 (3d Cir. 1984), *aff'd sub nom.* Slaughter v. NLRB, 876 F.2d 11 (3d Cir. 1989).

67. *Id.* at 628-29. The unorganized employees' request for a representative at a disciplinary hearing is still protected under Section 7, however, and may be granted by the employer. The employer is simply not required to do so. Even where the request is denied, the employer may not retaliate against the employee for making the demand. Slaughter v. NLRB, 876 F.2d at 12 n.2.

68. 351 U.S. 105 (1956).

69. In the more recent case of *Lechmere Inc. v. NLRB*, 112 S. Ct. 841 (1992), the

Just as this balancing act allows an employer to deny non-employee union representatives from gaining access to its property in most organizing cases, it also allows the scales to tip in the employees' favor in other circumstances, particularly in the area of safety, as illustrated by *Hercules, Inc. v. NLRB*.⁷⁰ In that case, a unionized employer denied a non-employee union representative access to its property after an explosion took place resulting in a death, arguing that the representative had no right to violate the company's private property rights and claiming a proprietary interest in the information the representative sought. The plant manufactured explosive chemicals under a highly secretive and competitive processing formula. The Board balanced the right of the employees to obtain information, through their representative, on "the gravest of matters imaginable to the employees it represents, namely, the cause and prevention of occupational injuries and work-related deaths . . ." against the company's private property interests.⁷¹

Applying the Supreme Court's *Babcock & Wilcox* balancing test enunciated in the *Hercules* case, the Board rejected the notion that the employer's interests in its property rights alone outweighed the employees' substantial interest in obtaining information related to the explosion.⁷² It distinguished the interest of the union representative asserted in the *Babcock & Wilcox* case, which focused on the goal of organizing employees and the alternatives available to achieve it, with the safety interests where access to the property itself was critical.⁷³

Supreme Court reaffirmed the *Babcock and Wilcox* decision in another union organizing case. Significantly, in *Lechmere*, the employer's policy denied *all* non-employee access to company property for purposes of solicitation or distribution.

70. 833 F.2d 426 (2d Cir. 1987), *enforcing* 281 N.L.R.B. 961 (1986).

71. 281 N.L.R.B. at 969.

72. *Id.* at 970.

73. *Id.* The Board relied on an earlier case, *NLRB v. Holyoke Water Power Co.*, 778 F.2d 49 (1st Cir. 1985), *enforcing* 273 N.L.R.B. 1369 (1985), presenting similar facts, in which it had balanced the private property interests of the employer and the employees interests in representation in critical safety issues and reached the same conclusion. In the *Hercules* case, however, the Board accommodated the employer's concerns by requiring the union to sign a trade secret agreement protecting the company's proprietary interest. 281 N.L.R.B. at 972.

As the *Hercules* case makes clear, employer property rights, when viewed from an NLRA perspective, are not sacred and may very well give way to a non-employee representative's access to the property to further the interests of employees in health and safety related matters. Within this framework, the Mine Act does not infringe on a company's private property rights (as developed under the NLRA) by providing a miners' representative "an opportunity to accompany the Secretary . . . during the physical inspection of any coal or other mine."⁷⁴ Nor does the statute conflict with the National Labor Relations Act in anticipating that a miners' representative might be a non-employee.⁷⁵

Indeed, the cases indicate that when the question of access of a non-employee miners' representative is analyzed under the NLRA alone, the Board and the courts will favor the interests of the employees in the area of occupational health and safety. This outcome has been strongly foreshadowed in the recent Supreme Court case brought under the Mine Act, *Thunder Basin Coal Co. v. Reich*,⁷⁶ in which the coal operator argued that its employees' designation of a non-employee UMW representative at its non-union mine violated the company's right to exclude non-employee union representatives from its property under the NLRA. The Supreme Court rejected the argument, cautioning that nothing in the NLRA or the cases interpreting that statute expressly protected employer private property rights from non-employee union intrusion:

[P]etitioner appears to misconstrue *Lechmere, Inc. v. NLRB* The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it. To the contrary, this Court consistently has maintained that the NLRA may entitle union employees to obtain access to an employer's property under limited circumstances. *See, id.*, at 112 S. Ct. at 845; *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112, 76 S. Ct. 679, 100 L.Ed. 975 (1956). Moreover,

74. 30 U.S.C. § 318(f) (1988).

75. *See supra* note 19.

76. 114 S. Ct. 771 (1994). The primary issue before the Supreme Court in that case was the federal district court's jurisdiction over pre-enforcement challenges to orders of the Mine Safety and Health Administration.

in a related context, the Court has held that Congress' interest in regulating the mining industry may justify limiting the private property interests of mine operators. See, *Donovan v. Dewey*, 452 U.S. 594, 101 S. Ct. 2534, 69 L.Ed.2d 262 (1981) (unannounced Mine Act inspections do not violate the Fourth Amendment).⁷⁷

Thus nothing in the NLRA compels the conclusion that non-employee representatives, including union organizers, are absolutely barred from employer property. To the contrary, there is no such bar, but only a balancing test which may, in some instances, weigh more heavily in favor of an employer's common law property rights and less heavily in favor of employees' rights to engage in mutual aid or protection. As *Thunder Basin* and the NLRA cases themselves indicate, where questions of miners' safety and health arise, it is unlikely that the NLRB or the courts will find that the employer's property rights overcome the rights of miners to achieve effective representation that may make the difference between life or death, safety or disability.

VII. CONCLUSION

The National Labor Relations Act and the Mine Safety and Health Act are distinct federal labor statutes which, for the most part, serve different purposes. In enacting the NLRA, Congress responded to employers' interference with their employees' right to organize and bargain collectively and sought to protect employee attempts to represent themselves on the vast array of subjects related to wages, hours and working conditions.⁷⁸ To that end, Congress established a detailed scheme for exclusive representation in collective bargaining, including provision for both protected and unlawful conducted related thereto,⁷⁹ as well as an elaborate design for the election of such representatives, complete with administrative hearings to determine appropriate units

77. *Id.* at 781 n.21. In *Kerr-McGree Coal Corp.*, 15 F.M.S.H.R.C. 352 (1993), *aff'g* 13 F.M.S.H.R.C. 1889 (ALJ 1991), *Kerr-McGree* was similarly unsuccessful in arguing that *Lechmere* stands for the proposition that a union member may not be designated as a miners' representative at a non-union mine. The Commission took note of the limited access the union member was permitted under Section 103(f) of the Mine Act. Slip op. at 10.

78. 29 U.S.C. § 151 (1988).

79. 29 U.S.C. § 158 (1988).

for collective bargaining, the presence or absence of majority support, and the filing of challenges to the Board's representative certification of a labor organization.⁸⁰

In enacting the Mine Safety and Health Act, Congress's purpose was far more limited. The statute addressed the "urgent need to provide more effective means and measures for improving the working conditions and practices in the national's coal and other mines in order to prevent death and serious physical harm"⁸¹ To that end, Congress provided mechanisms to protect miners' health and safety, including mining employees' designation of a "walkaround" representative, not to serve as a collective bargaining agent, but simply to perform the limited tasks allowed by the statute.⁸²

Thus, a miners' representative under the Mine Act is not the equivalent of a labor organization under Section 2(5) of the National Labor Relations Act. Although there are scenarios in which a miner representative could be dominated or interfered with by a coal company, it is particularly unlikely to occur where the miners designate a non-employee, as the Tenth Circuit noted in *Utah Power & Light Co.*⁸³ Given the plain language of the Mine Act, which contemplates both employees and non-employees as potential miners' representatives under Section 103(f) of the Mine Act,⁸⁴ there is no basis for denying a non-employee representative access to the mine for walkaround purposes. Similarly, it would constitute a blatant violation of the provisions of the National Labor Relations Act for a coal operator to provide access to a non-union non-employee representative, while denying access to a union member non-employee representative.⁸⁵

Although the viability of the Mine Act does not depend on its ability to pass muster under the National Labor Relations Act, the cases cited herein clearly show that the right of employees to designate

80. 29 U.S.C. § 159 (1988).

81. 30 U.S.C. § 801 (1988).

82. See *supra* notes 15-23.

83. See *supra* note 37.

84. 30 C.F.R. § 40.2(b) (1993).

85. Great Scot, 309 N.L.R.B. No. 84 (1992); New Jersey Bell Tel. Co., 308 N.L.R.B. 277 (1992); NLRB v. Babcock and Wilcox, 351 U.S. 105 (1956).

a mine representative is wholly consistent with the protections the NLRA extended to employees' concerted activities under Section 7. In a non-union setting, there is no conflict between the Mine Act and the exclusive representation principles of the NLRA. And in a unionized setting, that designation will effectively have been made through the employees' choice of a labor organization empowered to engage in the activities of a mine representative.

The two statutes coexist in harmony. To alter the Mine Act or its regulations so that a mine representative could only be selected from employee ranks and only exist with majority support, would undermine the purposes of the Mine Act for no purpose, while adding nothing to the protection provided to employees under the National Labor Relations Act. The scheme established by Congress is a sound one and requires no adjustment.