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## THE RIGHT TO ENGAGE IN CONCERTED ACTIVITIES

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Although the National Labor Relations Act<sup>1</sup> is primarily concerned with safeguarding employees in their right to organize labor unions and bargain collectively, it also confers important rights to engage in strikes, picketing and other forms of economic pressure. Section 7 created "the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) forbids an employer to interfere with, restrain or coerce employees in the exercise of a right guaranteed by section 7. When peaceful negotiations over wages or hours break down and the employees resort to a peaceful strike, they are engaging in "concerted activities."<sup>2</sup> The employer may hire replacements and refuse to discharge them in order to make room for strikers who wish to return to their jobs.<sup>3</sup> But if the strikers' jobs have not been filled, to deny them reinstatement<sup>4</sup> or to impose other discipline<sup>5</sup> is interference with the right to engage in

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1. 49 STAT. 449 (1935) as amended by 61 STAT. 140 (1947), 29 U.S.C. § 151 *et seq.* (Supp. 1949).

2. Some employee activities which are concerted activities as a matter of fact are not "concerted activities" within the meaning of section 7. Throughout this article I shall endeavor to use the phrases "concerted activity" and "concerted activities" as legal concepts and to speak of "concert of action" or "group activities" to describe facts.

3. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938); *NLRB v. Shenandoah-Dives Mining Co.*, 145 F.2d 542 (10th Cir. 1944). Where the strike is caused or prolonged by an unfair labor practice, replacements hired after the violation must be discharged to make room for the unfair labor practice strikers. *NLRB v. Remington Rand, Inc.*, 130 F.2d 919, 927-928 (2d Cir. 1942). Even though he has been replaced, a striker remains an employee within section 2(3), hence discrimination against him because of union affiliation or activity like other unfair labor practices remains unlawful. *NLRB v. Mackay Radio & Tel. Co.*, *supra*.

If all the strikers' positions have been filled prior to an unconditional application for reinstatement but new vacancies occur thereafter, the employer may, under some circumstances, be held to have committed an unfair labor practice if he fails to employ strikers for these positions. *Container Mfg. Co.*, 75 N.L.R.B. 1082 (1948).

4. *Firth Carpet Co. v. NLRB*, 129 F.2d 633 (2d Cir. 1942); *Home Beneficial Life Ins. Co. v. NLRB*, 159 F.2d 280 (4th Cir. 1947).

The NLRB has generally stated that discrimination against strikers also violates section 8(a)(3), but its reasoning is difficult to justify. Section 8(a)(3) declares it to be an unfair labor practice "to encourage or discourage membership in any labor organization" by discrimination in hire or tenure of employment, or any term or condition of employment. Discrimination against strikers may or may not encourage or discourage membership in a labor organization. Such discrimination falls under section 8(a)(1) because it interferes with concerted activities. It can be brought under section 8(a)(3) only by asserting that the strikers constitute an informal labor organization *ad hoc* and

concerted activities and violates section 8(a)(1). The same reasoning does not apply if, for one reason or another, the strike is not a concerted activity. Such strikers are not exercising a right safeguarded by sections 7 and 8(a)(1) and to punish them for their conduct is not an unfair labor practice. Thus an employer's privilege to take reprisals against employees who resort to economic measures depends to a considerable extent upon the meaning of "concerted activities."

These well-established rules make interpretation of the phrase "concerted activities" an important problem in the administration of the Act. A union might be reluctant to authorize a strike which, if lost, would subject the employees to reprisals because it was not a protected activity, even though the same union would favor the strike if the only risk attendant upon its loss were that some of the employees' jobs might be filled by strike-breakers.<sup>6</sup> Furthermore, a series of rulings placing objectionable activities outside the protection of section 7 may exert effective moral influence if the decisions are soundly conceived.

Under recent decisions there is a second, more important way in which the interpretation of the phrase "concerted activities" will affect strikes and picketing. Section 7 guarantees employees, in parallel terms, the rights—

to bargain collectively through representatives of their own choosing  
and—

to engage in concerted activities for the purposes of collective bargaining and other mutual aid and protection.

Although the Wagner Act was originally aimed at the anti-union practices of employers, the Supreme Court held in *Hill v. Florida*<sup>7</sup> that state legislation

that discrimination against them discourages joining such informal organizations in the future. *NLRB v. Kennametal, Inc.*, 182 F.2d 817 (3d Cir. 1950); *The Sandy Hill Iron & Brass Works*, 55 N.L.R.B. 1 (1944). The NLRB has never explained the need for resorting to this fiction. Apparently it stemmed from the assumption that since reinstatement was an appropriate remedy for discharges in violation of section 8(a)(3) proof of a section 8(a)(3) violation was prerequisite to an order of reinstatement. *NLRB v. Kennametal, Inc.*, 182 F.2d 817 (3d Cir. 1950); *cf. Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). It would seem sounder law to admit that the only unfair labor practice is a violation of section 8(a)(1) and then to hold the remedy of reinstatement is available under section 10(c) as appropriate way of effectuating the policies of the Act. See *e.g.*, *NLRB v. Schwartz*, 146 F.2d 499 (5th Cir. 1945). *Gullett Gin Co. v. NLRB*, 179 F.2d 499 (5th Cir. 1950). Other NLRB decisions accept this analysis to the extent of recognizing that it is immaterial whether the discharge be treated as a violation of section 8(a)(1) or 8(a)(3). *Westinghouse Electric Corp.*, 77 N.L.R.B. 1058, 1061 (1948); *Rockingham Poultry Marketing Cooperative, Inc.*, 59 N.L.R.B. 486 (1944).

5. *General Electric Co.*, 80 N.L.R.B. 174 (1948) (modification of seniority rights); *Potlach Forests, Inc.*, 87 N.L.R.B. No. 118, 25 LAB. REL. REP. (Ref. Man.) 1192 (1949) (modification of seniority); *Illinois Bell Telephone Co.*, 88 N.L.R.B. No. 191, 25 LAB. REL. REP. (Ref. Man.) 1440 (1950) (demotion).

6. See *e.g.*, *Home Beneficial Life Ins. Co. v. NLRB*, 159 F.2d 280 (4th Cir. 1947).

7. 325 U.S. 538 (1945).

interfering with the right of employees "to bargain collectively through representatives of their own choosing" was inconsistent with the guarantees of section 7 and therefore unconstitutional. In the *Briggs-Stratton*<sup>8</sup> case the unions argued that, by a parity of reasoning, the right "to engage in concerted activities" is also a federal right which the states may not curtail. Since a majority of the justices held that recurrent unannounced work stoppages were not "concerted activities" within the meaning of section 7, there was no need to pass upon the major contention. Nevertheless, the opinion of the Court espoused the union's view.

Most state laws regulating strikes, boycotts and picketing are based on earlier common law doctrines and make concert of action an integral part of the offenses which they create. Under the *Briggs-Stratton* approach such state laws cannot be applied to employees subject to the jurisdiction of the NLRB when the employee's activities are "concerted activities" within the meaning of section 7. Thus, while the Court has recently granted the states greater freedom to regulate strikes and picketing in the absence of federal legislation, it has concurrently extended the doctrine of federal preemption so as to bring large parts of the law of strikes and picketing under federal control whenever the employer and employees are subject to NLRA jurisdiction.<sup>9</sup>

Startling as this conclusion may seem the Court appeared to approve it in *United Automobile Workers, C.I.O. v. O'Brien*.<sup>10</sup> In holding the Michigan strike control law constitutionally inapplicable to a peaceful strike for higher wages because it was inconsistent with the NLRA, the Court said:

Congress has not been silent on the subject of strikes in interstate commerce. In the National Labor Relations Act of 1935 . . . Congress safeguarded the exercise of employees of 'concerted activities' and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act. . . . None of these sections can be read as permitting state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation.<sup>11</sup>

The same or parallel reasoning is applicable to any peaceful strike arising out of a grievance or contract negotiations. With small modifications it could be invoked in the case of strikes for other objectives. The implied conclusion that Congress has removed all concerted activities from control by the states is confirmed by the closing paragraph of the opinion, in which Mr. Chief Justice Vinson answered the contention of the state authorities that their action was sustained by the *Briggs-Stratton* case. "Clearly, we reaffirmed the principle that if 'Congress has protected the union conduct which the state has

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8. *International Union, UAW, AFL v. Wisconsin E. R. Bd.*, 336 U.S. 245 (1949).

9. Gregory, *Constitutional Limitations on the Regulation of Employer and Union Conduct*, 49 MICH. L. REV. 191, 193-197 (1950).

10. 339 U.S. 454 (1950).

11. *Id.* at 457.

forbidden . . . the State legislation must yield.' That principle is controlling here."<sup>12</sup> Other passages in the *O'Brien* opinion make the decision susceptible of a narrower interpretation if the Court decides to draw back from the position towards which its decisions tend; but for the present we are bound to conclude that the definition of "concerted activities" will measure not only the extent of an employer's power to impose discipline but also the authority of the states to regulate strikes, boycotts and picketing.<sup>13</sup>

The purpose of this article is to discuss the meaning of the phrase "concerted activities" with emphasis upon (I) the criteria by which the definition should be elaborated and (II) the allocation of responsibility for its interpretation between the NLRB and the courts.

## I

The Wagner Act became law on the floodtide of the belief that the conflicting interests of management and worker can be adjusted only by private negotiation, backed, if necessary, by economic weapons, without the intervention of law. Earlier the Norris-LaGuardia Act<sup>14</sup> had immunized in the federal courts, all peaceful labor activities. "So long as a union acts in its self-interest and does not combine with non-labor groups the licit and the illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."<sup>15</sup> Later the Supreme Court seemed to be about to write at least some of this philosophy into constitutional law.<sup>16</sup> There even developed considerable tolerance for violence and other activities unhesitatingly punished in the absence of a law dispute. "A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of Congress when it provided in Section 13 of the [Wagner] Act that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so, the rights afforded to employees by the Act would be indeed illusory."<sup>17</sup>

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12. *Id.* at 459.

13. The conclusions summarized above are discussed at length in Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950). The decision in *Amalgamated Ass'n of Street Ry. Employees v. Wisconsin E. R. Bd.*, 71 Sup. Ct. 359 (1951), confirms the conclusion stated above.

14. 47 STAT. 70 (1932), 29 U.S.C. § 101 *et seq.* (1946).

15. *United States v. Hutcheson*, 312 U.S. 219, 232 (1940).

16. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *AFL v. Swing*, 312 U.S. 321 (1941).

17. *Republic Steel Corp. v. NLRB*, 107 F.2d 472, 479 (3d Cir. 1939).

The philosophy behind the labor legislation of the nineteen thirties was deeply rooted in the disappointing experience of half a century of legal intervention into industrial conflicts. In a democracy sanctions can be invoked only against the occasional wrongdoer. The effectiveness of law depends upon its acceptance by the governed, either because they approve the policy which it expresses or because it is the law. To enforce a judicial edict against large numbers of employees is out of the question. There was, and is, no consensus of opinion about the propriety of labor's various objectives or of the weapons with which they are pursued. In each instance the decision, whether statutory or judge-made, too obviously involves policy judgments, and feelings run too high, for it to command acquiescence merely because it is law. Hence Congress turned the policy of relying for the adjustment of industrial conflicts upon negotiation between employers and labor organizations strong enough to bargain effectively on behalf of employees. Judicial intervention into strikes, boycotts or picketing was prohibited partly because it did nothing to resolve the underlying problems and partly because the injunction was traditionally a weapon for weakening employee organization.

The Wagner Act's guaranty of a right to engage in concerted activities is rooted in this philosophy. "In the light of labor movement history, the purpose of the quoted provision of the statute becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the National Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any State, as to relations within the reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert."<sup>18</sup> Under the words of section 7 concerted employee activities in pursuit of "other mutual aid or protection" must receive an equal degree of statutory protection.

The phrase "concerted activities" was interpreted most broadly during the early administration of the Wagner Act. It was not necessary to show that the employees were a majority<sup>19</sup> or that they were acting in behalf of a labor union.<sup>20</sup> Their objective was treated as irrelevant; and although the NLRB always recognized that particular activities might be so indefensible

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18. *International Union, UAW, AFL v. Wisconsin E. R. Bd.*, 336 U.S. 245 (1949).

19. *Firth Carpet Co. v. NLRB*, 129 F.2d 633 (2d Cir. 1942); *Agar Packing & Provision Corp.*, 81 N.L.R.B. 1262 (1949); *Olin Industries, Inc.*, 86 N.L.R.B. 203 (1949). As to concerted action by a minority after the designation of a bargaining representative, see pp. 331-333 *infra*.

20. See *NLRB v. Tovrea Packing Co.*, 111 F.2d 626 (9th Cir. 1940); *NLRB v. Phoenix Mutual Life Ins. Co.*, 167 F.2d 983 (7th Cir. 1948); *NLRB v. Kennametal, Inc.*, 182 F.2d 817 (3d Cir. 1950); *Morristown Knitting Mills*, 80 N.L.R.B. 731 (1948).

as to warrant discharge,<sup>21</sup> it not infrequently held employers guilty of unfair labor practices for punishing violations of normal plant discipline and breaches of the peace.<sup>22</sup> Indeed, it is not too much to say that the starting point in the interpretation of the right to engage in "concerted activities" was the proposition that the quoted phrase is a factual description, not a legal concept, and therefore covers all activities which are in fact concerted.

In this naked form the proposition could not be defended against some exceptions. When the Supreme Court held that the NLRB lacked power to order the reinstatement of sit-down strikers as a remedy for the unfair labor practices which precipitated the strike,<sup>23</sup> it followed *a fortiori* that a sit-down strike was not protected under section 7. The same was true of strikes on board ship<sup>24</sup> and strikes in breach of contract.<sup>25</sup> Later the NLRB was driven to recognize that in determining whether a peaceful strike fell within section 7,

21. Harnischfeger Corp., 9 N.L.R.B. 676, 686 (1938); Armour and Co., 25 N.L.R.B. 989, 996 (1940).

22. *E.g.*, Mt. Clemens Pottery Co., 46 N.L.R.B. 714, *modified*, 147 F.2d 262 (6th Cir. 1945); Wytheville Knitting Mills, Inc., 78 N.L.R.B. 640, *set aside*, 175 F.2d 238 (3d Cir. 1949).

23. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

24. Southern S.S. Co. v. NLRB, 316 U.S. 31 (1940).

A sharp distinction should be drawn between the *Fansteel* and *Southern S.S.* type of case and the problem of defining the concerted activities protected by section 7. Where a strike results from an employer's refusal to bargain collectively or from other unfair labor practices, as in the *Fansteel* case, the NLRB and courts may be faced with the problem of determining what effect the misconduct of the unfair labor practice strikers should have upon the normal remedy of reinstatement. This question turns upon the extent of the authority conferred on the NLRB by section 10(c), which empowers the NLRB to require employers who have engaged in unfair labor practices to take "such affirmative action, including reinstatement with back pay, as will effectuate the policies of this Act." In the cases discussed in this article the critical question is whether there has been an unfair labor practice. Such a practice is made out if the employees' conduct constituted "concerted activities." There is no unfair labor practice if the employer discharges the employees or imposes other discipline for conduct which falls outside the scope of "concerted activities."

Not only are the two groups of cases analytically distinguishable, the practical results may also differ. Employee misconduct may not be sufficiently serious to bar reinstatement under section 10(c) when the provocation of the employers' unfair labor practices is taken into account. But the same misconduct may fall outside the scope of the concerted activities protected by sections 7 and 8(a)(1) and therefore furnish the basis for an effective discharge if there has been no antecedent unfair labor practice. Compare NLRB v. Elkland Leather Co., 114 F.2d 221 (3d Cir. 1940), *cert. denied*, 311 U.S. 705 (1940), and Berkshire Knitting Mills, 46 N.L.R.B. 955 (1943), *with* Republic Creosoting Co., 19 N.L.R.B. 267 (1940) and International Nickel Co., 77 N.L.R.B. 286 (1948). The distinction was overlooked by the House managers in reporting the conference agreement on the Labor Management Relations Act, 1947, H.R. REP. No. 510, 80th Cong., 1st Sess. 38-39 (1947) and unfortunately it has not always been observed by the Board. In National Electric Products Corp., 80 N.L.R.B. 995 (1948) three members joined in denying reinstatement as a remedy for an unfair labor practice which provoked a strike in breach of contract. Possibly the result is a sound exercise of administrative discretion in framing a remedy which will effectuate the policy of the Act, but the opinion errs in basing the conclusion on the ground that the strike in breach of contract was not an activity protected by section 7. See Chairman Herzog's concurring opinion at pp. 1001-1002.

25. NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939).

the objective of the strike might be decisive. Thus strikes to compel the commission of an unfair labor practice<sup>26</sup> or to secure an unlawful wage increase<sup>27</sup> were denied NLRA protection. Just as subsequent experience led to the widespread belief that the philosophy of the Wagner and Norris-LaGuardia Acts, despite their essential soundness, required some limitation, so did adjudication under section 7 demonstrate that it could not wisely be held to immunize all group activity, however conducted and without regard to its aim. The important point to be observed, however, is that the basic philosophy has not been changed. Even though "concerted activities" has become a legal concept, the process of interpretation still begins at the original starting point; exceptions exist, or are created, only when the employees' conduct plainly deserves condemnation.

But although the philosophy of section 7 fixes the bias from which the definition of "concerted activities" should be approached, it does not furnish criteria by which to draw the line between protected and unprotected activities. Thus the central problem becomes the establishment of standards by which wholly egregious factors can be eliminated and the subjective attitudes of judges and administrators reduced to minimal roles.

#### A. Standards furnished by NLRA

*Express Provisions.*—Although section 8(b) regulates only the conduct of labor organizations and section 7 deals with the rights of employees, it seems plain that the group activities which section 8(b) forbids a labor organization to lead must fall outside the protection of section 7 when employees engage in them either with or without the direction of a union. To hold otherwise would disregard legislative history<sup>28</sup> and create an unwarranted anomaly. In the absence of union sponsorship there may be no need for government intervention to curtail undesirable employee activities, but surely the activities themselves have no greater claim to affirmative protection.

The converse conclusion is not necessarily true. It has often been said that there is an area of employee activity, not precisely defined, which, while not constituting an unfair labor practice under section 8(b), is nevertheless not protected by section 7.<sup>29</sup> The doctrine evolved out of a series of cases decided under the Wagner Act, which may be illustrated by *Thompson Products, Inc.*<sup>30</sup> On September 14, 1942, the Society of Tool and Die Craftsmen was certified as the exclusive representative of the respondent's employees in an appropriate bargaining unit. Later United Automobile Workers, C.I.O., instituted a strike

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26. *Thompson Products, Inc.*, 70 N.L.R.B. 13, *vacated*, 72 N.L.R.B. 886 (1947).

27. *American News Co.*, 55 N.L.R.B. 1302 (1944).

28. H.R. REP. No. 510, 80th Cong., 1st Sess. 37-40 (1947).

29. *Perry Norvell Co.*, 90 N.L.R.B. 225, 241 (1948); *National Maritime Union*, 78 N.L.R.B. 971, 986-987 (1948).

30. *Thompson Products, Inc.*, 70 N.L.R.B. 13, *vacated*, 72 N.L.R.B. 886 (1947).



for the purpose of compelling the respondent to grant UAW exclusive recognition in disregard of the certification. The Company offered to reinstate the strikers without discrimination but subsequently discharged the leaders. After some vacillation the Board held that the discharge of the committeemen was not a violation of section 8(1) "because they had called and continued a strike whose purpose was unlawful. . . . There would be neither moral, legal nor practical justification for our requiring employers to respect our certifications if we were unwilling to respect them ourselves."<sup>31</sup>

Although the point seems obvious, there was strong resistance to its acceptance. Dr. Millis, as NLRB chairman, and later Mr. Houston, stoutly maintained the view that "Congress used the phrase 'concerted activity' in our Act, as in the Norris-LaGuardia Act, with the deliberate aim of excluding any inquiry by the Board or the Courts into the purpose for which employees strike. . . ." Their fear was that the doctrine of the majority would be extended "to embrace a wide variety of employee conduct, the purpose of which is deemed to be in violation of some Federal law or other expression of public policy contained in State or local laws or court decisions," thus re-introducing "a convenient device whereby a judge might outlaw union conduct which was contrary to his own economic or social philosophy."<sup>32</sup>

Interpretation of section 7 would present the dangers feared by Dr. Millis if the acceptance of an objectives test were coupled with willingness to grant or deny the protection of section 7 according to the judge's own view of the justifiability of each objective. The rationale of the *Thompson Products* decision, however, permits the judge to rely on extrinsic standards and therefore allows him to observe any one or more of three limitations on the use of the objectives test which were not recognized in common law cases. First, in the *Thompson Products* case the objective was "unlawful" not merely in the somewhat Pickwickian sense in which the term is used in labor law, but also because the union could not attain its objective by any method without bringing about a violation of a positive statutory command. Second, there was a legislative standard for the Board to follow. Third, the standard was contained in the very same statute which was alleged to protect the employees' activities. Logic would permit drawing the limits of the *Thompson Products* doctrine at any of these points, if policy required.

Now that the NLRA proscribes union unfair labor practices, there are few occasions for invoking the doctrine that a strike to compel the commission of an employer unfair labor practice is not a "concerted activity" within the

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31. *Id.* at 888-889.

32. *American News Co.*, 55 N.L.R.B. 1302, 1314, 1318 (1944). *Cf. Thompson Products, Inc.*, 70 N.L.R.B. 13, 23, 24 (1947). Under the Norris-LaGuardia Act the federal courts may not enjoin a strike for the purpose of compelling an employer to commit an unfair labor practice. *United States v. Building & Construction Trades Council*, 313 U.S. 539 (1941).

meaning of section 7. The most troublesome cases have developed out of strikes for exclusive recognition and bargaining rights called at a time when two unions were competing for designation as the employees' representative. Section 8(b)(4) does not expressly condemn such activities, and the NLRB has held that they are not impliedly proscribed by section 8(b)(1).<sup>33</sup> It is an unfair labor practice, however, for an employer to grant exclusive recognition to either of the competing unions after a petition has been filed requesting the NLRB to investigate and certify the representative.<sup>34</sup> Hence it has been argued that employees who strike during a representation proceeding for the purpose of enforcing their claim to recognition are attempting to procure the commission of an unfair labor practice and, under the *Thompson Products* decision, should be denied the protection of section 7. After avoiding a square decision for some time,<sup>35</sup> the Board recently held that such activities are protected.

Under the doctrine of the *Midwest Piping* case the employer's exclusive recognition of one of the two rival unions violates the Act only if at the time such recognition is granted the question of representation is still pending. However, before recognition is granted many things might occur which would remove that question and would render exclusive recognition of a majority representative perfectly lawful: Thus, for example, the rival union might withdraw its petition, or the Board, for any number of reasons, might dismiss it. Again, the employer faced with rival demands may . . . grant recognition to each of the rival claimants on a member's only basis. . . . The chances of violation [as a result of recognizing the striking union] may be greater in some cases, less in others, but in all cases there are substantial uncertainties inherent in the situation. In such circumstances we see no justification for extending the *American News* and *Thompson Products* principles.<sup>36</sup>

It is easy to conjure up contingencies under which almost any demand may cease to be unlawful; in the *Thompson Products* case the certification might have been revoked, the majority union might have disintegrated, the striking union might have compromised for a lawful concession. The quoted decision is justified, however, by the impracticability of attempting to administer a distinction between strikes to compel premature recognition and other organizational strikes and picketing. Since the *Midwest Piping* doctrine does not apply until a petition for investigation and certification has been filed, a strike for recognition in the face of a competing claim to recognition

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33. *Perry Norvell Co.*, 80 N.L.R.B. 225 (1948).

34. *Midwest Piping and Supply Co.*, 63 N.L.R.B. 1060 (1945); *Flotill Products, Inc.*, 70 N.L.R.B. 119 (1946). The rule is known as the *Midwest Piping* doctrine. It has been questioned in at least two circuits. *NLRB v. Standard Steel Spring Co.*, 180 F.2d 942 (6th Cir. 1950); *NLRB v. Flotill Products, Inc.*, 180 F.2d 441 (9th Cir. 1950).

35. *Columbia Pictures Corp.*, 64 N.L.R.B. 490 (1945); *National Silver Co.*, 71 N.L.R.B. 594 (1946); *Horton's Laundry, Inc.*, 72 N.L.R.B. 1129 (1947).

36. *Hoover Co.*, 90 N.L.R.B. No. 201, 26 LAB. REL. REP. (Ref. Man.) 1365 (1950).

would not be a strike to compel the commission of an unfair labor practice; hence that activity would be protected. Should the strikers lose protection the moment one party files a petition under section 9 in order to resolve the controversy? A strike to bring pressure on the employees to join a union is protected even though the union also voices the demand that the employer recognize it upon its designation by the majority of the employees in the manner prescribed by the NLRA.<sup>37</sup> A strike demanding a prompt election and recognition following certification would also be lawful. To deprive the strikers of protection because their banners demand immediate rather than eventual recognition would put too high a premium on verbal niceties. Peaceful organizational strikes prior to NLRB action should be classified in a single group. Since most of them are concerted activities, all should be protected.

*NLRA policy.*—In a number of cases the discharge of strikers has been sustained, even though their positions were vacant, on the ground that their activities were inconsistent with the basic policies of the NLRA. To the extent that these policies are implicit in the statute and fairly well-defined, they furnish a second source of objective standards for defining the scope of “concerted activities.” But where the policy is only a loose generalization or there is doubt as to what the policy of the Act may be, this approach leaves much to the interpreter of the statute.

The clearest cases are those resulting from strikes in breach of a collective bargaining agreement.<sup>38</sup> A tendency to carry over into a law of collective bargaining the accepted view that a breach of contract is a civil wrong may have influenced the courts in concluding that the phrase “concerted activities” could not have been intended to protect employees engaged in contract violations. But certainly not every civil wrong falls outside section 7, and the principal ground for the rulings would seem to be that the purpose of the statute is to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be executed. “The stability of labor relations that the statute seeks to accomplish by the encouragement of the collective bargaining process ultimately depends upon the channelization of the collective bargaining relationship within the framework of the collective agreement, and the adherence thereto by both

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37. Cf. *Park & Tilford Import Corp. v. International Brotherhood of Teamsters*, 27 Cal.2d 599, 165 P.2d 891 (1946); *Peters v. Central Labor Council*, 179 Ore. 1, 169 P.2d 870 (1946).

38. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 344 (1939); *Hazel-Atlas Glass Co. v. NLRB*, 127 F.2d 109 (4th Cir. 1942); *Scullin Steel Co.*, 65 N.L.R.B. 1294 (1946); *Joseph Dyson & Sons, Inc.*, 72 N.L.R.B. 445 (1947). The recent enthusiasm of the NLRB for this rule is illustrated by the questionable decision in *National Electric Products Corp.*, 80 N.L.R.B. 995 (1948), discussed in note 24 *supra*.

employers and employees.”<sup>39</sup> It would tend to make the statute self-defeating to interpret “concerted activities” broadly enough to protect violations of the very agreements whose negotiation it seeks to induce.

One of the troublesome problems in applying the foregoing principle is to determine the extent to which a collective agreement contains an undertaking not to resort to economic pressures. In *Dorsey Trailers, Inc.*,<sup>40</sup> for example, a dispute arose over the discharge of an employee for an alleged breach of plant discipline. The current collective bargaining agreement contained no specific limitation on the right of employees to strike, but it did establish a four-step procedure for the settlement of grievances terminating in arbitration. The employees struck instead of invoking the grievance procedure. Later they offered to return to work, but the employer imposed a two-week disciplinary layoff. At the union’s request the lay-off was reduced to four days. The NLRB held the employer guilty of an unfair labor practice on the ground that the strike, not being in breach of contract, was protected by section 7. The Court of Appeals for the Fifth Circuit reversed, partly on the ground that there was an implied undertaking not to strike until the grievance procedure had been exhausted and partly on the ground that the agreement between company and union for a four day disciplinary lay-off should not be overturned.

The issue in the *Dorsey* case is obviously close. A collective bargaining agreement carries a number of implied commitments. An agreement fixing wages, hours, and other terms and conditions of employment for a definite period implicitly binds both parties not to take economic action to compel a change before the agreement expires.<sup>41</sup> Where a grievance procedure is established, one might, by parallel reasoning, imply the additional undertaking by each party not to resort to economic pressure until the procedure has been exhausted. If it were clear that such implied undertakings not to strike could be made effective, the Court of Appeals’ decision would be sound. The difficulty is that although plant discipline and legal sanctions may greatly influence the attitude of workers towards their contract commitments by giving them increased moral force, nevertheless the effective-

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39. *United Elastic Corp.*, 84 N.L.R.B. 768, 773 (1949). The decision also holds that it is not an unfair labor practice to solicit individual strikers to return to work or to offer a unilateral wage increase where the strike is in breach of contract. This portion of the decision has been sharply questioned. Cox and Dunlop, *The Duty To Bargain Collectively During the Term of a Collective Agreement*, 63 HARV. L. REV. 1097, 1106-1107, *esp.* n.30 (1950).

40. 80 N.L.R.B. 478 (1948), *enforcement denied*, 179 F.2d 589 (5th Cir. 1950).

41. *Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benevolent Society*, 265 Fed. 397 (1920); *Harper v. Local Union No. 520, IBEW*, 48 S.W.2d 1033 (Tex. Civ. App. 1932). See also letter to the Editor of the *New York Times* from Mr. Jesse Freidin, former General Counsel of the War Labor Board, reprinted in part in 20 LAB. REL. REP. (Ref. Man.) 215 (1947).

ness of a labor contract ultimately depends upon its ability to command voluntary acceptance.<sup>42</sup> A "no strike" clause is the subject of considerable deliberation during contract negotiations and is often a concession for which the union exacts a substantial price from the employer.<sup>43</sup> The Board might well have felt that, in the absence of an express reservation, workers would neither understand nor accept the doctrine that there was no right to engage in concerted action prior to exhaustion of the grievance procedure.

The *Dorsey Trailers* case also illustrates a second NLRB doctrine which is important in administering the statutory guaranty of a right to engage in concerted activities. After the events related, a new contract was signed; it contained a promise that there should be no strikes pending the exhaustion of the grievance procedure. Nevertheless the men struck again, this time over a question of contract interpretation. A week later they offered unconditionally to return to work. The employer replied that as a result of the strike it had canceled its orders for materials and would have no work available for an indefinite period. The plant reopened a month and a half later. All the strikers were rehired except three union officers who had been leaders in the strike. The Board held that the refusal to reinstate these men "because of their leadership in the strike" was an unfair labor practice. The Fifth Circuit reversed the resulting order of reinstatement.

The theory underlying the NLRB decision has never been thoroughly explicated. In the *Dorsey Trailers* case the Board declared:

Respondent by its own action had condoned the complainants' breach of their contractual obligations and waived the right to discharge or refuse to reinstate such persons because of the character of the strike.<sup>44</sup>

But this statement, which repeats a doctrine announced in earlier cases, merely states the conclusion. What is the basis for a doctrine of waiver or condonation? If the employer's motives were to discourage taking an active part in legitimate union activities, there would be an unfair labor practice; the strikers remain employees, at least until they are discharged, even though they are not engaged in concerted activities protected by section 7. The condonation doctrine appears to have evolved out of decisions based upon this principle.<sup>45</sup>

42. Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 Col. L. Rev. 829 (1948).

43. In the *Dorsey Trailers* case, for example, the union secured a union security clause in return for putting a no-strike clause into the next agreement.

44. 80 N.L.R.B. 478, 484 (1948).

45. The case most often cited in NLRB opinions, *Stewart Die Casting Corp. v. NLRB*, 114 F.2d 849 (7th Cir. 1940), plainly rests on the principles stated above. After a sit-down strike the respondent had refused to reinstate some of the strikers although no employee was discharged for participation in the sit-down. The Board found that the men denied reinstatement had been discriminated against "because they joined and assisted the U.A.W. and engaged in concerted activity in connection therewith." 15 N.L.R.B. 872, 900. The respondent argued that an order of reinstatement was proper because the men had lost their status as employees by engaging in a sit-down strike. The court

There is, however, a decisive difference between (a) discharging the leaders of a strike in breach of contract because of their leadership in collective activities generally and (b) disciplining them more severely than other employees (or singling them out for discipline) because they led the workers in the unlawful activities. The latter practice has often been approved by experienced labor arbitrators in awards sustaining the imposition of heavier penalties upon the union officers and other leaders of wildcat strikes than upon the rank and file.<sup>46</sup> The lack of an adequate explanation for the doctrine gives rise to faint suspicion that the Board is seeking to protect the strikers in every possible case even though precedent and policy make it plain that their action is not a concerted activity within the meaning of section 7. Unless further justification is developed, the doctrine is likely to be received in other courts as coolly as in the Fifth Circuit.

Strikes in breach of contract are not the only instances in which the policies of the statute furnish objective standards for the interpretation of concerted activities. In *NLRB v. Draper Corp.*<sup>47</sup> 41 out of 160 employees in the bargaining unit engaged in a brief stoppage protesting what they believed was the company's deliberate stalling during the negotiation of its first contract with the certified representative. The union did not call, authorize or sanction the strike. The Fourth Circuit, reversing the NLRB, held that the employees were not engaged in concerted activities within the protection of section 7 because theirs was "a strike in violation of the purposes of the Act by a minority group of employees in an effort to interfere with collective bargaining by the duly authorized agent selected by all the employees. . . . minorities who engage in 'wild cat' strikes, in violation of rights established by the collective bargaining statute, can find nothing in that statute which protects them from discharge."<sup>48</sup>

If the *Draper* decision rests upon a ruling that "concerted activities" does

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held that they did not lose their status as employees because the respondent plainly had not terminated anyone's status as employee because of the sit-down. Therefore, the court said, the workers continued to be protected against discrimination based upon union membership and activities other than the sit-down. *NLRB v. Aladdin Industries, Inc.*, 125 F.2d 377 (7th Cir. 1942) was a similar case, for the decision rested upon the Board's finding that the employees were denied reinstatement "because they had applied for employment through the union and thus indicated a partisan adherence to said union." 125 F.2d at 384. The *Carey Salt Co.*, 70 N.L.R.B. 1099 (1946), involved a similar set of facts. Cf. *Thompson Products, Inc.*, 70 N.L.R.B. 13, *vacated and set aside*, 72 N.L.R.B. 886 (1947). Apparently the Board failed to observe the distinction when in *Fafnir Bearing Co.*, 73 N.L.R.B. 1008 (1947), it first applied the doctrine of condonation to employees who were denied reinstatement, despite the return of most of the strikers to their former positions, on the ground that they had been the leaders in the unprotected activities. The *Fafnir* ruling has been followed in subsequent cases. See *e.g.*, *Columbia Pictures Corp.*, 82 N.L.R.B. 568 (1949).

46. *E.g.*, *Bethlehem Steel Co.*, 2 LAB. ARB. REP. 194 (1945). *Nathan Mfg. Co.*, 7 LAB. ARB. REP. 3 (1947).

47. *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944).

48. *Id.* at 205.

not include conduct the purpose of which is to interfere with collective bargaining by the majority representative,<sup>49</sup> it is sound enough in principle even though the application of the principle to the facts may be questioned. Majority rule requires the minority to bow to the decision of the majority and submerge its interests in those of the group. Hence, to hold that section 7 does not protect concerted action, the purpose of which is either to induce the employer to disregard its contract with the certified union<sup>50</sup> or to press upon the employer demands inconsistent with the certified union's bargaining policies,<sup>51</sup> is merely to apply a principle of interpretation already discussed: Section 7 cannot be supposed to protect activities inconsistent with one of the fundamental purposes of the Act, whether it be the negotiation of binding contracts or the determination of terms and conditions of employment through a system of collective bargaining based upon majority rule.

It is doubtful, however, whether this interpretation is adequate to support the ruling in the *Draper* case. There was nothing to show that the stoppage interfered with the certified union's conduct of the negotiations or, indeed, that the union disapproved the strikers' action. The absence of such evidence may explain the sentences in the opinion which appear to lay down the rule that when there is a bargaining representative, concerted action by a minority, not authorized by the representative, is not protected by section 7. If so, the employer may discipline the strikers and unless Congress has preempted the field, their action may be enjoined or punished by the state.<sup>52</sup>

It is easy to agree with the court's conviction that the wildcat strike is a harmful and demoralizing form of industrial strife. Even where its purpose is not to thwart the desire of the majority expressed through their designated representative, it may disrupt plant relationships and interfere with the normal processes of collective bargaining. But the considerations are not all on one side. Much can be said in favor of aggressive unions whose leaders are constantly pricked to action by militant minorities. It may be sound policy not to submerge the interests of minority groups into the policies or inertia of the union hierarchy until the collective agreement is negotiated—or at least until the union has formally adopted a position. The choice between the conflicting considerations requires a policy judgment as to how the institution of collective bargaining should operate. To make that kind of judgment the basis for an interpretation of section 7 casts the court or administrative agency adrift from the statute, for no provision of the

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49. This is the interpretation put upon the case by the NLRB. See Illinois Bell Tel. Co., 88 N.L.R.B. No. 191, 25 LAB. REL. REP. (Ref. Man.) 1440 (1950). Compare Nu-Car Carriers, 88 N.L.R.B. No. 24, 25 LAB. REL. REP. (Ref. Man.) 1288 (1950).

50. Markham & Callow v. International Woodworkers of America, 170 Ore. 517, 135 P.2d 727 (1943).

51. See p. 328 *supra*.

52. Cox and Seidman, *op. cit. supra* note 13.

Act supplies a standard by which the choice can be made. Most courts have followed the Board in granting minority strikers the protection of section 7 unless their conduct was improper for another reason.<sup>53</sup>

B. *Standards drawn from other federal legislation*

Although the course of decisions has not been uniform, it seems plain that other relevant federal legislation may serve as a guide in delimiting "concerted activities" in cases in which the answer is not furnished by the NLRA. In *Southern S.S. Co. v. NLRB*<sup>54</sup> the Supreme Court held that the Board had abused its discretion in ordering a shipowner to reinstate employees who, provoked by unfair labor practices, had struck in violation of the mutiny statute. Since the ruling necessarily implies that the strikers were not engaged in protected activities, the case may illustrate the proposition that economic pressure which violates another federal law is not protected under section 7. In *American News Co.*<sup>55</sup> a majority of the Board took the additional step of holding that an employer might lawfully discipline employees who had ceased work for the purpose of enforcing their demand for a wage increase that would violate the Wage Stabilization Act. The case seemed necessarily to decide that the NLRB would take into account other federal legislation in determining what activities are protected by section 7. The *American News* case was subsequently followed by the Seventh Circuit.<sup>56</sup>

Despite these decisions the Board and at least one circuit court of appeals refused to apply the *American News* doctrine to employees who went on strike without giving the 30 days' notice and waiting for the vote required by the War Labor Disputes Act.<sup>57</sup> Although the general dissatisfaction with the War Labor Disputes Act makes it unlikely that the same problem will arise again, the cases involved two points of principle which are sufficiently important to require discussion.

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53. See authorities cited note 19 *supra*. The contrary dictum in *NLRB v. Indiana Desk Co.*, 149 F.2d 987 (7th Cir. 1945), apparently rests upon a misunderstanding of *NLRB v. Brashear Freight Lines, Inc.*, 119 F.2d 379 (8th Cir. 1941), where the court said that "a minority is in no position to strike because of failure to bargain with it and then receive compulsory reinstatement." The facts of the *Brashear* case are not very clearly stated in the opinion but the NLRB decision (13 N.L.R.B. 191) makes it plain that the NLRB had ordered reinstatement of six strikers, discharging their replacements if necessary, on the theory that the strike was caused by an unfair refusal to bargain. When the latter finding was reversed, the order necessarily fell with it; the strikers, being "economic strikers," were not entitled to reinstatement at the expense of replacements and, since the NLRB had not ruled upon the issue, there was no occasion for the court to decide whether refusal to reinstate them to vacant positions would be an unfair labor practice.

54. 316 U.S. 31 (1940).

55. 55 N.L.R.B. 1302 (1944); *cf.* *Rockwood Stove Works*, 63 N.L.R.B. 1297 (1945).

56. *NLRB v. Indiana Desk Co.*, 149 F.2d 987 (7th Cir. 1945).

57. *Republic Steel Corp.*, 62 N.L.R.B. 1008 (1945); *Bohn Aluminum and Brass Corp.*, 67 N.L.R.B. 847, 850 (1946); *Agar Packing & Provision Corp.*, 81 N.L.R.B. 1262 (1949); *Hamilton v. NLRB*, 160 F.2d 465 (6th Cir. 1947).



*First.* The opinions seek to justify the failure to follow the *American News* doctrine on the ground that the legislative history showed that the War Labor Disputes Act was not intended to curtail the protection accorded employees under the NLRA. What the legislative history actually showed was only that Congress did not intend to deprive employees who struck in violation of the War Labor Disputes Act of their status as employees under the Wagner Act. In relying upon this history the court overlooked the distinction between (1) depriving employees of their rights under the NLRA and (2) holding that concerted violations of congressional labor policy are protected by section 7. The former step opens the door to discrimination against union leaders, to other forms of interference, coercion and restraint, and to refusals to bargain collectively while the workers are on strike. The latter ruling would withhold NLRB assistance only against discharges or other discipline based specifically upon the employees' violation of the related statute. The obscuring of the distinction often cuts against the interests of the workers. It has led the Board into holding that a strike in breach of contract terminates the worker's status as employees and therefore opens the way to practices which, under other circumstances, would violate the duty to bargain collectively.<sup>58</sup> Upon the same reasoning the Board also holds that such a strike cuts the workers off from any consideration of the wisdom of affording them the normal remedies for unfair labor practices. Thus far, however, the decisions are not so numerous as to bar their reconsideration upon a sounder analysis.<sup>59</sup>

*Second.* Although the opinions place the ruling on the ground that the legislative history showed that the War Labor Disputes Act was not intended to affect rights under the NLRA, one senses that the decisions stemmed at least in part from administrative and judicial disapproval of the provisions in the War Labor Disputes Act calling for notice of intent to strike, a waiting period and a strike vote conducted by the NLRB. Such disapproval was fully warranted—indeed the Congress came to share it—but there is no ground on which the NLRB can properly use some related federal laws as standards in interpreting the phrase “concerted activities” and refuse to use others. The principle of the *American News* case seems sound and should be uniformly followed.

### C. *The effect of state law*

Under the current Supreme Court decisions the right of employees “to engage in concerted activities for the purposes of collective bargaining and other mutual aid and protection” is a federal right which cannot be curtailed

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58. *United Elastic Corp.*, 84 N.L.R.B. 768 (1949).

59. *National Electric Products Corp.*, 80 N.L.R.B. 995 (1948).

by state legislation<sup>60</sup> or action of an administrative body.<sup>61</sup> On principle, interference by a state court would be equally invalid even though based upon common law principles. It follows that neither state statutes nor common law decisions defining the permissible employee activities can furnish, by themselves, standards sufficient for determining the scope of the protection accorded to employees by section 7.<sup>62</sup>

Probably the rule would be the same even if the Supreme Court were to draw back from the conclusion that the NLRA guarantees employees a right to engage in concerted activities immune from state intervention as well as employer interference. In *NLRB v. Hearst Publications, Inc.*<sup>63</sup> the Supreme Court held that the term "employees" must be given a single, uniform interpretation.

Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees' organization and collective bargaining. . . . The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. Cf. e.g., Sen. Rep. No. 573, 74th Cong., 1st Sess. 2-4. It is an Act, therefore, in reference to which it is not only proper, but necessary for us to assume, 'in the absence of a plain indication to the contrary, that Congress . . . is not making the application of the federal Act dependent on State law.'

The same reasoning would seem applicable to the term "concerted activities."

By these observations I do not mean to imply that state law is always irrelevant. As pointed out below, section 7 probably leaves room for state legislation curtailing concert of action aimed at achieving violations of other state laws.

#### D. *Standards drawn from other sources*

The problem of defining "concerted activities" does not end with the exclusion of conduct inconsistent with the express provisions or policy of the NLRA, or of some related federal statute. The NLRB has repeatedly stated that the phrase does not comprehend conduct which is "so indefensible, under the circumstances" as to warrant discharge.<sup>64</sup> The courts of appeals also have denied the protection of sections 7 and 8(a) (1) to workers whose group activities were regarded as improper either because of their objective or because of the way in which the objective was pursued. Despite the number and uniformity of these decisions however, they offer no very satisfactory rationalization.

The problem was presented to the Supreme Court in *International Union, UAW, AFL v. Wisconsin E.R. Bd.*<sup>65</sup> The union had engaged in a series of

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60. *United Automobile Workers, CIO v. O'Brien*, 339 U.S. 454 (1950).

61. *International Union, UAW, AFL v. Wisconsin E. R. Bd.*, 336 U.S. 245 (1949).

62. *Hamilton v. NLRB*, 160 F.2d 465 (6th Cir. 1947); cf. *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874 (1st Cir. 1941), *cert. denied*, 313 U.S. 595.

63. 322 U.S. 111 (1944).

64. See cases cited note 21 *supra*.

65. 336 U.S. 245 (1949).

short unannounced work stoppages for the purpose of weakening the employer in anticipation of the bargaining about to take place over a new collective agreement. Under Wisconsin law the activities were unlawful, hence they were enjoined by the local courts. The Supreme Court upheld Wisconsin's action on the ground that the employees were not engaged in "concerted activities" within the meaning of section 7. Mr. Justice Jackson, who delivered the opinion of the Court, gave no reason for this conclusion except to say—

In the light of labor movement history, the purpose of the quoted provision of the statute becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the National Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert.<sup>66</sup>

The courts which espoused the prima facie theory of torts articulated by Holmes and Wigmore held that a combination to inflict injury on an employer's business might be justified by the objective of the combination if it were pursued in a lawful manner; it was on what methods were lawful and what objectives constituted justification that judges disagreed. Those courts which spoke in the language of the law of conspiracy generally held that the lawfulness or unlawfulness of a conspiracy depended upon its purpose and on the means which the combination invoked. There were many demands which were treated as unlawful objectives of concerted action even though they might lawfully be achieved through different means. Collective bargaining,<sup>67</sup> the closed or union shop,<sup>68</sup> and agreements to postpone the installation of labor saving machinery<sup>69</sup> were often treated as unlawful objectives in this sense of the word. In the passage just quoted from his *Briggs-Stratton* opinion Mr. Justice Jackson explains that section 7's guaranty of the right to engage in concerted activities overruled this doctrine. The interpretation seems sound and has real value in determining how far a state may go in limiting the objectives for which employees may strike,<sup>70</sup> but it offers little help

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66. *Id.* at 257-258.

67. *United Shoe Machinery Corp. v. Fitzgerald*, 237 Mass. 537, 130 N.E. 86 (1921).

68. "A strike for a closed shop has, accordingly, been held a strike for an unlawful purpose. . . . On the other hand, agreements voluntarily made between an employer and a union calling for a closed shop have always been recognized and enforced in this Commonwealth." *Fashioncraft, Inc. v. Halpern*, 313 Mass. 385, 388, 48 N.E.2d 1, 3-4 (1943).

69. *Hopkins v. Oxley Stave Co.*, 83 Fed. 912 (8th Cir. 1897); *Haverhill Strand Theatre v. Gillen*, 229 Mass. 413, 118 N.E. 671 (1918).

70. I failed to appreciate what now seems to me to be the meaning of the passage quoted from the *Briggs-Stratton* opinion until after Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950), was published. Our intimation that the

in deciding what methods involving concert of action are protected by section 7. Nor does it seem to advance the point to say that "because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert." The truism would fit the facts of the *Briggs-Stratton* case only if a series of unannounced stoppages would be "unlawful" on the part of an individual acting alone. Concert of action was an essential part of the unfair labor practice with which the employees were charged,<sup>71</sup> and there is nothing in the Wisconsin statutes or court decisions making it any more unlawful for an individual to stop work for a series of short, unannounced periods than it would be for him to quit work for a longer period in order to achieve the same end. By common law standards both would be a breach of the servant's duty to his master, but although at least one court has relied on the breach of provisions implied in the individual employee's contract of hiring as ground for denying the protection of section 7,<sup>72</sup> the servant's duty to his master at common law does not furnish a satisfactory test for the definition of "concerted activities." This is demonstrated most clearly by the cases holding that a spontaneous refusal to work for the purpose of presenting a grievance to the employer is a concerted activity even though the employees do not leave the premises for the purpose of going on strike.<sup>73</sup>

The *Briggs-Stratton* decision illustrates the developing rule that employees are not engaged in concerted activities when, without going on strike and quitting their employment, they "continue to work and remain at their positions, accept the wages paid them, and at the same time select what part of their allotted tasks they care to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work."<sup>74</sup> The rule has been applied to employees who refuse to work overtime,<sup>75</sup> systematically slow down production,<sup>76</sup> refuse to handle correspondence of a struck plant,<sup>77</sup> engage in unannounced

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passage was obscure now seems unjustified and some of our inferences may have been too broad. See pp. 337-339 *infra*. I trust that the criticisms of the opinion in this article will not prove, upon further reflection, to be equally mistaken.

71. WISC. STAT. § 111.06(2) (h) (1947).

72. NLRB v. Montgomery Ward & Co., 157 F.2d 486, 496 (8th Cir. 1946).

73. NLRB v. American Mfg. Co., 106 F.2d 61, 68 (2d Cir. 1939); NLRB v. Kennametal, Inc., 182 F.2d 817 (5th Cir. 1950); Gullet Gin Co. v. NLRB, 179 F.2d 499 (5th Cir. 1950), *modified*, 71 Sup. Ct. 337 (1951); Carter Carburetor Corp. v. NLRB, 140 F.2d 714, 717-718 (8th Cir. 1944); Agar Packing & Provision Corp., 81 N.L.R.B. 1262 (1949); Globe Wireless, Ltd., 88 N.L.R.B. No. 211, 25 LAB. REL. REP. (Ref. Man.) 1460 (1950).

74. NLRB v. Montgomery Ward & Co., 157 F.2d 486, 496 (8th Cir. 1946).

75. NLRB v. Mt. Clemens Pottery Co., 147 F.2d 262 (6th Cir. 1945); C. G. Conn, Ltd. v. NLRB, 108 F.2d 390 (7th Cir. 1939).

76. Elk Lumber Co., 91 N.L.R.B. No. 90, 26 LAB. REL. REP. (Ref. Man.) 1493 (1950).

77. NLRB v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946).

work stoppages<sup>78</sup> or disobey the lawful directions of their superiors.<sup>79</sup> Such decisions reflect an apparently deep-seated community sentiment. Despite their obvious effectiveness neither the slow-down nor similar practices have taken hold in the American labor movement, and there can be little doubt of the general public condemnation of occupying a job and taking pay while simultaneously refusing to perform the services required. It is at least partly to this criterion that the *Briggs-Stratton* decision must be traced.

Invoking this principle the employer argued in *Hoover Co.*<sup>80</sup> that section 7 did not cover a consumer boycott organized by the store's employees without going on strike. The NLRB rejected the argument and held that the discharge of such employees violated section 8(a)(1).

. . . It is clear that in grafting these exceptions upon the broad language of Section 7, the Board and courts have been particularly careful to limit such exceptions to *those instances in which the means employed involved violence or similar misconduct*, or where the objectives sought were inconsistent with the terms of the clearly enunciated policy of this Act or other federal statutes. . . . *absent any showing that the means employed were other than peaceful* or that the objectives sought were [such] as have been held for reasons of clear public policy to be improper we find no authority to regard the concerted activity involved herein as unprotected.<sup>81</sup>

The term "violence or similar misconduct" is hardly descriptive of slowdowns, refusals to work overtime and the like; but one could overlook the misplaced emphasis if the opinion had not immediately substituted "other than peaceful" as justification for the conclusion that the *Hoover* boycott was a protected activity. The unexplained transition has only the dubious virtue of freeing the Board from the necessity of explaining why employees may be discharged for slowing down production or refusing to work overtime but not for persuading their employer's customers to patronize other establishments.<sup>82</sup>

Perhaps the distinction lies in the relative effectiveness of the employees' activities. The *Briggs-Stratton* opinion hints that the Court was moved

78. *International Union, UAW, AFL v. Wisconsin E. R. Bd.*, 336 U.S. 245 (1949).

79. *Home Beneficial Life Ins. Co. v. NLRB*, 159 F.2d 280 (4th Cir. 1947); *NLRB v. Condenser Corp.*, 128 F.2d 67 (3d Cir. 1942). See also cases denying the protection of section 7 to employees who have shut off the power. *Mt. Clemens Pottery Co.*, 46 N.L.R.B. 714 (1943); *River Falls Cooperative Creamery*, 90 N.L.R.B. 56, 26 LAB. REL. REP. (Ref. Man.) 1208 (1950). *Contra: Andrews Co.*, 87 N.L.R.B. 379 (1949).

80. 90 N.L.R.B. No. 201, 26 LAB. REL. REP. (Ref. Man.) 1365 (1950).

81. 26 LAB. REL. REP. (Ref. Man.) at 1367-1368. (Italics added.)

82. Two additional cases should be noted which point in a direction contrary to *Hoover Co.* In *Greater New York Broadcasting Corp.*, 48 N.L.R.B. 718 (1943), the NLRB denied reinstatement to a chief engineer who led the company to believe that he would perform his duties during an unfair labor practice strike by the rank and file but then refused. *Carnegie-Illinois Steel Corp.*, 84 N.L.R.B. 851 (1949), extended the doctrine to supervisors who, without engaging in deceptive misconduct, refused to perform the work of strikers necessary to protect the plant. Neither case has current importance because the Taft-Hartley amendments deny supervisors the status of employees under the NLRA.

by the fear that not the states but "the management also would be disabled from any kind of self-help to cope with these coercive tactics of the union except to submit to its undeclared demands."<sup>83</sup> Collective bargaining can function as a mechanism for pricing labor only if there is some bargaining power on each side. Slow-downs and similar disobedience on the job cost the employees nothing and, if they were protected activities, management would be helpless to resist. Hence such weapons are too effective to permit them to be part of the employees' arsenal.

At one time the NLRB attempted to resolve the problem somewhat differently. Instead of denying all protection to employees who engaged in such activities, it followed the words of section 7 to the literal conclusion that they were engaged in "concerted activities" and could not lawfully be discharged. Nevertheless, since the employees were unwilling to work on terms prescribed by their employer, the employer had the right to exclude them from the plant until they offered to obey his instructions while they were on the job.<sup>84</sup> Presumably, the employer, having converted the issue into a strike, could also hire replacements.<sup>85</sup> The Court of Appeals for the Sixth Circuit disagreed with this ruling. Either the men were engaged in concerted activities, the court said, or they were not. If they were, the employer could not exclude them from the plant without being guilty of interference, coercion and restraint; if they were not so engaged, he was free to impose any discipline.<sup>86</sup> Such verbal difficulties should not be insuperable. An employer is privileged to hire replacements for economic strikers even though this is a deterrent to concerted activities.<sup>87</sup> By a parity of reasoning he should be entitled to exclude from the plant, and seek replacements for, employees who attempt to hold their jobs and take wages while refusing to perform their duties. And in each case also, the employer's privilege to take countermeasures should cease when the employees offer to terminate their activities. This solution would preserve a tolerable balance of economic power between employer and employees in case of open conflict without requiring the NLRB and courts to read into "concerted activities" moral and economic limitations for which they lack accepted standards. Protection would be denied only to violence, mass picketing and related misconduct which both our labor laws and general criminal statutes have uniformly condemned.<sup>88</sup>

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83. 336 U.S. 245, 264 (1949).

84. *Mt. Clemens Pottery Co.*, 46 N.L.R.B. 714, 716 (1943).

85. *Pinaud, Inc.*, 51 N.L.R.B. 235 (1943).

86. *NLRB v. Mt. Clemens Pottery Co.*, 147 F.2d 262, 267 (6th Cir. 1945).

87. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938).

88. *NLRB v. Indiana Desk Co.*, 149 F.2d 987 (7th Cir. 1945) (mass picketing); *NLRB v. Perfect Circle Co.*, 162 F.2d 566 (7th Cir. 1947) (obstructing access to plant); *The International Nickel Co.*, 77 N.L.R.B. 286 (1948) (obstructing access to plant); *Dearborn Glass Co.*, 78 N.L.R.B. 891 (1948); *Republic Creosoting Co.*, 19 N.L.R.B. 267

The difficulties in defining "concerted activities" are immeasurably increased when one passes from consideration of the means of self-help to its objectives. The passage in the *Hoover Co.* opinion quoted above indicates that the NLRB is disposed to exclude concerted activities from the scope of section 7 because of their objective only where the objective is "inconsistent with the terms of the clearly enunciated policy of this Act or other federal statutes."<sup>89</sup> By adhering to this principle the NLRB could avoid making essentially legislative judgments and thus escape the morass in which the equity courts bogged down. The philosophy of collective bargaining also requires avoidance of any attempt to judge by law the social desirability or undesirability of employee objectives in the normal area of economic competition.

Nevertheless, these desiderata ought not to be pushed to a dryly logical conclusion. The range of employee interests is constantly widening. Although no very serious problems would result from extending section 7 to employee activities without regard to their purpose so long as the extension affected only the employer's treatment of such strikers, further development along these lines, coupled with the rulings that the states cannot interfere with "concerted activities,"<sup>90</sup> might seriously impair the state power to deal with social and economic problems.

The necessity of drawing a line is illustrated by the conflict which arises in applying state anti-trust policies to labor unions. Some unions have endeavored to enlarge the employment opportunities open to their members by refusing to handle products manufactured outside the territorial jurisdiction of the union.<sup>91</sup> Others seek to protect their wages and working standards against the competition of one man businesses by driving the independents from the market or forcing them to observe union rules.<sup>92</sup> Still other unions, representing employees in industries in which the employees' earnings are intimately related to the prices at which the industry sells its products or services, have sponsored combinations to control prices or limit production.<sup>93</sup> If employees whose wages were tied to the price at which the products sold were to strike for an agreement with the employer establishing

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(1940) (assault and battery; leaving power house dangerously unattended); *Mt. Clemens Pottery Co.*, 46 N.L.R.B. 714 (1943), *modified in other respects*, 147 F.2d 262 (6th Cir. 1945) (pulling power switch).

89. 26 LAB. REL. REP. (Ref. Man.) at 1368.

90. See p. 334 *supra*.

91. *E.g.*, *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945); *Mayer Bros. Poultry Farms v. Meltzer*, 274 App. Div. 169, 80 N.Y.S.2d 874 (1948).

92. *E.g.*, *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769 (1942); *Bautista v. Jones*, 25 Cal.2d 746, 155 P.2d 343 (1944).

93. *E.g.*, *Commonwealth v. McHugh*, 93 N.E.2d 751 (Mass. 1951); *De Neri v. Gene Louis, Inc.*, 174 Misc. 1000, 21 N.Y.S.2d 993 (1940), *affirmed*, 261 App. Div. 920, 25 N.Y.S.2d 433 (1941), *modified*, 288 N.Y. 592, 42 N.E.2d 602 (1942); *Hawaiian Tuna Packers, Ltd. v. International Longshoremen's and Warehousemen's Union*, 72 F.Supp. 562 (D. Hawaii, 1947); *cf. Saveall v. Demers*, 322 Mass. 70, 76 N.E.2d 12 (1947).

minimum prices, they could argue with some plausibility that they were exercising the right to bargain collectively about wages and other conditions of employment, that a strike to back up the demand was a concerted activity protected by section 7, and that for a state to interfere by an injunction would be inconsistent with federal law and invalid under the supremacy clause.

One answer to this line of argument may be that price policies are not proper subjects of collective bargaining and therefore cannot be legitimate objects of concerted action. There are cases under the anti-injunction laws which intimate that the law may develop along these lines.<sup>94</sup> The slogan "management prerogative" has also been interjected into cases turning on the interpretation of "concerted activities." In *NLRB v. Reynolds International Pen Co.*,<sup>95</sup> the Seventh Circuit declared that a walkout to protest the demotion of a foreman fell outside the protection of section 7. A later decision of the same court held that the employees were properly concerned with the selection of an insurance company cashier whose duties affected their earnings,<sup>96</sup> but one judge delivered a strong dissenting opinion arguing that these were matters "wholly within the realm of the managerial orbit."<sup>97</sup> There will be strong temptation to try to draw such a line in cases involving prices, production and other managerial policies affecting the employees. The analysis is less objectionable than the common law objectives test but it has many of the same faults. The conflict between management and union over their respective functions is scarcely more amenable to a hard and fast legal solution than their controversies over other issues.<sup>98</sup>

A wiser solution, more consonant with the philosophy of the NLRA, would be to leave the definition of the respective functions of management and union to the interplay of competitive forces but also to hold that the NLRA does not cut down state power to enact and enforce state laws governing the terms of collective bargaining agreements where the state law expresses a public concern for matters other than the method of resolving conflicts of interest between employers and employees or different groups of employees. Prior to 1935 the employer was largely free, under the conditions of modern industry, to dictate terms and conditions of employment not regulated by statute. The chief purpose of the NLRA was to encourage the growth of

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94. In addition to the cases cited in notes 87 and 89 *supra*, see *Bakery Sales Drivers Local Union No. 33 v. Wagshal*, 333 U.S. 437 (1948).

95. 162 F.2d 680 (7th Cir. 1947).

96. *NLRB v. Phoenix Mutual Life Ins. Co.*, 167 F.2d 983 (7th Cir. 1949).

97. *Id.* at 989. Cf. *Joanna Cotton Mills v. NLRB*, 176 F.2d 749 (4th Cir. 1949), holding that activity to procure the discharge of a foreman was, under the circumstances, the venting of personal spite and not "for the purposes of collective bargaining or other mutual aid and protection." The NLRB reached a similar conclusion in *Fontaine Converting Works, Inc.*, 77 N.L.R.B. 1386 (1948).

98. *Cox and Dunlop, Regulation of Collective Bargaining by the NLRB*, 63 HARV. L. REV. 389 (1950).



strong unions and spread the institution of collective bargaining, under which negotiations between the employer and employees as a group are substituted for the employer's dictate. The accomplishment of this purpose does not require federal preemption of the field against all state laws limiting what may be done by a labor union alone or by agreement between a union and an employer. This seems beyond dispute in the case of laws having general applicability, such as anti-trust laws,<sup>99</sup> insurance regulations and sundry criminal statutes; but state legislation regulating wages, hours or other terms and conditions of employment as such may present a more debatable question in view of the evidence that Congress preferred to have wages and hours fixed by "free collective bargaining" rather than direct government control.<sup>100</sup> So long as the state labor legislation does no more than fix the outside limits of a permissible bargain, however, the interference with the institution of collective bargaining is so slight that Congress cannot fairly be supposed to have withdrawn from the states power to establish fair labor standards. Surely a state statute limiting the hours of employment for women is not inapplicable to interstate industries because it may interfere with a union's wish to negotiate for a longer workweek at high overtime rates. A statute forbidding discrimination against women might prevent a union from negotiating contracts excluding women from certain kinds of employment; nevertheless it must be held valid even as applied to interstate industries. Note well, however, that the suggested principle permits the application of state law only when it is directed at the actual or supposed evils flowing from the prohibited arrangement. The NLRA blocks a state from attempting to deal with actual or supposed evils flowing from the processes of collective bargaining, including those of resort to economic weapons, when the industry is covered by the federal act. Thus a state law providing that a pension plan or welfare fund should not be made the subject of a collective bargaining agreement would be invalid as applied to interstate industries because the failure to outlaw all plans shows that the state is less concerned with the consequences of pension plans and welfare funds than with the method by which such terms of employment are arranged.<sup>101</sup>

Where these principles permit the application of a state law to employment in interstate industries, section 7 should not be interpreted to protect strikes, picketing and similar activities aimed at accomplishing a violation of

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99. *Commonwealth v. McHugh*, 93 N.E.2d 751 (Mass. 1950) *semble*; *Mayer Bros. Poultry Farms v. Meltzer*, 274 App. Div. 169, 80 N.Y.S.2d 874 (1948) *semble*.

100. SEN. REP. No. 105, 80th Cong., 1st Sess. 2, 13-14; 93 CONG. REC. 3835 (1947).

101. Some cases fall close to the line. I am inclined to the view that state regulations of the closed or union shop and limitations on the check-off deal with the institution of collective bargaining as a method of arranging terms and conditions of employment and therefore could not be applied to businesses affecting commerce in the absence of section 14(b). But there is obviously room for the opposite view.

the statute. Since workers resort to concerted action only because it increases their power to induce an employer to conform to their demands, Congress can scarcely have been supposed to put a higher value on concerted action than on its objectives. There is no reason, therefore, to interpret section 7 as securing a privilege to engage in concerted action in order to obtain objectives that the state has properly withheld.

It is of the utmost importance, however, not to confuse this conclusion with the common law objectives test. The unfortunate term "unlawful objective" describes at least three kinds of purposes:

(a) A purpose to induce another (usually the employer) to commit a crime, tort, or other breach of legal duty.<sup>102</sup> Probably this category should be broadened sufficiently to include the purpose of inducing another to engage in conduct which is against the declared public policy of the state but which is not prohibited by law.<sup>103</sup>

(b) A purpose to induce another to engage in conduct which is lawful and not contrary to public policy but which the court deems of insufficient benefit to the employees to justify a strike. For example, Massachusetts long adhered to the rule that closed shop contracts which were lawful and, when voluntarily executed, would be enforced by the courts, were nevertheless an unlawful objective of concerted labor activity.<sup>104</sup>

(c) A purpose to bring organized economic power to bear upon the decision of another in matters in which considerations of public policy require that he should have freedom of choice. For example, a state may wish to protect the community against the social and economic consequences of the destruction of small independent enterprises by large combinations of capital or labor.<sup>105</sup>

The proposed analysis holds that concerted activities for the first purpose may be forbidden by a state without conflict with section 7 even in industries affecting commerce.<sup>106</sup> Judicial opposition to concerted action in the second category was not based upon the employees' goal but upon concert of action as a method of achieving the goal. Under such a rule of decision or corresponding statute the employees are free to pursue their aim by other methods. The teaching of the passage quoted earlier from the opinion of Mr. Justice Jackson in the *Briggs-Stratton* case appears to be that the purpose of section 7 was to immunize employees against the impact of this doctrine.<sup>107</sup> It accords with our analysis.

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102. *E.g.*, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *R. H. White Co. v. Murphy*, 310 Mass. 510, 38 N.E.2d 685 (1942).

103. *E.g.*, *Building Service Employees Union v. Gazzam*, 339 U.S. 532 (1950); *cf.* *Hughes v. Superior Court*, 339 U.S. 460 (1950).

104. See note 68 *supra*.

105. *E.g.*, *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950).

106. There would remain the question whether the field of interstate commerce was preempted by section 8(b). I would give the same answer, but the issue is analytically different and no attempt has been made to deal with it in this article. See Cox and Seidman, *op. cit. supra*, 231-236, 241-243.

107. See p. 336 *supra*.

Cases falling in the third category are the most puzzling. Under the rule proposed a state which enacted a comprehensive law prohibiting any form of interference of technological advance, would have power to deal with union violations as well as others. The usual situation, however, is that the state leaves employers free to delay technological advances in order to prevent existing plants from becoming obsolescent too rapidly, permits unions to bargain for such delays so long as they do not resort to strikes or picketing, but enjoins concerted activity looking towards the accomplishment of such a purpose. In this situation the state policy condemns concert of action as such, but it differs from cases in the second category because here the condemnation may stem from a desire to avoid the consequences of the employer's yielding to the union pressure. The issue could easily go either way, but it would seem more consistent with the philosophy of section 7 to hold that the federal right to engage in concerted activities protects strikes, boycotts and picketing whose purpose is to achieve any objective of collective bargaining which has not been outlawed by the state. This may seem to make the application of section 7 depend upon state law but only in the sense that the federal guaranty goes to a method of self-help and is not concerned with establishing a uniform rule as to the terms permissible in a collective bargaining agreement.

Finally, an employer should not be guilty of an unfair labor practice if he disciplines strikers for engaging in concerted conduct which the applicable state law constitutionally forbids. Such a strike would not be concerted activity within the meaning of section 7.

## II

In an article already too long it would exhaust the reader's patience to discuss at length the respective responsibilities of the National Labor Relations Board and the courts in resolving questions concerning the meaning of "concerted activities." Yet the points already discussed are closely bound up with the question whether the courts should substitute independent judgment for NLRB rulings, merely giving weight to administrative opinion, or should affirm any NLRB determination that has "warrant in the record" and a reasonable basis in law."<sup>108</sup> Perhaps it will be permissible, therefore, to sketch a few suggestions.

Up to the present the courts have shown no tendency to defer to the NLRB. In the *Briggs-Stratton* case the Supreme Court noted that the union had argued that the "quickie" strikes should be held protected by section 7 "because that has become the settled interpretation of the Act by the

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108. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944).

Board charged with its administration."<sup>109</sup> The Court concluded that that was not the NLRB interpretation but went on to say:

However, in no event could the Board adopt such a binding practice as to the scope of § 7 in the light of the construction, with which we agree, given to § 7 by the Courts of Appeals, authorized to review Board orders.<sup>110</sup>

The *Hearst* case has been cited in none of the opinions in which the Board's application of section 7 has been reviewed by the courts of appeals. Under the precedents, therefore, the interpretation of "concerted activities" will be a matter for independent judicial determination.

With respect to many issues this conclusion is probably inevitable. Even though the cases on the scope of judicial review leave the court a broad range of discretion the factors influencing its choice can be identified. Professor Davis groups them under four heads: (a) the comparative qualifications of the court and administrative agency, (b) manifestations of an intent to delegate administrative power, (c) the generality or specificity of the issue, and (d) unarticulated preferences.<sup>111</sup> In deciding many of the issues concerning the meaning of "concerted activities" the relevant factors point towards independent judicial determination. The scope given to the phrase is likely to mark boundaries of state power, hence its interpretation involves the Court's traditional function of mediating between state and nation. This is particularly true, for example, of such questions as whether the states may enact either general or special laws affecting the terms that may be included in collective bargaining agreements. It is equally true of issues concerning the impact of section 7 on the common law objectives test. Even in the exclusive realm of the federal government the basic questions are as familiar to courts as to the Board. Thus, deciding what effect to give a related federal statute involves the kind of appraisal of the thrust and interplay of legislation that forms the bulk of present day adjudication in the federal appellate courts. There is also scant evidence that Congress desired to leave this sort of question to the NLRB even though it is vested with broad discretion in applying the basic statute. The questions obviously have a generality reaching far beyond the confines of a particular controversy. These factors make it exceedingly unlikely that the Court will invoke the rule of *Gray v. Powell*<sup>112</sup> in dealing with the major questions in this area, most of which are likely to come up from state tribunals without a litigated NLRB decision on the controversy.<sup>113</sup>

109. 336 U.S. 245, 255 (1949).

110. *Id.* at 257.

111. Davis, *Scope of Review of Federal Administrative Action*, 50 COL. L. REV. 560 (1950).

112. 314 U.S. 402 (1941).

113. In *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944), the Court noted that broad questions of statutory interpretation were for the courts to resolve "especially when arising in the first instance in judicial proceedings."

Nevertheless, there are two kinds of question upon which the courts, in my opinion, should defer to an NLRB decision. One kind involves applications of the general principle that conduct inconsistent with the recognized policies of the NLRA is not protected by section 7.<sup>114</sup> Once the principle is established that section 7 does not protect a strike the purpose of which is to interfere with collective bargaining by the majority representative, the bulk of the judicial task is done and the NLRB should decide what will be the effects of any particular strike under all the surrounding circumstances. This kind of question is one which those who are daily immersed in the problems of labor relations are most competent to resolve<sup>115</sup> and the judgment, when made, should have little importance for later cases. The issue is very similar, moreover, to questions which Congress committed to the Board as part of the day-to-day administration of the Act.

The second kind of question on which a measure of administrative finality seems appropriate involves drawing the line between permissible strikes and boycotts and improper methods of pursuing permissible objectives. The conduct of strikers ranges from name-calling to sabotage. A decision upon whether to grant or deny section 7 in this kind of case depends partly upon the seriousness of the wrong, in its context, and partly upon one's estimate of the probability that withdrawing the protection of section 7 would deter repetition. The Board ought to be better equipped to answer these questions than a court; and since no two cases will be quite alike, there is no occasion to worry about the precedent value of a decision.

There is a good deal to be said for treating in like fashion questions concerning the protection of employees who engage in "quickies," slow-downs and similar forms of peaceful economic pressure. Whether to grant them protection, and how much protection to grant, depends upon a nice appraisal of their place in industrial relations. Quite apart from the lack of forthrightness in the opinion, the *Hoover* case<sup>116</sup> resulted, in my personal opinion, in a shocking decision. Nevertheless, that which offends the moral sensibilities of an academician may have a different quality when judged by the standards of the industrial world. By virtue of its experience the Board should be better versed in that than any other body. Despite these considerations it seems probable that the courts will find it necessary to substitute independent judgment on questions of this character. They will often come up from a state court, as in the *Briggs-Stratton* litigation, and therefore will require judicial determination without a litigated decision from the NLRB. Furthermore, un-

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114. See p. 328 *supra*.

115. *Cf. NLRB v. Standard Oil Co.*, 138 F.2d 885, 887-888 (2d Cir. 1943).

116. 90 N.L.R.B. No. 201, LAB. REL. REP. (Ref. Man.) 1365 (1950). See p. 338 *supra*.

like the cases discussed in the preceding paragraph, the rulings not only will have general application but will furnish precedents for related issues.

Where so many of the questions are inappropriate for administrative finality, it is likely that the courts will substitute their judgment for that of the NLRB in all cases turning on the interpretation of section 7. Perhaps such a consequence is preferable to refinements giving the NLRB the last word on some questions and the courts the power to make the final judgment on others. Nevertheless it is to be hoped that the courts will give great weight to administrative opinions on those questions within the special experience and competence of the NLRB.

## DOCUMENTS

With this issue The Indiana Law Journal institutes a new department, a Documents section. The failure of current legal periodicals to devote space to documentary materials may well mean that papers of genuine legal and historical value never become available even to the scholar, certainly not to the general reader. The student who turns up in his researches primary source material must wait upon the day when he may have an opportunity to publish a treatise or article upon which that material bears. The section here inaugurated is designed to fill the gap, to provide an immediate outlet for these items of interest.

No rigid standard will be established to determine what documents will be selected for publication; variety seems desirable. Any item not generally available elsewhere and significant in that it treats an important legal or governmental problem, historic or modern, or throws light upon the life or thought of an important man will meet the test.

Introductory comments and annotations will supply data concerning provenance, will place the document in its setting, and will assess its significance.