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The Supreme Court Takes One Step Forward and the NLRB Takes One Step Backward: Redefining Constructive Concerted Activities

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RECENT DEVELOPMENTS

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I. INTRODUCTION

The National Labor Relations Act (NLRA or the Act)[1] governs the relationship between employers and employees in the United States.[2] Specifically, section 7 of the Act[3] defines the basic rights of employees and section 8(a)[4] defines employer unfair labor practices. Section 8(a)(1) generally proscribes employers from interfering with employees in the exercise of section 7 rights.[5] Thus, many unfair labor practice cases turn on whether section 7 of the Act protects the employee activity.[6] Section 7 protects *"concerted activities"* engaged in "for the purpose of collective bargaining or

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1. 29 U.S.C. §§ 151-169 (1982).

2. *See id.* § 151 (declaration of United States labor relations policy); *see also* § 1(b) of the Labor Management Relations Act of 1947, which amended the NLRA:

> It is the purpose and policy of this [Act], in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141(b) (1982).

3. 29 U.S.C. § 157 (1982). Section 7 provides:

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

Id.

4. Section 8(a) states in relevant part:

> It shall be an unfair labor practice for an employer— (1) to interfere witb, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or to contribute financial or other support to it . . . ;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;
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> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;
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> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(a) (1982).

5. *Id.* § 158(a)(1); *see supra* noto 4.

6. *See generally* Note, *The Sixth Circuit Spurns* Interboro *and the Doctrine of Constructive Concerted Activity*—ARO, Inc. v. NLRB *Leaves Non-Union Employees at the Mercy of Their Bosses*, 11 U. TOL. L. REV. 1045, 1051-53 (1980) (noting role of NLRB and courts to interpret scope of § 7).

other mutual aid or protection."[7] Courts frequently struggle to determine whether given employee activities with which an employer has interfered are "concerted activities."[8] This determination is particularly difficult when one employee acts alone instead of with other employees.

The National Labor Relations Board (NLRB or the Board) formally announced the doctrine of constructive concerted activities[9] in 1966 in *Interboro Contractors, Inc.*[10] Under this doctrine an individual employee's attempt to enforce a provision of a collective bargaining agreement is "concerted activity" even if the attempt does not contemplate group action.[11] During the years since the Board promulgated the *Interboro* doctrine, the circuit courts split on the issue of whether and in what circumstances individual activity could constitute concerted activity.[12] The Supreme Court recently resolved the conflict by approving the *Interboro* doctrine in *NLRB v. City Disposal Systems, Inc.*[13] Although the *Interboro* doctrine is theoretically inapplicable in a nonunion context,[14] the Board established a collateral doctrine in 1975 in *Alleluia Cushion*

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7. 29 U.S.C. § 157 (1982) (emphasis added). See *supra* note 3 for the full text of § 7.

8. *See generally* Johnson, *Protected Concerted Activity in the Non-Union Context: Limitations on the Employer's Rights to Discipline or Discharge Employees*, 49 Miss. L.J. 839, 851 (1978) ("[T]he determination of concerted status is the threshold question upon which federal statutory protection hinges.").

9. As used in this Recent Development, actual concerted activities would be those activities in which more than one employee engages, while constructive concerted activities would be those activities in which an individual employee engages that nonetheless fall within the meaning of § 7.

10. 157 N.L.R.B. 1295 (1966) (2-1 decision), *enforced*, 388 F.2d 495 (2d Cir. 1967).

11. *See id.* at 1298; 388 F.2d at 500.

12. *See infra* notes 31-69 and accompanying text.

13. 104 S. Ct. 1505 (1984) (5-4 decision), *rev'g* 683 F.2d 1005 (6th Cir. 1982) (per curiam), *rev'g* 256 N.L.R.B. 451 (1981).

14. Because the *Interboro* doctrine provides that an individual's activity to enforce provisions of an existing collective bargaining agreement is concerted activity, the doctrine would appear to be inapplicable in situations in which there is no collective bargaining agreement. Courts, nonetheless, have applied the doctrine of constructive concerted activity to unionized companies in which there is no existing collective bargaining agreement. *See, e.g,* Keokuk Gas Serv. Co. v. NLRB, 580 F.2d 328 (8th Cir. 1978) (absence of a collective bargaining agreement in a union context did not render an employee's threat to file a grievance unprotected by § 7 of the NLRA); NLRB v. Ben Pekin Corp., 452 F.2d 205 (7th Cir. 1971) (per curiam) (applying *Interboro* in union context despite absence of a collective bargaining agreement). Most courts, however, have declined to extend the doctrine in the absence of a collective bargaining agreement. *See, e.g.*, Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980) (finding no foundation for constructive concerted activity in absence of collective bargaining agreement); Anchortank, Inc. v. NLRB, 618 F.2d 1153 (5th Cir. 1980) (individual employee's activities do not have the requisite effect on other employees essential to the *Interboro* standard absent a collective bargaining agreement).

Co.[15] In *Alleluia Cushion* the Board held that individual activity seeking to enforce statutory occupational safety rights was concerted activity absent a showing that other employees disavowed the activity.[16] No circuit court ever approved the *Alleluia Cushion* doctrine and the Board recently overruled it in *Meyers Industries*.[17]

This Recent Development examines the doctrine of constructive concerted activities in union and nonunion contexts in light of both the Supreme Court's approval of the *Interboro* doctrine and the NLRB's rejection of *Alleluia Cushion*. Part II traces the history of NLRB and circuit court application of the constructive concerted activities doctrine in union and nonunion contexts. Part III discusses the *City Disposal* and *Meyers Industries* decisions. Part IV analyzes these decisions individually and conjuctively and examines the ramifications of the current "definition" of individual concerted activities. Finally, part IV of this Recent Development argues that the two decisions together result in an inconsistent application of section 7 protection to individual "concerted" activities and suggests a consolidated *City Disposal-Alleluia Cushion* analysis for constructive concerted activities issues in both union and nonunion settings.

II. Legal Background

A. *Constructive Concerted Activities in the Union Context*

1. The *Interboro* Doctrine

Section 7 of the NLRA protects "concerted activities for the purpose of collective bargaining or other mutual aid or protec-

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15. 221 N.L.R.B. 999 (1975).

16. *Id.* at 1000.

17. 268 N.L.R.B. 493 (1984) (3-1 decision), *rev'd and remanded sub nom.* Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985) (2-1 decision).

The United States Court of Appeals for the District of Columbia reversed *Meyers Industries* on the grounds that the Board "misconstrued the bounds" of § 7, 755 F.2d at 942, and that the Board's decision lacked an adequate rationale, *id.* at 948. The court, however, did not express an opinion on the correct definition of "concerted activities," *id.* at 942, 948 n.46, 956, 957, but remanded the case for the Board's reconsideration. This Recent Development focuses on the Board's decision and analysis in *Meyers Industries* despite the D.C. Circuit's reversal because the D.C. Circuit's discussion of "concerted activities" was only dicta, the NLRB has continued to employ the *Meyers Industries* test, the Board is scheduled to reconsider *Meyers Industries* late in 1985 or early in 1986, and on remand the Board may adhere to its holding in *Meyers*. See *infra* notes 169-80 and accompanying text for a discussion of the D.C. Circuit's opinion. *See also infra* note 215 for Board decisions that continue to apply *Meyers Industries* after the D.C. Circuit reversal.

tion."[18] In early cases decided under the NLRA the Board and the courts required at least two employees acting together to find concerted activity.[19] In 1960 the United States Court of Appeals for the Sixth Circuit inferred concerted activity when employees discussed among themselves their complaints about a new foreman but complained individually to management.[20] The Board actually formulated what is known as the *Interboro* doctrine in 1962 in *Bunney Brothers Construction Co.*[21] In *Bunney Brothers* the Board held that section 7 of the NLRA protected as concerted activity an individual employee's assertion of a claim arising from a collective bargaining agreement.[22]

Although *Bunney Brothers* stated the essence of the constructive concerted activity doctrine, courts and commentators associate the origin of the doctrine with *Interboro Contractors, Inc.*[23] This doctrine, which has spawned so much controversy, ironically originated as dictum in a two to one Board decision.[24] In *Interboro*

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18. 29 U.S.C. § 157 (1982). For the full text of § 7, see *supra* note 3.

19. *See* Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 752 (4th Cir. 1949) ("concerted activities" not requiring union or other formal organization, but employees "acting together for mutual aid or protection"); *see also* 2 J. JENKINS, LABOR LAW § 7.53, at 397 (1969) ("[T]he Board has uniformly held that there must be two or more employees engaged in [concerted] activity."). *See generally* Note, *The Requirement of "Concerted" Action Under the NLRA*, 53 COLUM. L. REV. 514, 516 (1953) (declaring that "[t]he decisions indicate that an act, to he concerted, need only be motivated by a common purpose or community of interest *shared by at least two employees*") (emphasis added).

20. NLRB v.Guernsey-Muskingum Elec. Coop., Inc., 285 F.2d 8 (6th Cir. 1960). The court stated:

> The mere fact tbat the men did not formally choose a spokesman or that they did not go together to see . . . [their manager] does not negative concert of action. It is sufficient to constitute concert of action if from all of the facts and circumstances in the case a reasonable inference can be drawn that the men involved considered that they had a grievance and decided, among themselves, that they would take it up with management.

Id. at 12.

21. 139 N.L.R.B. 1516 (1962).

22. *Id.* at 1519. The Board concluded that in asserting a claim under the terms of a collective bargaining agreement, the employee "sought to implement the collective-bargaining agreement applicable to him as well as other drivers and . . . the implementation of such an agreement by an employee is but an extension of the concerted activity giving rise to that agreement." *Id.*

Interestingly, this precursor to the *Interboro* doctrine appears to reach farther than *Interboro* itself. *Bunney Brothers* arose in a contractor-subcontractor context. The discharged employee worked for the subcontractor, Bunney Brothers. The relevant collective bargaining agreement was between the contractor (Western) and the Teamsters. Although tbe Teamsters had not organized the Bunney Brothers employees, the Board concluded that the Teamsters' agreement governed Bunney, too. *See id.* at 1516-19.

23. 157 N.L.R.B. 1295 (1966) (2-1 decision), *enforced*, 388 F.2d 495 (2d Cir. 1967).

24. *See Interboro*, 157 N.L.R.B. at 1298, 1305.

an employer discharged two employees for complaining about an alleged violation of certain working condition provisions of the collective bargaining agreement.[25] The Board held that the employees had engaged in protected concerted activities, but noted that the assertion of collective bargaining agreement provisions would have been concerted even if one of the employees had acted alone.[26] According to the Board, "complaints made for such purposes are grievances within the framework of the contract that affect the rights of all employees in the unit, and thus constitute concerted activity which is protected by Section 7 of the Act."[27] The United States Court of Appeals for the Second Circuit enforced the Board's decision and order,[28] agreeing that individual activity aimed at enforcing existing collective bargaining agreement provisions "may be deemed to be for concerted purposes even in the absence of interest by fellow employees."[29] The Second Circuit has

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25. The trial examiner recommended dismissing the complaint against Interboro after concluding that one of the employees alone had voiced the complaints. *Id.* at 1310 n.15. The trial examiner asserted further that the employee had acted "not for any legitimate union or concerted objective but . . . for his own personal selfish benefit and aggrandizement." *Id.* at 1311. The Board disagreed with the trial examiner's findings and asserted that the record showed three employees had made complaints. The Board went on to posit that even if the one employee had acted alone, his complaints would constitute protected activity because he was attempting to enforce provisions of the collective bargaining agreement. *Id.* at 1298. The employees had leveled complaints against alleged violations of collective bargaining agreement provisions ensuring two-man welding teams, payment terms, and various safety and other standard procedures. The employees also attempted to secure eight-hour days and expense money. The collective bargaining agreement did not address these last two alleged rights. The Board, however, maintained that the employees' attempt to obtain benefits not provided for by the collective bargaining agreement did not change the Board's conclusion. *Id.* at 1299 n.7.

26. *Id.* at 1298; *see also supra* note 25.

27. *Interboro*, 157 N.L.R.B. at 1298. The Board appeared to establish an "effect" standard of constructive concerted activity by emphasizing the effect on other employees' rights rather than a purpose of protecting those rights. The Board did not address expressly the § 7 requirement that the "concerted activity" be "for the *purpose* of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1982) (emphasis added). Rather, the Board implied that the assertion of contract rights constituted an extension of the collective bargaining process. *See supra* note 22 and accompanying text.

Other circuits have construed *Interboro* as an "effect" test. *See, e.g.*, Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1160 (5th Cir. 1980); Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708 (1st Cir. 1975). *But see* Note, *Protection of Individual Action as "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 384-85 (1983) (arguing that subsequent applications of an "effect" test were misapplications of *Interboro*).

28. *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967).

29. *Id.* at 500. Although the Second Circuit agreed with the Board's decision, the Second Circuit stated the holding as a possibility, not as a certainty, and emphasized purpose rather than effect. *See supra* note 27. The court stated that "[e]ven if it were true that [the employee] was acting for his personal benefit, it is *doubtful* that a selfish motive negates the

continued to uphold the *Interboro* doctrine.[30]

Two other circuits have accepted the *Interboro* analysis. The United States Court of Appeals for the Eighth Circuit has employed the doctrine of constructive concerted activity in a number of cases.[31] The United States Court of Appeals for the Fourth Circuit in *Owens-Corning Fiberglas Corp. v. NLRB*[32] alluded to the doctrine of constructive concerted activities in dicta. In *Roadway Express, Inc. v. NLRB*[33] the Fourth Circuit actually approved the doctrine, without opinion, by enforcing a Board order.

2. The Ensuing Circuit Court Split

In *NLRB v. Northern Metal Co.*[34] the United States Court of Appeals for the Third Circuit became the first circuit court to refuse to adopt the *Interboro* doctrine.[35] The court held that an employee's attempt to secure holiday pay under a collective bargain-

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protection that the Act normally gives to Section 7 rights." 388 F.2d at 499 (emphasis added).

30. *See* Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980) (dicta); NLRB v. John Langenhacher Co., 398 F.2d 459, 463 (2d Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969).

31. The Eighth Circuit employed the *Interboro* approach to constructive concerted activity in several cases but never endorsed the *Interboro* doctrine per se. *See, e.g.*, Keokuk Gas Serv. Co. v. NLRB, 580 F.2d 328, 333 (8th Cir. 1978) (individual employee threatening to present a grievance in the absence of a collective bargaining agreement engaged in concerted activity); NLRB v. Sencore, Inc., 558 F.2d 433, 434 (8th Cir. 1977) (per curiam) ("The requirement of concertedness relates to the end, not the means."); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217, 221 (8th Cir. 1970) (individual employee presenting a grievance under the collective bargaining agreement engaged in concerted activity). *But cf.* NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1083 (8th Cir. 1977) (2-1 decision) (refusing to extend *Interboro* analysis to a noncollective bargaining agreement context).

32. Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357 (4th Cir. 1969). The court stated that "[t]he activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity. The one seldom exists without the other." *Id.* at 1365.

33. 532 F.2d 751 (4th Cir. 1976), *enforcing mem.* 217 N.L.R.B. 278 (1975). The Board, in its decision and order, held that an individual employee's refusal to drive a truck that he considered to be unsafe was concerted activity because the existing collective bargaining agreement gave the employees the right to refuse to drive unsafe trucks. 217 N.L.R.B. at 278-79. Citing *Interboro*, the Board stated that the employee's complaint was relevant to the other employees under the bargaining agreement. *Id.* at 279.

The Fourth Circuit later appeared to back away from its *Roadway Express* endorsement of *Interboro*. In Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 309 (4th Cir. 1980), the court indicated that it did not have to "determine in this case whether *Interboro* is to be applied in this Circuit" because there was no collective bargaining agreement.

34. 440 F.2d 881 (3d Cir. 1971) (2-1 decision).

35. Until *Northern Metal*, 440 F.2d at 881, no circuit court, other than the Second Circuit, had expressly followed or rejected the *Interboro* doctrine. In 1970 the Eighth Circuit applied a constructive concerted activities analysis in *Selwyn Shoe*, 428 F.2d at 217, but the court did not mention *Interboro*. *See supra* note 31 and accompanying text.

ing agreement was not concerted activity.[36] Instead of following *Interboro*, the Third Circuit adhered to a test requiring that individual concerted activity be for the purpose of initiating, inducing, or preparing for group action.[37] Thus, *Northern Metal* created the initial circuit court split over the *Interboro* doctrine,[38] which widened considerably in succeeding years.

The Third Circuit continued to reject the *Interboro* doctrine in subsequent cases. *In Tri-State Truck Service, Inc. v. NLRB*[39] the court held that two employees who individually refused to work weekends without time and a half pay were not engaged in concerted activity because their individual activities did not aim to induce group action.[40] The court noted that two or more employees are not necessarily acting concertedly when they react to a situation similarly or take the same courses of action.[41] In *Wheeling-Pittsburgh Steel Corp. v. NLRB*[42] the Third Circuit stated that the *Interboro* doctrine did not apply when two employees together had

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36. *Northern Metal*, 440 F.2d at 884-85.

37. *Id.* at 884. The Third Circuit followed a pre-*Interboro* Third Circuit decision that held that an employee's discussions with other employees concerning their rights under the existing collective bargaining agreement was not concerted activity because there was no indication of contemplated group action. *See* Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 684-85 (3d Cir. 1964). The Third Circuit declared in *Mushroom Transportation* that "mere talk" was an individual activity. *Id.* at 685. According to the court, if "mere talk" did not contemplate group action, then it probably was "mere 'griping.'" *Id.*

The Third Circuit also relied on Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967), a pre-*Interboro* case, in which the Seventh Circuit extended the *Mushroom Transportation* approach from discussions to other activities. The court held that individual activity must have the purpose of preparing for or inducing group activity to be concerted activity under § 7. *Id.* at 276. Ironically, a few months after the Third Circuit handed down the *Northern Metal* decision, the Seventh Circuit adopted the *Interboro* doctrine and extended it to cover a noncollective bargaining agreement situation. *See* NLRB v. Ben Pekin Corp., 452 F.2d 205 (7th Cir. 1971) (per curiam); *infra* notes 59-60 and accompanying text.

38. For in depth discussions of the initial *Interboro-Northern Metal* split, see Note, *The* Interboro *Doctrine of "Constructive" Concerted Activity—A Logical Interpretation of Section 7 of the NLRA or a Legal Fiction?*, 7 J. CORP. L. 75, 84-86 (1981); Comment, *Constructive Concerted Activity and Individual Rights: The* Northern Metal-Interboro *Split*, 121 U. PA. L. REV. 152 (1972).

39. 616 F.2d 65 (3d Cir. 1980) (2-1 decision).

40. *Id.* at 68, 71.

41. *Id.* at 71. The *Tri-State* court also noted that an employee discharge and a finding of protected concerted activity did not automatically require the finding of a § 8(a)(1) violation. *Id.* Had the court found concerted activity the court also would have required employer knowledge of the concerted activity and a causal connection between the activity and the discharge or discipline for a § 8(a)(1) violation. *Id.*; *see also* McLean Trucking Co. v. NLRB, 689 F.2d 605, 610 (6th Cir. 1980); Southwest Latex Corp. v. NLRB, 426 F.2d 50, 56 (5th Cir. 1970).

42. 618 F.2d 1009 (3d Cir. 1980).

refused to work in what they considered to be unsafe conditions.[43] Without invoking the *Interboro* doctrine, the court found that the employees had engaged in concerted activity.[44] In *Frank Briscoe Inc. v. NLRB*[45] the Third Circuit upheld a Board determination that employees who filed charges with the Equal Employment Opportunity Commission were engaged in concerted activity.[46] The court, however, was careful to point out that the Board had not based its conclusion on the *Interboro* doctrine.[47]

In *ARO, Inc. v. NLRB*[48] the Sixth Circuit allied with the Third Circuit in rejecting the *Interboro* doctrine. Stating that the *Interboro* doctrine was an overly expansive reading of NLRA section 7, the court adhered to a modified version of its pre-*Interboro* test for constructive concerted activity that required activity with or on the authority of other employees.[49] The Sixth Circuit maintained this posture by refusing to adopt the *Interboro* doctrine in a number of subsequent cases[50] including *City Disposal Systems*.[51]

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43. *Id.* at 1017 n.14. The employees were asserting rights under § 14(C) of the collective bargaining agreement, which provided that employees who believed their working conditions were abnormally unhealthy or unsafe could refuse to work without losing their right to return to their jobs. *Id.* at 1012.

44. *Id.* at 1017.

45. 637 F.2d 946 (3d Cir. 1981) (2-1 decision).

46. *Id.* at 949.

47. *Id.* at 949 & n.4. The court adhered to *Wheeling-Pittsburgh, Tri-State,* and *Northern Metal,* and to the "contemplated group action" test for concerted activity the court announced in *Mushroom Transportation. Id.*; *see supra* note 37.

48. 596 F.2d 713 (6th Cir. 1979).

49. *Id.* at 717. The Sixth Circuit indicated later in its opinion that an individual complaint or claim could be concerted activity if the employee acted as a representative for or on behalf of other employees *or* if the employee acted "with the object of inducing or preparing for group action," and the claim or complaint had "some arguable basis in the collective bargaining agreement." *Id.* at 718.

The court had adopted the first prong of this test in NLRB v. Guernsey-Muskingum Elec. Coop., Inc., 285 F.2d 8 (6th Cir. 1960). *See* Note, *supra* note 6, at 1063-67 (discussing Sixth Circuit's retention in *ARO* of its narrow *Guernsey-Muskingum* test); *see also supra* note 20 and accompanying text. The second prong appears identical to the Third Circuit's standard in *Mushroom Transportation,* 330 F.2d at 684-85. *See supra* note 37 and accompanying text. In formulating the second prong, however, the *ARO* court did not cite *Mushroom Transportation* or any other authority as support. 596 F.2d at 718.

50. *See* Bay-Wood Indus., Inc. v. NLRB, 666 F.2d 1011 (6th Cir. 1981) (per curiam) (individual employee who complained about unsafe working conditions but did not file a grievance as provided in the collective bargaining agreement was acting on his own behalf and was not engaged in concerted activity); *cf.* McLean Trucking Co. v. NLRB, 689 F.2d 605 (6th Cir. 1982) (2-1 decision) (individual employee who, with union support, refused to drive a truck he considered unsafe was engaged in concerted activity). In *McLean* the court delineated three factors relevant to the determination of whether an individual activity was concerted:

(1) the substance of the employee's activity—did he act alone, without union advice or

The United States Court of Appeals for the Fifth Circuit likewise rejected the *Interboro* doctrine in a series of cases. The court initially declined to apply the *Interboro* doctrine in *Buddies Supermarkets*.[52] Although the court stated in *Buddies Supermarkets* that *Interboro* was not applicable because there was no collective bargaining agreement,[53] subsequent opinions used the *Buddies Supermarkets* "rejection" as support for nonacceptance of the doctrine.[54] After the reorganization of the Fifth Circuit, the United

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did he seek to involve and inform other employees; (2) the degree of union involvement in and concern with the dispute—was a grievance filed, were union officials notified; (3) the subject of the complaint—did it have at least an arguable basis in the collective bargaining agreement or was it merely a personal dispute.

Id. at 609.

51. 683 F.2d 1005 (6th Cir. 1982) (per curiam), *rev'd*, 104 S. Ct. 1505 (1984) (5-4 decision); *see infra* notes 91-143 and accompanying text.

52. 481 F.2d 714 (5th Cir. 1973); *see also* Note, *supra* note 6, at 1063-70.

53. 481 F.2d at 719. The court stated that "regardless of our analysis of *Interboro* the result remains the same." *Id.*

54. *See, e.g.*, NLRB v. Datapoint Corp., 642 F.2d 123 (5th Cir. 1981); Scooba Mfg. Co. v. NLRB, 694 F.2d 82 (5th Cir. 1982) (per curiam), *cert. denied*, 104 S. Ct. 1706 (1984). In *Datapoint* the court cited *Buddies Supermarkets* and adopted the *Mushroom Transportation* standard, which requires contemplation of group action. 642 F.2d at 128-29; *see supra* note 37 (*Mushroom Transporation* test). Like the situation in *Buddies Supermarkets*, unions had not organized the employees of *Datapoint* and *Scooba*. The Fifth Circuit, however, did not base its rejection of the constructive concerted activity doctrine on the absence of a collective bargaining agreement. The *Datapoint* court expressed its rationale by declaring:

> [W]e would not overrule *Buddies Supermarkets* even if we could do so. The Board asks us to set too far-reaching a precedent, one by which virtually any action taken by a single employee in any way related to wages, hours or the terms and conditions of employment would be considered protected concerted activity. If Congress had intended Section 7 to be used so broadly, it certainly could have done so with much more definite language, and courts would have discovered that intent long ago.

642 F.2d at 129.

But see Anchortank, Inc. v. NLRB, 618 F.2d 1153 (5th Cir. 1980). In *Anchortank* an employee requested union representation at an investigatory interview with his employer. *Id.* at 1156. At the time of the employee's request, the union had been elected but neitber certified nor voluntarily recognized. *Id.* The Fifth Circuit implied in dicta that *Interboro* might have become an accepted doctrine as a result of the Supreme Court's decision in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), which the court said weakened the *Buddies Supermarkets* precedent. 618 F.2d at 1161. In *Weingarten* the Supreme Court held that an individual employee had engaged in concerted activity under § 7 when he requested a union representative to be present at an investigatory meeting the employer conducted. 420 U.S. at 260. The Supreme Court said that even though only the one employee had an immediate stake in the outeome of his request for the presence of a union representative,

> [H]e seeks "aid or protection" against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview.

States Court of Appeals for the Eleventh Circuit rejected the *Interboro* doctrine in *Roadway Express, Inc. v. NLRB*.[55] The Eleventh Circuit noted that it was bound by the decisions of the former Fifth Circuit Court of Appeals,[56] which had declined to accept the *Interboro* doctrine.[57] Thus, the Eleventh Circuit adopted a rule requiring individual concerted activity "to initiate, induce, or prepare for group action or relate to group action in the interest of other employees."[58]

Two other circuits originally accepting the *Interboro* doctrine abandoned it in subsequent cases. The Seventh Circuit initially agreed with the Second Circuit's holding in *Interboro* and even applied the doctrine to a situation in which there was a certified union but no collective bargaining agreement.[59] In a later case involving an existing bargaining agreement, however, the court used the old collective activity standard rather than *Interboro* to determine that an employee's solicitation of support from his fellow employees for his pending grievance was concerted activity.[60] Thus, the Seventh Circuit presumably abandoned the *Interboro* doctrine. Similarly, the Ninth Circuit agreed in principle with the *Interboro* doctrine in *C & I Air Conditioning*,[61] but found insufficient evidence that the employee's complaint was for the purpose of mutual

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Id. at 260-61 (footnote omitted). The Supreme Court went on to state that the NLRB's construction of § 7 effectuated the most fundamental purposes of the NLRA. *Id.* at 261.

The Fifth Circuit, however, declared in *Anchortank* that *Weingarten* was not controlling because the union was not the certified bargaining representative at the time of the employee's request. 618 F.2d at 1160. The Fifth Circuit, describing itself as bound by precedent, later declined to recognize either the significance of the *Interboro* dicta in *Anchortank* or any effect of *Weingarten* on the interpretation of § 7. *See Datapoint*, 642 F.2d at 129.

55. 700 F.2d 687 (11th Cir. 1983).

56. *Id.* at 693. Because of the reorganization of the Fifth Circuit in 1981, *see* Fifth Circuit Court of Appeals Reorganization Act of 1980, §§ 1, 9, 9(1), 9(2), 28 U.S.C. § 41 (1982), the decisions of that circuit court as handed down on or before September 30, 1981, are binding on the Eleventh Circuit. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

57. *See supra* notes 52-54 and accompanying text.

58. *Roadway Express*, 700 F.2d at 694.

59. NLRB v. Ben Pekin Corp., 452 F.2d 205, 206 (7th Cir. 1971) (per curiam); *see supra* note 14 and accompanying text.

60. The court stated that the activity was concerted because it " 'was for the purpose of inducing or preparing for group action to correct a grievance or a complaint.' " Dries & Krump Mfg. Co. v. NLRB, 544 F.2d 320, 327 (7th Cir. 1976) (quoting Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967)). In *Ben Pekin* the court distinguished the case from *Indiana Gear Works* on the grounds that the employee's acts in *Indiana Gear Works* constituted a public and contemptuous venting of a personal grievance instead of an attempt to secure a benefit for all employees. NLRB v. Ben Pekin Corp., 452 F.2d 205, 206-07 (7th Cir. 1971) (per curiam).

61. NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 978 (9th Cir. 1973).

aid or protection and, thus, did not hold the activity concerted under *Interboro*.[62] In a subsequent case that concerned employee consultation with a union representative about an overtime pay dispute, the court found the *Interboro* doctrine inapplicable because the employee had involved the union in his activities.[63] The court held the employee's activity to be concerted without resorting to the *Interboro* "fiction."[64] In 1983 the Ninth Circuit explicitly rejected the *Interboro* doctrine in *Royal Development Co. v. NLRB*.[65]

While the United States Court of Appeals for the District of Columbia expressed reservations about the *Interboro* doctrine,[66] the D.C. Circuit never rejected the doctrine expressly.[67] Dicta in the D.C. Circuit opinions, however, indicate that the court favors a more strict interpretation of section 7 than the *Interboro* doctrine reflects.[68]

By the time *City Disposal* reached the Supreme Court, the circuits were divided on the validity of the *Interboro* doctrine. The majority of the circuits, however, had rejected the doctrine.[69]

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62. *Id.* The court placed its emphasis not on the "effect" of the activities but on their "purpose." *See supra* notes 27-29 and accompanying text (discussing "purpose" and "effect" interpretations of the *Interboro* doctrine).

63. NLRB v. Adams Delivery Serv., Inc., 623 F.2d 96, 100 (9th Cir. 1980).

64. *Id.* The court emphasized the employee's resort to union assistance, asserting that "[o]ur decisions indicate a strong preference that the established grievance procedure be used to resolve employment disputes, and to hold otherwise would ignore the importance of the counseling function which the union serves in these matters." *Id.* For a discussion of the utility of the grievance arbitration procedure in individual concerted activity cases, see *infra* notes 193-98 and accompanying text. *See also* Callaway, *Refurbishing the Grievance Procedure Under Collective Bargaining*, 35 LAB. L.J. 481 (1984); Robins, *Unfair Dismissal: Emerging Issues in the Use of Arbitration as a Dispute Resolution Alternative for the Nonunion Workforce*, 12 FORDHAM URB. L.J. 437 (1984).

65. 703 F.2d 363, 374 (9th Cir. 1983). The court noted that without the *Interboro* doctrine, the employee had not engaged in concerted activity within the ambit of § 7 because he had acted by and for himself without the union's assistance. *Id.* Thus, even though rejecting *Interboro*, the court emulated the Second Circuit's approach of emphasizing the purpose rather than the effect of an employee's actions under § 7. *See supra* notes 27-29 and accompanying text.

66. Other circuits have interpreted these reservations as indicating outright rejection by the D.C. Circuit. *See, e.g.*, Roadway Express, Inc. v. NLRB, 700 F.2d 687, 694 n.9 (11th Cir. 1983); City Disposal Sys., Inc. v. NLRB, 683 F.2d 1005, 1008 (6th Cir. 1982), *rev'd*, 104 S. Ct. 1505 (1984). *See generally* Note, *supra* note 38, at 86-88.

67. *See* American Freight Sys., Inc. v. NLRB, 722 F.2d 828, 833 (D.C. Cir. 1983); Kohls v. NLRB, 629 F.2d 173, 177 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

68. Kohls v. NLRB, 629 F.2d 173, 177 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

69. To summarize, the Second, Fourth, and Eighth Circuits favored the doctrine, and the rest of the circuits either expressly rejected or otherwise refused to apply it. The First and Tenth Circuits never actually ruled on the doctrine. *But cf.* NLRB v. Empire Gas, Inc.,

B. *Constructive Concerted Activities in the Nonunion Context: The* Alleluia Cushion *Doctrine*

The *Interboro* doctrine technically is not applicable in the nonunion context because of the absence of a collective bargaining agreement.[70] The NLRB, nonetheless, propounded a constructive concerted activity doctrine for nonunion settings in 1975 in *Alleluia Cushion Co.*[71] The employee in *Alleluia Cushion* complained about alleged employer safety violations and without the assistance or express consent of other employees, filed complaints with the California Occupational Safety and Health Agency.[72] The Board found that the employee had engaged in concerted activities because all employees were concerned with occupational health and safety.[73]

No circuit adopted the *Alleluia Cushion* doctrine and two circuits expressly rejected it.[74] Despite this lack of support from the circuit courts, the Board, awaiting Supreme Court resolution of the issue,[75] continued to apply the doctrine in succeeding cases.[76] The

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566 F.2d 681 (10th Cir. 1977) (individual employee's solicitation of support from fellow employees for a work stoppage held concerted); Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706 (1st Cir. 1975) (individual employee's expression of interest in unionization held concerted because the employee had the welfare of other employees in mind).

70. *See supra* note 14. The NLRA itself protects employees in both unionized and nonunionized organizations. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

71. 221 N.L.R.B. 999 (1975).

72. *Id.* at 999.

73. *Id.* at 1000. The Board stated that "where an employee . . . seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted." *Id.* The Board supported its finding further by noting that the nature and extent of the safety complaints the employee filed indicated that his concern was not only for himself but also for his fellow employees. *Id.* at 1000-01. Thus, the Board found the mere assertion of statutory rights in the nonunion context constructively concerted, as it had found the assertion of collective bargaining agreement rights in the union context in *Interboro.*

74. In 1977 the Eighth Circuit rejected the *Alleluia Cushion* doctrine in NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1083 (8th Cir. 1977). The Nintb Circuit rejected the doctrine in 1980 in NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980). *See also* Bohlander, *Employee Protected Concerted Activity: The Nonunion Setting*, 33 LAB. L.J. 344, 346-47 (1982). Both the Fourth and Seventh Circuits, without mentioning the *Alleluia Cushion* doctrine, have held an individual employee's complaints about certain terms and conditions of employment not to be concerted activities. *See* Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980) (employee's refusal to forego workers compensation claim not concerted activity); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980) (employee's complaints about job risks and overtime not concerted activity).

75. *See* Hotel and Restaurant Employees and Bartenders Union, Local 28, 252 N.L.R.B. 1124, 1124 (1980) ("[W]e respectfully decline to adopt the Ninth Circuit's rejection of that [*Alleluia Cushion*] principle until such time as the Supreme Court may deter-

Board applied the *Alleluia Cushion* doctrine in cases concerning employee complaints about job safety,[77] unhealthy working conditions,[78] and sex discrimination.[79] The Board also applied the doctrine in cases in which an employee acted out of concern over payroll funds and payments,[80] when an employee filed an unemployment compensation claim,[81] and when an employee filed a grievance for denial of seniority rights and alleged racial discrimination.[82]

Thus, in cases following *Alleluia Cushion* but preceding *Meyers Industries*[83] the Board applied the *Alleluia Cushion* doctrine

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mine the issue.").

76. The Board's adherence to *Alleluia Cushion* was adamant. The Board repeatedly cited its decision in NLRB v. Dawson Cahinet Co., 228 N.L.R.B. 290, *enforcement denied*, 566 F.2d 1079 (8th Cir. 1977), as support for later *Alleluia Cushion* cases, despite the Eighth Circuit's express rejection of *Alleluia Cushion* in its *Dawson Cabinet* opinion. *See, e.g.*, Pink Moody, Inc., 237 N.L.R.B. 39, 40 (1978); General Teamsters Local Union No. 528, 237 N.L.R.B. 258, 261 (1978). The Board likewise continued to apply *Alleluia Cushion* after the Ninth Circuit expressly rejected it. Hotel and Restaurant Employees and Bartenders Union, Local 28, 252 N.L.R.B. 1124, 1124 (1980).

77. Pink Moody, Inc., 237 N.L.R.B. 39 (1978) (employee refused to drive a truck that had defective brakes).

78. Akron Gen. Medical Center, 232 N.L.R.B. 920 (1977) (employee complained about lint and dust in laundry work area).

79. Dawson Cabinet Co., 228 N.L.R.B. 290 (employee filed a sex discrimination complaint with the Wage and Hour Division of the Department of Labor), *enforcement denied*, 566 F.2d 1079 (8th Cir. 1977); Diagnostic Center Hosp. Corp., 228 N.L.R.B. 1215 (1977) (employee wrote a letter to corporate officials protesting "racism, sexism, and favoritism"); Hotel and Restaurant Employees and Bartenders Union, Local 28, 252 N.L.R.B. 1124 (1980) (employee filed a sex discrimination complaint with the California Fair Employment Practices Commission).

80. Ambulance Serv. of New Bedford, Inc., 229 N.L.R.B. 106 (1977) (employee demanded payment in cash because of repeated difficulties cashing employer's payroll checks); Air Surrey Corp., 229 N.L.R.B. 1064 (1977) (2-1 decision) (employee inquired at employer's bank whether employer had sufficient funds to cover upcoming payroll distribution).

81. Self Cycle & Marine Distrib. Co., 237 N.L.R.B. 75 (1978). The Board found concerted the employee's claim for unemployment compensation benefits for a period during which she was laid off. *Id.* at 75. The Board asserted that it was attempting to effectuate the whole scheme of national labor policy, which included unemployment benefits. *Id.* at 75 & nn.1-3. The Board noted also that the employee-employer dispute over such a claim was a matter of common interest to the other employees. *Id.* at 75-76.

82. General Teamsters Local Union No. 528, 237 N.L.R.B. 258 (1978). The Board affirmed the conclusion of the Administrative Law Judge (ALJ) that both the employee's grievance concerning denial of seniority and the employee's racial discrimination complaint to the Equal Employment Opportunity Commission constituted concerted activities. *Id.* at 260. In his opinion and recommended order, the ALJ noted that "the right of employees to be free from racial discrimination by an employer or union must be accorded the same primacy and protection as the right to safe working conditions" and that the Board generally recognizes the "purposes of other legislation and [construes] the Act in a manner supportive of other statutory schemes." *Id.* at 261.

83. Meyers Indus., Inc., 268 N.L.R.B. 493 (1984) (3-1 decision), *rev'd and remanded*

to employee assertions of both statutory and nonstatutory rights. The NLRB applied *Alleluia Cushion* to cases in which the employee complained to a governmental agency[84] and to cases in which the employee complained only to the employer.[85] The Board, as it had done with the *Interboro* doctrine, began applying the *Alleluia Cushion* doctrine in both union and nonunion contexts. What began as a doctrine protecting individual employee assertions of statutorily protected occupational health and safety rights in a nonunion, no collective bargaining agreement context became a doctrine protecting individual employee assertions of any claimed right of common interest to fellow employees even in a union, collective bargaining agreement context.[86]

III. Recent Developments

Both the United States Supreme Court and the NLRB have decided cases recently that interpret the definition of "concerted activities" under section 7 of the NLRA differently. The Supreme Court in *NLRB v. City Disposal Systems, Inc.* [87] resolved the circuit court split over the *Interboro* doctrine. In *City Disposal* the Court addressed for the first time the question of whether an individual's assertion of a right grounded in a collective bargaining agreement constitutes concerted activity within the meaning of section 7 of the NLRA. The Court held that an individual em-

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sub. nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985) (2-1 decision); *see infra* notes 144-68 and accompanying text.

84. *See* Hotel and Restaurant Employees and Bartenders Union, Local 28, 252 N.L.R.B. 1124 (1980) (California Fair Employment Practices Commission); General Teamsters Local Union No. 528, 237 N.L.R.B. 258 (1978) (Equal Employment Opportunity Commission).

85. *See* Akron Gen. Medical Center, 232 N.L.R.B. at 927 (1977). The Board adopted the ALJ's opinion, which asserted:

> Even though . . . [*Alleluia Cushion*] involved the filing of a complaint with the California OSHA Office, I see no distinction between that case and the instant case where the employee complained to the employer rather than to a governmental agency. As in *Alleluia*, the complainant herein sought to compel Respondent to comply with standards concerning occupational safety.

Id.

86. *See* General Teamsters Local Union No. 528, 237 N.L.R.B. 258 (1978) (applying *Alleluia Cushion* to individual employee's filing of a grievance with the union protesting his denial of seniority rights); Akron Gen. Medical Center, 232 N.L.R.B. 920, 921 (1977) (applying *Alleluia Cushion* to employee's complaint of lint and dust in work area in union-collective bargaining agreement context). *See generally* Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286, 303-09 (1981) (discussing history of the *Alleluia Cushion* doctrine).

87. 104 S. Ct. 1505 (1984) (5-4 decision).

ployee's reasonable and honest assertion of a collective bargaining agreement right is concerted activity.[88] The NLRB in *Meyers Industries, Inc.*[89] overruled the *Alleluia Cushion* doctrine. The Board reverted to a standard requiring that concerted activity be with or on behalf of other employees, not merely by or on behalf of an individual employee.[90]

A. NLRB v. City Disposal Systems, Inc.

In *City Disposal* an employee refused to drive a truck he believed to have defective brakes.[91] As a result of this refusal City Disposal discharged the employee.[92] Under the existing collective bargaining agreement between City Disposal and the Teamsters, employees could refuse to operate unsafe equipment without violating the bargaining agreement, if the employees could justify their refusals.[93] The employee then filed a charge alleging that the employer had committed a section 8(a)(1) unfair labor practice. After the initial hearing the Administrative Law Judge (ALJ) concluded that, absent a showing that the employee's complaint was not "honestly held,"[94] his refusal to drive the truck constituted concerted activity.[95] The NLRB summarily affirmed the ALJ's

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88. *Id.* at 1516.

89. 268 N.L.R.B. 493, *rev'd and remanded sub. nom.* Prill v. NLRB, 755 F.2d 941 (1985).

90. *Id.* at 495-96.

91. *City Disposal*, 104 S. Ct. at 1509. The employee did not expressly invoke the relevant bargaining agreement provision to support his refusal.

92. *Id.*

93. *Id.* at 1507-08. Article XXI of the collective bargaining agreement provided:

> The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

Id. Article XXI also provided that "[t]he Employer shall not ask or require any employee to take out equipment that has heen reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department." *Id.* at 1508 n.1.

94. City Disposal Sys., Inc., 256 N.L.R.B. 451, 454 (1981) (quoting United Parcel Serv., 241 N.L.R.B. 1074, 1077 (1979), *enforcement denied sub. nom.* Kohls v. NLRB, 629 F.2d 173 (D.C. Cir. 1980)), *enforcement denied*, 683 F.2d 1005 (6th Cir. 1982), *rev'd*, 104 S. Ct. 1505 (1984). The ALJ relied upon Roadway Express, Inc., 217 N.L.R.B. 278 (1975), *enforced mem.*, 532 F.2d 751 (4th Cir. 1976). *See supra* note 33 and accompanying text.

95. *City Disposal*, 256 N.L.R.B. at 454. The ALJ also cited the Board's decision in McLean Trucking Co., 252 N.L.R.B. 728 (1980), *enforced*, 689 F.2d 605 (6th Cir. 1982) (2-1 decision), as support for the "honestly held" belief requirement. *United Parcel* had required that an employee's invocation of collective bargaining rights must be "honestly held." 241 N.L.R.B. at 1077. *McLean Trucking* had required that the employee's assertion be "honestly and reasonably believed." 252 N.L.R.B. at 733; *see also* NLRB v. John Langenbacher

finding in favor of the discharged employee. On appeal the Sixth Circuit reversed, adhering to its *ARO* concertedness standard,[96] which requires activity on behalf of other employees or at least with the object of preparing for or inducing group action.[97]

The Supreme Court reversed the Sixth Circuit's holding in a five to four decision.[98] The Court defined its task as determining whether the Board's interpretation and application of section 7 were reasonable.[99] In making this determination, the Court noted that neither City Disposal nor the Sixth Circuit denied that an individual employee's invocation of a collective bargaining agreement right satisfied the requirement that the action be "for the purpose of collective bargaining or other mutual aid or protection."[100] According to the Court, the disagreement between the Board and the Sixth Circuit concerned the definition of "concerted activities." Recognizing that the Act does not define "concerted activities," the Court asserted that the term clearly includes activities of employees who have united to further common goals.[101] The Court, therefore, set out to articulate "the precise manner in which particular

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Co., 398 F.2d 459, 463 (2d Cir. 1968) (requiring a "reasonable basis" for an employee's interpretation of a collective bargaining agreement), *cert. denied*, 393 U.S. 1049 (1969). In both *United Parcel* and *McLean Trucking* the relevant collective bargaining agreement provisions contained the exception for unjustified refusals. Apparently, the collective bargaining agreement language has been the primary source of the "honestly held" or justifiable belief requirement. Neither circuit court opinion discussed the employee's belief, but focused on the issue of concertedness. In *McLean* the Sixth Circuit discussed the justifiable refusal language, but did so in rejecting the employer's contention that the employees violated the collective bargaining agreement by unjustifiably refusing to drive vehicles that were safe. 689 F.2d at 611.

96. *See* ARO, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979).

97. 683 F.2d 1005, 1007 (6th Cir. 1982) (per curiam), *rev'd*, 104 S. Ct. 1505 (1984); *see supra* notes 48-51 and accompanying text (tracing Sixth Circuit's treatment of the *Interboro* doctrine).

98. Justice Brennan wrote the opinion for the majority, in which Justices White, Blackmun, Marshall, and Stevens joined.

99. 104 S. Ct. at 1510. The Court declined to waive the normal standard of review and deferred to the Board's expertise, even though the case presented the Court with a question fundamental to the scope and coverage of the Act. *Id.* at 1510 n.7. The Court referred to NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), stating that "we have not hesitated to defer to the Board's interpretation of the Act in the context of issues substantially similar to that presented here." *Id.* In *Weingarten* the Court approved the Board's construction of § 7 "concerted activities" to cover an individual employee's request for union representation at an investigatory interview the employer conducted. *See supra* note 54 (discussing the effect of *Weingarten* on the Fifth Circuit's analysis of the *Interboro* doctrine); *infra* note 184 (discussing separate issue of union or co-employee representation at employee interview).

100. 104 S. Ct. at 1510.

101. *Id.* at 1511. The Court cited the Board's decision in *Meyers Industries* for this proposition. *See infra* notes 144-68 and accompanying text.

actions of an individual employee must be linked to the actions of fellow employees" to constitute concerted activities.[102]

The majority began its analysis with a discussion of the *Interboro* doctrine. The Court noted the dual underpinnings of the constructive concerted activity doctrine: (1) that the assertion of a collective bargaining agreement right is an extension of the concerted activity that gave rise to the agreement, and (2) that this assertion affects all employees covered by the agreement.[103] The Court characterized the collective bargaining process, including the organization of the bargaining unit, collective negotiations, and implementation of the resulting agreement, as one collective activity.[104] The Court said, further, that the individual employee could not assert his rights without the preceding collective bargaining steps and that collective bargaining itself would be useless without the individual employee's right to enforce the agreement.[105] The Court concurred with the second principle underlying the *Interboro* doctrine by concluding that an employee asserting a collective bargaining right does not act alone, but rather "brings to bear on his employer the power and resolve of all his fellow employees."[106]

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102. 104 S. Ct. at 1511.

103. *Id.* at 1510-11. The first principle originated in *Bunney Brothers*, and the second principle had its roots in *Interboro*. *See supra* note 22 and accompanying text (extension of collective bargaining agreement); *see also supra* text accompanying note 27 (rights of all employees affected).

104. 104 S. Ct. at 1511. The Court cited Conley v. Gibson, 355 U.S. 41 (1957), in which it had characterized collective bargaining as a "continuing process" involving "the protection of employee rights already secured by contract." 355 U.S. at 46.

105. 104 S. Ct. at 1511. The Court seemed to imply that the collective bargaining agreement would be ineffective if an individual employee could not enforce the provisions of the agreement without union assistance. A collective bargaining agreement, however, usually establishes a procedure for enforcement of the mutual duties and obligations that the agreement secures. The most common mechanism for self-enforcement is the grievance arbitration process. *See* J. ATELSON, R. RABIN, G. SCHATZKI, H. SHERMAN & E. SILVERSTEIN, COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT 459 (2d ed. 1984) ("A study by the U.S. Bureau of Labor Statistics has revealed that 99 percent of 1,717 major contracts provided for a grievance procedure.").

106. 104 S. Ct. at 1511. Applying this statement to the facts in *City Disposal*, the Court stated:

> When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks . . . . [and] that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks.

The Court next analyzed the language of section 7. The Court observed that Congress had deemed employees' individual actions in joining or assisting labor organizations to be concerted activities because of "the integral relationship among the employees' actions."[107] The Court said there was an analogous integral relationship between the collective bargaining activity and the individual assertion of collective rights. The Court asserted that in each case, neither the group nor the individual activity would be meaningful without the other.[108]

The Court continued by asserting that the *Interboro* doctrine was consistent with the objectives of the NLRA.[109] Admitting that neither the Act nor its legislative history clarifies the meaning of "concerted activities," the Court asserted that the general history of section 7 indicates that the *Interboro* doctrine is consistent with the intent of the Act.[110] The Court provided no express support for its proposition that Congress intended to provide equal bargaining power between individual employees and employers, but relied simply on the absence of contrary evidence.[111] Specifically, the Court asserted that there was "no indication that Congress intended to limit this [section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way . . . [or] to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process."[112]

Id. at 1511-12.

107. *Id.* at 1512. The Court had noted, in an earlier footnote, that because § 7 referred to "other concerted activities," the forming, joining, and assisting of labor organizations were deemed to be concerted activities already enumerated in § 7. *Id.* at 1511 n.8; see *supra* note 3 for the full text of § 7.

108. *Id.* at 1512. In a footnote, the Court conceded that "at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity." *Id.* at n.10. As an illustration the Court cited Capitol Ornamental Concrete Specialties, Inc., 248 N.L.R.B. 851 (1980) (employee's "griping" about the condition of the employees' road and parking lot not concerted activity).

109. 104 S. Ct. at 1512.

110. *Id.* at 1512-13. The Court emphasized that equalization of bargaining power between the employer and the employees was the general intent of the Act. Commentators also have struggled with the frustrating lack of legislative history. *See* Note, *supra* note 62, at 376-77 & n.40.

111. 104 S. Ct. at 1513.

112. *Id.* The Court summarized by stating that Congress did intend "to create an equality in bargaining power between the employer and the employee throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining

The Court next considered the role of the grievance procedure in employee collective bargaining agreement enforcement. The Court noted both the importance of the grievance mechanism and the inherently concerted nature of processing a grievance according to the provisions of an existing collective bargaining agreement.[113] The Court said that there is little practical difference between an employee's grievance, complaint to his employer, or refusal to perform work. The Court rejected the notion that the availability of a formal grievance mechanism for dispute resolution precludes section 7 protection of other, informal methods of collective rights enforcement.[114] The Court concluded by stating that an employee's refusal to perform duties not required by the collective bargaining agreement should be deemed concerted activity when the employee satisfies two requirements. First, the employee must base his conduct on a "reasonable and honest belief." Second, the employee must reasonably direct his conduct "toward the enforcement of a collectively bargained right."[115]

Similarly, the Court rejected City Disposal's argument that the *Interboro* doctrine undermines the grievance arbitration process. City Disposal contended that, using the *Interboro* doctrine, an employee could avoid the arbitration process by provoking a discharge and filing a section 8(a)(1) unfair labor practice charge.[116] The Court rebuffed this argument on three grounds. First, an employee intentionally attempting to bypass grievance arbitration by relying on the *Interboro* doctrine runs the risk that the NLRB will find "concerted activities" but not *protected* "concerted activities" under section 7.[117] Second, the *Interboro* doctrine

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agreements." *Id.*

113. *Id.*; *see also supra* note 64; *infra* notes 193-98 and accompanying text (discussing grievance mechanisms).

114. 104 S. Ct. at 1513-14. The Court acknowledged that an employee's initial reaction to a perceived violation of a collective bargaining agreement right would likely be an informal complaint to the employer. The employee might decide later to file a formal grievance, depending upon the nature of the infringed right, the employer's response to the initial complaint, and the existence of a grievance procedure or alternative method of enforcement. The Court explained that, for various reasons, an employer's infringement of an employee's collective bargaining agreement rights might not result in the filing of a formal grievance. *Id.* at 1514.

115. 104 S. Ct. at 1514. The Court noted that, whenever an employee meets these two requirements, "there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity, just as he would have been had he filed a formal grievance." *Id.*

116. *Id.*; *see also supra* notes 4-5 and accompanying text (discussing the relationship between § 7 and § 8(a)(1) of the Act).

117. 104 S. Ct. at 1514. The Court recognized the possibility that "concerted activi-

does not undermine the arbitration process any more than would the test that the Sixth Circuit had used. City Disposal had argued in favor of the Sixth Circuit's *ARO* test, which would classify as concerted any individual activity on behalf of other employees or for the purpose of inducing or preparing for group action.[118] According to the Court, an employee acting concertedly under *ARO* is "equally well positioned" to invoke the grievance or arbitration mechanism as an employee acting concertedly under *Interboro*; the *Interboro* doctrine, therefore, no more interferes with the arbitration process than would the *ARO* doctrine.[119] Third, the Board always can defer to an applicable grievance arbitration process when issues addressed in an unfair labor practice case either were or could have been raised in arbitration.[120] The Court, therefore, concluded that the Board's interpretation of section 7 "concerted activities" as expressed in the *Interboro* doctrine poses no inherent danger to the usefulness of the grievance arbitration mechanism.

Applying the *Interboro* doctrine to the facts in *City Disposal*, the Court held that the employee's reasonable and honest invocation of a collective bargaining agreement right was concerted activity.[121] The Court made this determination over two of City Disposal's arguments. City Disposal argued, first, that the employee's

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ties" might nevertheless fall outside the protective scope of § 7. An employee might lose § 7 protection for otherwise "concerted activities" if such activities are violent or otherwise unlawful, *see, e.g.*, Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984), constitute insubordination, *see, e.g.*, Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724 (5th Cir. 1970); Yellow Freight Sys., Inc., 247 N.L.R.B. 177 (1980), or are disloyal to the employer, *see, e.g.*, NLRB v. Local Union No. 1229, 346 U.S. 464 (1953). *See generally* Johnson, *supra* note 8, at 869-76.

The Court noted that the employer also has the option of negotiating a collective bargaining provision to prohibit certain types of concerted activity. A common example is the no-strike agreement. Although striking is concerted activity, § 7 protection does not cover strikes in violation of a no-strike clause. *See* 104 S. Ct. at 1514; *see also* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (no-strike agreement operates as effective waiver of economic henefit strikes but not as waiver of unfair labor practice strikes).

118. *See supra* notes 48-51 and accompanying text (discussing the Sixth Circuit's holding and analysis in *ARO, Inc.* and its subsequent application).

119. 104 S. Ct. at 1515. The Court correctly noted that both the *Interboro* and the *ARO* doctrines "undermin[e]" the grievance arbitration process. *Id.* It seems undeniable, however, that the *Interboro* doctrine has the potential for greater erosion of the process than does *ARO* hecause *Interboro* grants employees more opportunities to sidestep the grievance mechanism.

120. *Id.* In support of this principle, the Court cited Collyer Insulated Wire, 192 N.L.R.B. 837 (1971) and Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). *See infra* notes 208-10 and accompanying text (noting the Board's recent return to the broad deferral policies of *Collyer* and *Spielberg*).

121. 104 S. Ct. at 1516. The Court decided only whether the employee's activity was concerted; the issue whether the activity was also protected was not before the Court. *Id.*

refusal to drive the truck was not concerted activity because he did not base his refusal explicitly on the collective bargaining agreement.[122] The Court rejected this contention, stating that: (1) the NLRB and the courts never have conditioned the applicability of the *Interboro* doctrine on an employee's express reference to a collective bargaining agreement right,[123] and (2) this condition would diminish greatly the protection that the doctrine affords to employees, who often are unversed in collective bargaining agreement matters.[124] City Disposal argued, second, that the language of the collective bargaining agreement provisions excluding "unjustified" refusals[125] meant that only employee refusals to drive trucks that were in fact unsafe should be deemed "concerted."[126] The Court declined to express a view on City Disposal's interpretation of the collective bargaining agreement language, stating that the *Interboro* doctrine will deem to be concerted activity "honest and reasonable invocation[s] of a collectively bargained right . . . regardless of whether the employee turns out to have been correct in his belief that his right was violated."[127] The Court summarized by holding that the *Interboro* doctrine, which "recognizes as concerted activity an individual employee's reasonable and honest invocation of a right provided for in his collective-bargaining agree-

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122. *See supra* note 91.

123. 104 S. Ct. at 1515. The Board never has required that an employee refer explicitly to an applicable collective hargaining agreement right for *Interboro* to apply. *See* Roadway Express, Inc., 217 N.L.R.B. 278, 279 (1975) (employee's refusal to drive an allegedly unsafe truck deemed concerted activity despite the fact that "he did not at the time of his refusal specifically refer to the contract as granting him this right . . . ."), *enforced mem.*, 532 F.2d 751 (4th Cir. 1976).

124. 104 S. Ct. at 1515. The Court announced a standard for employee articulation of collective bargaining rights:

> As long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement.

Id.

125. *See supra* note 93 (text of relevant collective bargaining agreement provision).

126. 104 S. Ct. at 1516; *see also* McLean Trucking Co. v. NLRB, 689 F.2d 605, 611 (6th Cir. 1982) (rejecting an argument indentical to City Disposal's argument in the instant case).

127. 104 S. Ct. at 1516. The Court observed that the filing of a grievance is concerted even if it is not meritorious. The Court, however, noted that the language of the collective bargaining agreement ultimately controls whether an activity will be protected. If an agreement allows only employee refusals to operate trucks that are *in fact* unsafe, then neither the agreement nor § 7 will protect refusals to operate *safe* trucks. *Id.*; *see supra* note 117 and accompanying text (distinction between "concerted" activity and "protected concerted" activity).

ment," is a reasonable interpretation of the NLRA and applies to make the City Disposal employee's individual refusal to drive an allegedly unsafe truck concerted activity.[128]

The dissent[129] labeled the *Interboro* doctrine an "exercise in undelegated legislative power by the Board."[130] Specifically, the dissent argued that the *Interboro* doctrine, in effect, automatically transforms every employee allegation of an employer collective bargaining agreement violation into an unfair labor practice charge. The dissent recognized two problems arising from this transformation. First, the dissent cited precedent stating that an alleged employer violation of a collective bargaining agreement cannot by itself provide adequate grounds for an unfair labor practice.[131] In the dissent's view, the *Interboro* doctrine would allow an employer's alleged collective bargaining agreement violation to form the sole basis of a section 8(a)(1) unfair labor practice complaint. Second, the dissent argued that the doctrine essentially grants the Board jurisdiction over collective bargaining agreement disputes and thus violates congressional intent.[132] The dissent criticized what it termed the extension of the Board's jurisdiction to "interpreting all contracts" and "resolving all contract disputes."[133]

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128. 104 S. Ct. at 1516.

129. Justice O'Connor authored the dissenting opinion, in which Chief Justice Burger, Justice Powell, and Justice Rehnquist joined.

130. 104 S. Ct. at 1517 (O'Connor, J., dissenting).

131. *Id.* The dissent cited NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967) and Dowd Box Co. v. Courtney, 368 U.S. 502, 513 (1962). In *C & C Plywood* the Court noted that Congress did not enact into law a proposed provision of the NLRA that would have made employer collective bargaining agreement violations unfair labor practices. 385 U.S. at 427 & n.11. In *Dowd Box* the Court said, "Congress expressly rejected . . . the proposal that such [collective bargaining agreement] violations be made unfair labor practices." 368 U.S. at 513; *see infra* notes 202-06 and accompanying text.

132. 104 S. Ct. at 1517 (O'Connor, J., dissenting). The dissent urged again that Congress intended the Board to have jurisdiction over contractual disputes only when they are incident to other, independent unfair labor practice claims. The dissent stressed that "Congress expressly decided that, '[o]nce [the] parties have made a collective bargaining contract[,] the enforcement of that contract should be left to the usual processes of the law and not to the . . . Board.' " *Id.* (quoting H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 42, *reprinted in* 1947 U.S. CODE CONG. SERV. 1135, 1147). Even though the dissent did not refer to § 130 of the NLRA, that section may provide further evidence of congressional intent to preempt Board jurisdiction over any employment contract dispute resolution that is not appurtenant to a separate unfair labor practice claim. Section 130 provides that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a) (1982).

133. 104 S. Ct. at 1517 (O'Connor, J., dissenting). The dissent's concern that *any* contract dispute will provide the basis for an unfair labor practice complaint is overblown. Its

According to the dissent, the majority's willingness to recognize individual triggering of collective bargaining provisions was particularly disturbing because the *Interboro* doctrine does not require an employee to invoke expressly or even to be aware of the relevant contract right.[134] The dissent was dissatisfied with the majority's reliance on the Board's power to defer to an existing grievance process.[135] The dissent noted that the Board did not defer to the grievance process in *City Disposal*, even though the union had declined to process the employee's grievance for lack of objective merit.[136]

The dissent also disagreed with the majority's conclusion that the *Interboro* doctrine was consistent with the purposes of the NLRA. The dissent stressed that the Act's purpose was not to encourage collective bargaining but rather to encourage group activity. The dissent concluded, therefore, that "[t]he fact that two employees receive coverage where one acting alone does not is therefore entirely consistent with the labor laws' emphasis on collective action."[137] The dissent also disagreed with the majority's ar-

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analysis fails to realize that, in many *Interboro*-type situations, the alleged unfair labor practice is not the employer's supposed violation of the collective bargaining agreement, but the employer's discharge of the employee. While the Board should not have primary jurisdiction over the former complaint, it should over the latter. In *City Disposal* the employee claimed that City Disposal committed an unfair labor practice by *discharging* him, not by violating Article XXI of the collective bargaining agreement, which lay at the heart of the employer-employee dispute. *See City Disposal*, 683 F.2d at 1006, 104 S. Ct. at 1508. For the text of Article XXI of the *City Disposal* collective bargaining agreement, see *supra* note 93. The ultimate resolution of the controversy in *City Disposal*, as in any firing case, would concern the substance of the dispute that led to the employee's discharge. A contract dispute, however, would provide the basis for a § 8 charge under the *Interboro* doctrine only if the dispute resulted in other employer conduct that offended to § 7 rights.

A discharge could fall, in and of itself, under § 8(a)(1), if a collective bargaining provision prohibited employee discharge for particular conduct or for certain reasons. In these cases, the fact that the parties negotiated over the question and provided expressly for it in their collective bargaining agreement would not, and should not, preclude the Board's jurisdiction.

134. 104 S. Ct. at 1517 & n.3 (O'Connor, J., dissenting). The dissent said: "One would think that a rule defining 'concerted activity' would require the employee to have some idea that he is engaging in it." *Id.* For the majority view, see *supra* notes 123-24 and accompanying text.

135. *Id.* at 1517 n.4 (O'Connor, J., dissenting). For the majority view, see *id.* at 1515; *see also supra* note 120 and accompanying text.

136. *Id.* at 1517 n.4 (O'Connor, J., dissenting) (citing *id.* at 1509). The dissent averred that the NLRB does not defer to grievance and arbitration procedures consistently. *See infra* notes 208-10 and accompanying text (discussing the Board's changing deferral policies).

137. *Id.* at 1518 (O'Connor, J., dissenting) (citing NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967); Republic Steel Corp. v. Maddox, 370 U.S. 650, 653 (1965)).

gument that an individual, self-interested assertion of a collective bargaining agreement right must be concerted because the employees as a group expressed interest in the right during the contract negotiation process.[138] The dissent criticized this argument for failing to distinguish between substantive contract rights and the procedure for their enforcement. According to the dissent, when employees act together for a mutual cause, whether or not it is based in the collective bargaining agreement, those actions are "concerted activities." When an individual employee acts alone in furtherance of a personal cause, whether or not the action is based on the collective bargaining agreement, the action is not "concerted" activity. Thus, the dissent postulated that the real question is not whether the employee's substantive rights will be vindicated, but rather through which forum or procedure the employee should seek redress. The dissent argued that "concerted activities" should be processed through the NLRB's administrative procedures and that individual activities should be processed through either the union or the courts.[139]

In conclusion, the dissent stated that the *Interboro* doctrine made little sense when applied to the facts in *City Disposal.* The dissent found significant the absence of any evidence that the discharged employee discussed the truck with other employees, warned them about the alleged unsafe conditions, sought the support or assistance of other employees in the union, or filed a grievance immediately after the incident.[140] The dissent, therefore, concluded that the discharged employee had not been engaged in "concerted" activity and the employer had not violated section 8(a)(1). Although the dissent viewed the *Interboro* doctrine as an unreasonable interpretation of section 7, the dissent did not adopt the position that no individual activity could be "concerted."[141] Rather, the dissent postulated that an individual who "acts with or

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138. 104 S. Ct. at 1518 (O'Connor, J., dissenting). For the majority view, see *id.* at 1510-12; *see also supra* notes 101-08 and accompanying text.

139. *Id.* at 1518 (O'Connor, J., dissenting). The dissent contended that "[t]he *Interboro* doctrine is therefore against Congress' judgment as to how contract rights are best vindicated." *Id.* at 1519 (O'Connor, J., dissenting).

140. *Id.* at 1519 (O'Connor, J., dissenting). The dissent claimed that the employee "simply asserted that the truck was not safe enough for *him* to drive." *Id.* (emphasis in original). It determined that "[t]he fact that the right asserted can be found in the collective bargaining agreement may be relevant to whether activity of that type should be 'protected,' but not to whether it is 'concerted.' " *Id.*

141. *Id.* The dissent agreed with the majority that the critical issue concerns the exact nature of the relationship between the actions of the individual employee and the actions of the other employees. *Id.* For the majority view, see *id.* at 1511.

expressly on behalf of one of more of the other employees . . . [or] takes action with the proven object of inducing, initiating, or preparing for group action" is engaged in concerted activity.[142] Thus, the dissent sided with the circuits that had rejected the *Interboro* doctrine and had adopted the *ARO* test.[143]

B. Meyers Industries, Inc.

The Board, in *Meyers Industries, Inc.*,[144] overruled the *Alleluia Cushion* doctrine, a "corollary" to the *Interboro* doctrine. In *Meyers Industries* the Administrative Law Judge had relied on *Alleluia Cushion* and concluded that the employer's discharge of an employee who refused to drive an unsafe truck after reporting its condition to a state safety agency was a violation of section 8(a)(1).[145] The Board rejected both the ALJ's conclusions and the *Alleluia Cushion* doctrine, returning to a "united-action interpretation of 'concerted activity.' "[146]

The Board began its opinion by discussing the history of the Board's interpretation of "concerted activities" prior to *Alleluia Cushion*.[147] The Board noted that, in pre-*Alleluia Cushion* deci-

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142. *Id.* at 1519 (O'Connor, J., dissenting).

143. *See supra* notes 48-51 and accompanying text (discussing the Sixth Circuit's *ARO* test for "concerted activities").

144. 268 N.L.R.B. 493 (1984) (3-1 decision), *rev'd and remanded sub. nom.* Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985) (2-1 decision). Members Dotson, Hunter, and Diaz Dennis comprised the Board's majority.

145. 268 N.L.R.B. at 493. The discharged employee had complained to his employer on numerous occasions about malfunctions of the truck he drove. The employee experienced problems primarily with the truck's braking and steering systems. During one of the employee's many interstate roadtrips from his base in Michigan, he voluntarily stopped for inspection in Ohio after the brakes malfunctioned. Ohio State roadside inspectors cited the truck for several defects, including defects in the braking system. On the occasion that gave rise to the employee's discharge, the defective brakes caused the employee to have an accident. After this accident the employee notified the Tennessee Public Service Commission, which inspected the truck, issued a citation for bad brakes, and put the truck out of service until repaired. Shortly thereafter, the vice president of Meyers discharged the employee, telling him: " '[W]e can't have you calling the cops like this all the time.' " *Id.* at 498.

146. *Id.* at 493. The D.C. Circuit disagreed with the Board's statement that it was returning to its pre-*Alleluia Cushion* standard. *Prill*, 755 F.2d at 948; *see infra* notes 172-74 and accompanying text.

147. 268 N.L.R.B. at 493-95. The Board discussed Root-Carlin, Inc., 92 N.L.R.B. 1313, 1314 (1951) (noting that "the guarantees of Section 7 . . . extend to concerted activity which *in its inception involves only a speaker and a listener*, for such activity is an indispensable preliminary step to employee self-organization."); Traylor-Pamco, 154 N.L.R.B. 380, 388 (1965) (emphasizing the lack of evidence that "there was any consultation between the two [employees] in the matter, that either relied in any measure on the other in making his refusal, or that their association . . . was anything but accidental."); and Continental Mfg., 155 N.L.R.B. 255, 257 (1965) (holding an individual employee's letter unconcerted

sions, it defined concerted activities "in terms of interaction among employees."[148] The Board next discussed *Alleluia Cushion* and its "per se standard" of concerted activity.[149] The Board outlined four reasons for its conclusion that the *Alleluia Cushion* per se standard is inconsistent with the NLRA. First, the Board criticized the *Alleluia Cushion* doctrine's effect of shifting attention from actual to hypothetical employee action.[150] Under the *Alleluia Cushion* doctrine, instead of finding concerted activity only when employees took action to pursue a common health and safety concern, the Board could find concerted activity whenever, because of health and safety legislation, the employees *should have had* a common concern. Second, the Board noted that subsequent Board decisions exacerbated this defect by extending the doctrine to any situation in which the employees should have had a common concern, even when no relevant legislation existed.[151] Third, the Board objected to the rule under *Alleluia Cushion* that required employers to negate otherwise concerted individual action by showing that other employees disavowed the discharged employee's action. The majority disapproved of this effective shift of the General Counsel's burden of proof to the employer.[152] Last, the Board cited circuit court rejection of the per se standard as further grounds for overruling *Alleluia Cushion.*[153]

The Board next enunciated an " 'objective' standard of concerted activity," which requires that an individual employee's activity "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[154] The

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because she directed it only to the employer, prepared it alone, did not consult with fellow employees or the union, and did not intend to enlist the support of other employees or the union).

148. 268 N.L.R.B. at 494.

149. *See supra* notes 72-86 and accompanying text (discussing *Alleluia Cushion* and the Board's application of the *Alleluia Cushion* doctrine).

150. 268 N.L.R.B. at 495.

151. *Id. See supra* notes 77-86 and accompanying text (discussing the Board's extension of the scope of the *Alleluia Cushion* doctrine).

152. 268 N.L.R.B. at 496. The Board quoted the relevant language from *Alleluia Cushion*, which provides that the Board will deem concerted individual employee enforcement of a statutory health or safety right "*in the absence of any evidence that fellow employees disavow such representation.*" *Id.* (quoting *Alleluia Cushion*, 221 N.L.R.B. at 1000) (emphasis in original).

153. *Id.*; *see also supra* notes 74-76 and accompanying text (discussing circuit court rejection of *Alleluia Cushion*).

154. *Id.* at 496-97 (footnote omitted). Thus, the standard the Board adopted in *Meyers Industries* is the same as that proposed in *Guernsey-Muskingum.* 285 F.2d at 12. The *Guernsey-Muskingum* standard formed the first prong of the two-part test proposed in

Board emphasized two effects of the return to an objective standard. First, the General Counsel must prove all elements of a section 8(a)(1) violation, not merely that an individual employee expressed concern over a matter that constructively concerns all employees.[155] Second, the determination of whether an individual employee's activity is "concerted" becomes a fact question requiring full and complete evidence.[156] Applying this objective standard to the facts in *Meyers Industries*, the Board held that the discharged employee's refusal to drive an unsafe truck was not concerted activity.[157]

The majority's ruling drew a stinging dissent from Member Zimmerman, who criticized the Board's "distortion" of section 7 rights.[158] On a number of grounds, the dissent supported a presumption of concertedness for individual assertions of employment-related statutory rights.[159] First, the dissent took exception to the *Meyers Industries* objective standard and the way it distinguishes between concerted and unconcerted activities. The dissent argued that the determination of whether an employee's assertion of a statutorily protected right is concerted should not depend ultimately upon whether the employee had been "so omniscient as to rally other employees to [his] aid in advance."[160] The dissent ex-

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ARO. The dissenting opinion in *City Disposal* apparently endorsed the *Meyers Industries* standard. 104 S. Ct. 1505, 1519 (1984) (O'Connor J., dissenting). Justice O'Connor's dissent said that § 7 "certainly" will hold concerted any activity that satisfies the first prong of the *ARO* test, and that "the statutory language can even be stretched" to hold concerted activity that satisfies the second prong. *Id.* For further discussion of the *ARO* two-prong test, see *supra* note 49. The D.C. Circuit similarly concluded in *Prill* that the *Meyers Industries* standard was more narrow than the Board's pre-*Alleluia Cushion* standard. *See* infra notes 172-74 and accompanying text.

155. 268 N.L.R.B. at 497. The Board mentioned four elements of a prima facie § 8(a)(1) violation: (1) the employee was engaged in concerted activity as defined under *Meyers Industries*; (2) the employer had knowledge of both the employee's activity and its concerted nature; (3) § 7 protects the concerted activity; and (4) the employee's activity motivated the employer's reaction. *Id.*

156. *Id.*

157. *Id.* at 498. The Board addressed the sympathies of the case, acknowledging that "[o]ne might . . . argue that [the employee's] situation is a sympathetic one that should cause us concern." *Id.* at 499. The Board stated:

> Outraged though we may he by [an employer] who—at the expense of its drivers and others traveling on the nation's highways—was clearly attempting to squeeze the last drop of life out of a trailer that had just as clearly given up the ghost, we are not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws.

Id.

158. *Id.* (Zimmerman, Member, dissenting).

159. *Id.*

160. *Id.* The dissent noted the majority's admission "that a solitary over-the-road

pressed concern about the "safe zone" the *Meyers Industries* standard creates for employers by allowing them to retaliate against employees who complain when they believe the employer is impinging upon their legislatively protected rights.[161] Second, the dissent perceived the protection of individual assertions of statutory rights as being consistent with the history, purposes, and policies of the NLRA.[162] The dissent's statutory interpretation of the NLRA rested largely upon the assumption that an employment-related statutory right is not an individual but a collective right.[163] The dissent, therefore, argued that section 7 "concerted activities" cover the individual assertion of such a right. Last, the dissent stressed that the *Alleluia Cushion* presumption of concertedness was reasonable.[164]

The dissent's analysis rested primarily on the equities connected with constructive concerted activity cases. The dissent compared a "literal" concerted activity, such as a group of employees requesting an increase in wages, with a constructive concerted ac-

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truckdriver would be hard pressed to enlist the support of co-workers while away from the home terminal. Nevertheless, they find this employee unprotected by the Act because no other employee expressly joined him in lodging the complaint with the Tennessee Commission." *Id.*

161. *Id.* at 503 (Zimmerman, Member, dissenting). The dissent saw this result as a direct contravention of the NLRA policy "to guarantee that employees do not lose their jobs because they challenge an employer on a matter concerning group wages, hours, or terms and conditions of employment." *Id.*

162. *Id.* at 500 (Zimmerman, Member, dissenting). *See generally* Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 TEX. L. REV. 991, 998-1014 (1980) (discussing the policies of the NLRA and the legislative and case history of § 7 concerted activities). Member Zimmerman also noted the Supreme Court's directive that the Board effectuate the NLRA in accommodation with other federal legislation. 268 N.L.R.B. at 500 (citing Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942)).

163. 268 N.L.R.B. at 501 (Zimmerman, Member, dissenting). The dissent said:

> It goes against the history and spirit of Federal labor laws to use the concept of concerted activity to cut off protection for the individual employee who asserts *collective rights* . . . .
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> . . . [[T]he term 'concerted' appears to limit only the assertion of individual rights which have no relationship to any *collective effort* to improve working conditions or to extend aid or protection to fellow workers.
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> . . . .
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> A work-related statutory right is *not in essence an individual right;* instead it is a right *shared by and created for employees as a group* through the legislative process at the Federal or state level.

Id. at 499, 501 (emphasis added).

164. *Id.* at 500, 502 (Zimmerman, Member, dissenting). The dissent discussed the Supreme Court's approval of Board-created presumptions in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), and concluded that the *Alleluia Cushion* presumption was valid under *Republic Aviation* standards.

tivity, such as an individual employee asserting a statutorily protected right, and concluded that both activities opposed the employer's economic power, affected all the employees, and deserved the protection of section 7.[165] Similarly, the dissent implied that the construction of the term "concerted activities" should not operate to restrict, but rather to "expand[ ] preexisting employee rights concerning the workplace."[166] The dissent tempered its argument by pointing out that a finding of concerted activity under the *Alleluia Cushion* doctrine does not resolve an 8(a)(1) case. According to the dissent, the *Alleluia Cushion* presumption shifts the burden of proof to the employer to demonstrate that other employees disaffirmed the individual employee's actions or that the individual employee acted solely in his own interest.[167] The dissent, in conclusion, argued that under the *Alleluia Cushion* doctrine the Board should have held that the employee's refusal to drive the unsafe truck was constructive concerted activity under section 7 of the NLRA.[168]

The D.C. Circuit in *Prill v. NLRB* recently reversed *Meyers Industries* and remanded the case for the Board's reconsideration.[169] The D.C. Circuit gave two reasons for the reversal. First, the court held that the Board made an erroneous legal conclusion when it decided that the NLRA *mandated* the Board's new definition of "concerted activities."[170] Specifically, the court asserted

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165. 268 N.L.R.B. at 501-02 (Zimmerman, Member, dissenting).

166. *Id.* at 501.

167. *Id.* at 503 (Zimmerman, Member, dissenting). Earlier in his dissent, Member Zimmerman had noted that, in *Alleluia Cushion*, the "nature and extent" of the employee's OSHA complaints indicated that his concern was for the safety of other employees as well as his own. *Id.* at 500; *see also supra* note 73. The dissent cited Comet Fast Freight, Inc., 262 N.L.R.B. 430 (1982) (2-1 decision), for an example of an individual employee acting solely in his own interest. In *Comet* the Board held not concerted an individual employee's refusal to drive a truck he believed to be unsafe because the employee admitted in his pretrial affidavit that " 'I was looking out for myself, not the other drivers. The other drivers didn't mind driving the red truck like I did.' " 262 N.L.R.B. at 430 (footnote omitted). While there is merit in drawing a distinction between employees who act solely on their own behalf and those who act on behalf of their fellow employees as well, very few cases likely will be as clear-cut as either *Alleluia Cushion* or *Comet Fast Freight*. Consequently, under this analysis the determination of whether the employee acted solely on his own behalf would be critical to the outcome of the case and, unfortunately, not readily discernible from the facts.

168. 268 N.L.R.B. at 503 (Zimmerman, Member, dissenting).

169. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985) (2-1 decision), *rev'g* Meyers Indus., Inc., 268 N.L.R.B. 493 (1984) (3-1 decision).

170. 755 F.2d at 942, 948. The court explained: "[T]he Board's opinion is wrong insofar as it holds that the agency is without discretion to construe 'concerted activities' except as indicated in the *Meyers* test . . . . We express no view on whether, under § 7, the Board

that the Supreme Court's decision and analysis in *City Disposal* clearly indicates that neither the language nor history of the NLRA mandates the *Meyers Industries* "concerted activities" test.[171] Second, the D.C. Circuit held that the NLRB misinterpreted the law when it declared that the *Meyers Industries* test was merely a return to the Board's pre-*Alleluia Cushion* "concerted activities" standard.[172] The court found the Board's new test to be more restrictive than the standard applied before *Alleluia Cushion*, in part because the *Meyers Industries* test requires that a group of employees authorize an individual assertion of a group complaint for the complaint to be "concerted activity."[173] Further, the court noted that the narrow *Meyers Industries* standard might not protect an individual employee's attempts to induce group action.[174] Thus, the court concluded that the Board's decision in *Meyers Industries* stood "on a faulty legal premise and

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may adopt the *Meyers* test as an exercise of discretion." *Id.* at 948 & n.46.

The court reversed and remanded the case under SEC v. Chenery Corp., 318 U.S. 80 (1943), which states that an agency's order may not stand "if the agency has misconceived the law." *Id.* at 947 (quoting *Chenery*, 318 U.S. at 94).

171. 755 F.2d at 948, 951-53. See *supra* notes 109-12 and accompanying text for a discussion of the Supreme Court's analysis of the *Interboro* doctrine in light of the language, history, and objectives of the NLRA.

The court pointed out that the Board decided *Meyers Industries* before the Supreme Court handed down the *City Disposal* decision. 755 F.2d at 953. Accordingly, the court noted that the remand will allow the Board to reconsider the constructive "concerted activities" question in light of *City Disposal*. *Id.*

172. 755 F.2d at 948, 953, 956. The court treated the Board's "misreading of precedent" as a *Chenery* misconception of the law. *Id.* at 953; *see also supra* note 169 (discussing *Chenery*).

173. 755 F.2d at 954. The court noted that the *Meyers Industries* test adopted language identical to that found in Pacific Electricord Co. v. NLRB, 361 F.2d 310 (9th Cir. 1966), a one paragraph, per curiam opinion without citations. The court expressed the opinion that the *Meyers Industries* test was similar to but more narrow than the Sixth Circuit's *ARO* test. *Id.* at 954 n.75. This Recent Development likewise has observed that the *Meyers Industries* test is essentially the same test that the Sixth Circuit adopted in *Guernsey-Muskingum*, which constitutes the first prong of the *ARO* two-prong test. *See supra* note 154 and accompanying text.

The court noted that "[t]he Board's decisions since *Meyers* indicate that the new definition will be strictly construed to include only activity clearly joined in or endorsed by other employees . . . . [T]he Board in effect will require that the complaint have been specifically authorized by other employees." 755 F.2d 948-49 (citing Mannington Mills, Inc., 272 N.L.R.B. No. 15, 1984-85 NLRB Dec. (CCH) ¶ 16,714 (Sept. 21, 1984)). The Court noted also that the Board's decision in Jefferson Elec. Co., 271 N.L.R.B. No. 177, 1984-85 NLRB Dec. (CCH) ¶ 16,630 (Aug. 21, 1984), indicated that an *individual* employee's filing of a safety complaint with a governmental agency will not be deemed "concerted" even though other employees share the complaint. 755 F.2d at 949 & n.49.

174. 755 F.2d at 955 & n.83.

without adequate rationale."[175]

The dissent in *Prill v. NLRB* would have upheld both the Board's decision and the new standard the Board adopted in *Meyers Industries*.[176] The dissent argued that the court should have upheld the Board's *Meyers Industries* decision because the Board's new construction of section 7 was "altogether reasonable."[177] The dissent disagreed with the majority's conclusions that the Board wrongly defined the scope of the law and the Board's own precedent. The dissent stated that the Board did not hold expressly or implicitly that it was required to define "concerted activities" as it did in *Meyers Industries*.[178] The dissent found that the Board did return, as it had claimed, to a pre-*Alleluia Cushion* standard, not to a more narrow test. The dissent stated that the *Meyers Industries* standard was not "exhaustive" and could be modified to handle the different factual situations that arise in constructive concerted activities cases.[179] Further, the dissent argued that the court should not reverse and remand *Meyers Industries* even if the Board had made an erroneous legal conclusion because such an error would not have been prejudicial.[180]

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175. *Id.* at 942, 948. The court characterized the Board's opinion in *Meyers Industries* as "devoted primarily to criticizing *Alleluia* as inconsistent with the Act and contain[ing] not a word of justification for its new standard in terms of the policies of the statute." *Id.* at 950. Thus, the court stated that, even if the Board had not made any erroneous legal conclusions, it would still have had to remand the case under *Chenery* because the Board did not provide an adequate rationale for the new standard adopted. *Id.*

176. *Id.* at 958 (Bork, J., dissenting).

177. *Id.* at 959 (Bork, J., dissenting). The dissent asserted that *City Disposal* neither controlled the case nor supported the majority's position because *City Disposal* governed only collective bargaining agreement contexts. *Id.*

178. *Id.* at 962 (Bork, J., dissenting).

179. *Id.* at 963-65 (Bork, J., dissenting). The dissent argued that the Board would not always construe the *Meyers Industries* test as narrowly as possible. *Id.* at 963.

180. The dissent argued that "[o]n the facts as we must take them, there is . . . no definition the Board could propose that would, consistently with the language of section 7, afford petitioner relief . . . [because] there is no finding here that [the employee's] conduct was in any way related to group activity." *Id.*

The majority disagreed with the dissent's position that the Board's "error" did not affect the result of the case, arguing instead that:

> [T]he result in a given case will often turn not only on the governing standard but also on the manner in which the standard is applied, and this may well be infiuenced by whether the Board believes the standard to be dictated by the statute itself or rather adopted as a matter of policy in order to effectuate the purposes of the Act.

Id. at 956-57 (majority's opinion).

IV. ANALYSIS

A. *Application of the* City Disposal *and* Meyers Industries *Doctrines*

Theoretically, the reach of the constructive concerted activities doctrine may extend to any individual employee activity that would be concerted if more than one employee engaged in that activity.[181] Most constructive concerted activity cases, however, have concerned either individual employee complaints or refusals to work.[182] Likewise, the motivation for employee activities that the constructive concerted activities doctrine covers may include any legitimate concern relating to the employment relationship.[183] In practice, however, individual employee complaints have addressed job safety,[184] compensation,[185] and, to a lesser extent, other primary terms and conditions of employment.[186]

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181. The activities, of course, must not be unlawful, insubordinate, or disloyal; § 7 would not protect these activities even if they were "concerted." *See supra* note 117 and accompanying text.

182. Both *Interboro* and *Alleluia Cushion* concerned employee complaints, and both *City Disposal* and *Meyers Industries* concerned employee complaints combined with refusals to work.

183. *See* Note, *supra* note 162, at 1008 (concerted activities for . . . mutual aid or protection" means "all acts reasonably related to the employees' jobs or to their status as employees . . . activity directed at wages, hours, or terms and conditions of employment . . . .") (footnote omitted).

184. *See, e.g.*, NLRB v. City Disposal Sys., Inc., 104 S. Ct. 1505 (1984) (5-4 decision) (complaint and refusal to drive allegedly unsafe truck); American Freight Sys., Inc. v. NLRB, 722 F.2d 828 (D.C. Cir. 1983) (refusal to drive a truck believed to be unsafe); Meyers Indus., Inc., 268 N.L.R.B. 493 (1984) (3-1 decision) (complaint and refusal to drive a truck alleged to be unsafe); Pink Moody, Inc., 237 N.L.R.B. 39 (1978) (complaint about unsafe trucks and refusal to drive truck with allegedly defective brakes).

185. *See, e.g.*, NLRB v. Adams Delivery Serv., Inc., 623 F.2d 96 (9th Cir. 1980) (complaint to union about overtime pay dispute with employer); Tri-State Truck Serv., Inc. v. NLRB, 616 F.2d 65 (3d Cir. 1980) (2-1 decision) (refusal to work on weekends without time and a half overtime pay); Air Surrey Corp., 229 N.L.R.B. 1064 (1977) (2-1 decision) (inquiry whether employer had sufficient funds to meet upcoming payroll distribution); Diagnostic Center Hosp. Corp., 228 N.L.R.B. 1215 (1977) (complaint about employer's failure to grant 10% wage increase).

186. *See, e.g.*, Koch Supplies, Inc. v. NLRB, 646 F.2d 1257 (8th Cir. 1981) (complaint to management about vacation policies); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217 (8th Cir. 1970) (complaint about employer's denial of alleged seniority rights); Mushroom Transp. Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964) (complaint to and discussion with fellow employees about employer's vacation, work assignment, and holiday pay policies); General Teamsters Local Union No. 528, 237 N.L.R.B. 258 (1978) (grievance protesting employer's failure to put employee's name on seniority list).

A number of constructive concerted activities cases have addressed individual employee requests for union or fellow employee representation at employer-conducted meetings. *See, e.g.*, E.I. du Pont de Nemours and Co. (Chestnut Run) v. NLRB, 733 F.2d 296 (3d Cir. 1984) (per curiam); E.I. de Pont de Nemours and Co. v. NLRB, 707 F.2d 1076 (9th Cir. 1983);

Employee activities potentially invoking either of the constructive concerted activity doctrines may arise in eight general contexts of workplace governance: (1) a union context in which there is an applicable collective bargaining agreement provision and an applicable statute covering the individual employee's action; (2) a union context in which there is an applicable collective bargaining provision but no applicable statute; (3) a union context in which there is a collective bargaining agreement not containing an applicable provision and an applicable statute; (4) a union context in which there is a collective bargaining agreement but neither an applicable provision nor an applicable statute; (5) a union context in which there is no operative collective bargaining agreement but an applicable statute; (6) a union context in which there is neither an extant collective bargaining agreement nor an applicable statute; (7) a nonunion context in which there is an applicable statutory provision; and (8) a nonunion context in which there is no applicable statute.

To understand the practical import of *City Disposal* and *Meyers Industries*, consideration of a hypothetical case, typical of actual constructive concerted activity cases, and the probable outcome of the case under current analysis in these eight contexts would be helpful. Assume that an individual employee complains to his employer and refuses to transport toxic wastes to a dump site without protective safety equipment. The employer then discharges the employee for making the complaint and for his refusal to transport the toxic waste. The employee then files a section 8(a)(1) charge against the employer. The outcome of the case would depend upon in which of the eight possible contexts the case

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Anchortank, Inc. v. NLRB, 618 F.2d 1153 (5th Cir. 1980); Keokuk Gas Serv. Co. v. NLRB, 580 F.2d 328 (8th Cir. 1978). Although the same basic constructive concerted activities analysis applies in these cases, a specific body of law particular to these cases has developed. *See* NLRB v. Weingarten, Inc., 420 U.S. 251 (1975) (5-3 decision) (union employees entitled to representation at an interview that the employer reasonably believes will result in disciplinary action); *see also supra* note 54 (discussing the effect of *Weingarten* on the Fifth Circuit's treatment of the *Interboro* doctrine). *But see* Sears, Roebuck and Co., 274 N.L.R.B. No. 55, 1984-85 NLRB Dec. (CCH) ¶ 17,039 (Feb. 22, 1985) (refusing to extend *Weingarten* rights to nonunionized employees). *See generally "Concerted Activities" Under Section 7 of the National Labor Relations Act—A Nonunion Employee Has a Right to the Presence of a Co-Worker Witness at an Investigatory Interview Where the Employee Reasonably Believes That Discipline Will Result* (E.I. du Pont de Nemours & Co. (Chestnut Run) v. NLRB (3d Cir. 1983)), 29 VILL L. REV. 987 (1983-84) (discussing the Third Circuit's treatment of the issue in *Chestnut Run*). This Recent Development, accordingly, does not purport to analyze thoroughly the problems associated with individual employee requests for representation at investigating interviews.

arose. Under current analysis, the employee's action would be "concerted" in only two of the eight contexts—numbers one and two. If the employer's company were unionized, a collective bargaining agreement were in effect, and the agreement contained a provision prohibiting the employer from requiring employees to transport toxic substances without safety equipment, then the employee's discharge would violate section 8(a)(1) regardless of the existence of a statutory provision. In none of the remaining six contexts would the employee's activities be "concerted." Thus, under the current analysis of individual concerted activity, which consists of *City Disposal* and *Meyers Industries*, the determination of concertedness turns critically upon the existence of an applicable collective bargaining agreement provision. Subsequent sections of this part IV will explore the ramifications of this disparity and suggest that in at least three of the remaining six workplace contexts, the Board and the courts should consider the employee's activities to be "concerted."

B. *Impact of Current "Concerted Activities" Analysis on Labor Dispute Resolution*

The divergent "concerted activities" analyses of *City Disposal* and *Meyers Industries* may have a negative effect on harmonious labor relations and an overall effect of increasing the volume of labor litigation originating in the district courts and, therefore, outside the infiuence of the NLRB. Specifically, the divergent nature of the two opinions is likely to affect section 8(a)(1) charges; suits brought under section 301 of the Act;[187] complaints filed under occupational health and safety, equal employment opportunity, workers compensation, and other employment-related statutes; suits concerning section 502 of the Act;[188] grievance arbitration procedures; and negotiation and content of collective bargaining agreements.

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187. Section 301(a) of the NLRA provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1982).

188. Section 502 of the NLRA provides in pertinent part: "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." 29 U.S.C. § 143 (1982).

The composition, if not the number, of section 8(a)(1) charges filed is likely to change. Because *City Disposal* deems concerted an individual employee's honest and reasonable assertion of a collective bargaining agreement right,[189] the number of section 8(a)(1) complaints charging the employer with the violation or denial of collective bargaining agreement rights is likely to increase.[190] On the other hand, because the *Meyers Industries* decision denies "concerted" status to individual employee assertions of statutory rights, the number of section 8(a)(1) cases alleging employer retribution for an employee's filing of a statutory charge or complaint is likely to decline.

The number of suits brought under NLRA section 301 is likely to increase as a result of the Board's restrictive definition of concertedness in *Meyers Industries*. Section 301 provides statutory subject matter jurisdiction in federal district courts for cases in which a party has alleged a breach of a collective bargaining agreement.[191] Courts firmly have established that an employee can bring suit in federal district court under section 301 even if the alleged breach of a collective bargaining agreement also constitutes a section 8 unfair labor practice.[192] An employee, however, must exhaust all exclusive grievance and arbitration procedures the extant collective bargaining agreement establishes before bringing suit under section 301.[193] Thus, a union employee discharged for asserting a right that the collective bargaining agreement does not expressly secure could bring an action under section 301 in federal

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189. *See City Disposal*, 104 S. Ct. 1505, 1516 (1984).

190. The dissent in *City Disposal* predicted and criticized this result. *Id.* at 1517 (O'Connor, J., dissenting); *see also supra* notes 131-33 and accompanying text (discussion of dissent's view).

191. 9 U.S.C. § 185(a) (1982). For the full text of § 301(a), see *supra* note 187. *See also supra* note 132 and accompanying text.

192. *See* Vaca v. Sipes, 386 U.S. 171, 179-80 (1967); *see also* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964); Humphrey v. Moore, 375 U.S. 335 (1964); Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Peltzman v. Central Gulf Lines, Inc., 497 F.2d 332 (2d Cir. 1974) (per curiam).

193. *See, e.g.*, Clayton v. UAW, 451 U.S. 679, 681 (1981); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976); Vaca v. Sipes, 386 U.S. 171, 184 (1967); Repuhlic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965).

An employee is not required to exhaust all internal union appeal procedures before filing suit under § 301, as long as those procedures cannot afford the complete relief sought in the § 301 action. Clayton v. UAW, 451 U.S. 679, 695 (1981) (5-4 decision) ("The preferable approach is for the court to permit the employee's § 301 action to proceed . . . , despite the employee's failure to exhaust [internal union appeals procedures], unless the internal union procedures can reactivate the grievance or grant the relief that would be available in the employee's § 301 suit . . . .").

district court for breach of that agreement, if the employee first has exhausted all available grievance arbitration procedures under the collective bargaining agreement. This provision would allow an individual employee to seek damages and reinstatement[194] for an alleged wrongful discharge even though such a claim is not available under section 8(a)(1) because the employee's activity is not "concerted" under either *City Disposal* or *Meyers Industries*.

A number of drawbacks exist to this alternative course of action. First, bringing suit before a federal district court necessitates foregoing the benefits of the NLRB's expertise. Second, proceedings in a federal district court may take longer than NLRB proceedings. Last, section 301 suits, by definition, are not available to employees in a no collective bargaining agreement context.[195] Some of the cases that union employees previously would have brought before the Board as section 8(a)(1) charges, but now would fail under *Meyers Industries* for lack of "concertedness," nevertheless could appear in the future as section 301 suits in the federal district courts.

The primary impact of the *Meyers Industries* ruling should be a decline in the number of complaints employees file against their employers under occupational health and safety, equal opportunity, and workers compensation statutes. Without the protection of the *Alleluia Cushion* doctrine, an individual employee fired for

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194. If an employer wrongfully discharges an employee in violation of § 8(a)(1), the NLRB is empowered to order the reinstatement of the employee with backpay. Section 10(c) of the NLRA provides in pertinent part:

> If . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action *including reinstatement of employees with or without back pay*, as will effectuate the policies of this subchapter.

29 U.S.C. § 160(c) (1982) (emphasis added). Section 10(c) further provides that "[n]o order of the Board sball require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." *Id.* Thus, the Board cannot require reinstatement of an employee discharged for engaging in an activity the Act does not protect.

Similarly, § 301 empowers federal district courts to order either damages or reinstatement. Seymour v. Olin Corp., 666 F.2d 202, 211 (5th Cir. 1982). The Fifth Circuit has argued that reinstatement should be the preferred remedy and that federal courts should award damages only in cases when reinstatement is not practicable. *Id. But cf.* Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 297 (1st Cir. 1978) (reinstatement is a less preferred "alternative remedy" because it is a "more drastic remedy" than damages).

195. These employees would fall in one of workplace contexts (5)-(8). *See supra* text following note 174. If union employees invoke § 301 more frequently, by analogy nonunion employees could turn to common-law wrongful discharge actions.

filing a workers compensation, discrimination, or occupational safety complaint has no recourse beyond the institution of a common-law wrongful discharge action.[196] Employees who are aware of their rights will think twice before filing a complaint against their employer, and employees who are unaware of their vulnerability under the *Meyers Industries* standard will be more likely to face discharge or other disciplinary action than they would have under *Alleluia Cushion.* These results tend naturally to hinder both the intended prophylactic and remedial purposes of employment-related legislation.[197]

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196. If an employer discharges an employee for filing an Occupational Safety and Health Act (OSHA) claim, the employee also has the option of filing a complaint under § 11(c) of the OSHA, which provides in pertinent part:

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

29 U.S.C. § 660(c)(1) (1982).

Section 660(c)(2) provides for a 30-day statute of limitations, which is significantly shorter than the 6-month statute of limitations established for unfair labor practice complaints. NLRA, 29 U.S.C. § 160(b) (1982); *see* Comment, *Individual Safety Protests in the Nonunion Workplace: Hazardous Decisions Under Hazardous Conditions*, 89 DICK. L. REV. 207, 227-30 (1984) [hereinafter cited as *Hazardous Decisions*]. If, upon investigation of the employee's complaint, the Secretary of Labor finds that the employer has violated this provision, the Secretary "shall" file a suit against the employer in federal district court; the district courts have jurisdiction in such cases to order reinstatement with backpay. OSHA, 29 U.S.C. § 660(c)(2) (1982). *See generally* Comment, *A Right Under OSHA to Refuse Unsafe Work or a Hobson's Choice of Safety or Job?*, 8 U. BALT. L. REV. 519 (1979) (examining the right to refuse unsafe work under OSHA and the differences between OSHA and the NLRA).

197. The Occupational Safety and Health Act of 1970 declares its purpose as follows: "to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ." 29 U.S.C. § 651(b) (1982). The proposed means of achieving these ends indicate the importance of employee participation:

> (1) by encouraging employers *and employees* in their efforts to reduce the number of occupational safety and health hazards at their place of employment . . . ;
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> (2) hy providing that employers *and employees* have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;
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> . . . ;
>
> (12) by providing for appropriate reporting procedures witb respect to occupational safety and health which procedures will help achieve the objectives of this chapter
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> . . . .

29 U.S.C. § 651(b) (1982) (emphasis added). Furthermore, the OSHA makes express provision for inspection requests by "[a]ny employees or representative of employees." 29 U.S.C. § 657(f)(1) (1982).

Similarly, the enforcement provisions of the Equal Employment Opportunities Act center around "charge[s] . . . filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in unlawful employment practices . . . ." 42

The number of suits brought under NLRA section 502 may increase as a result of *Meyers Industries*. Section 502 provides some degree of protection for an individual employee or group of employees who refuse to work in "abnormally dangerous" working conditions.[198] Section 502 provides that an employee's refusal to work in "abnormally dangerous" conditions shall not constitute a strike. Thus, an employer discharging an employee who refuses to work in abnormally unsafe conditions cannot avoid an unfair labor practice violation by invoking a no-strike clause in the collective bargaining agreement.[199] Section 502, however, would not necessarily grant employees the general right to refuse to work in unsafe conditions in the absence of a no-strike clause, or in the absence of a collective bargaining agreement. Employees who are not under the benefit of a collective bargaining agreement "safety" provision[200] and are discharged for refusing to work in allegedly dangerous conditions increasingly will urge the Board and the courts to interpret section 502 to grant employees an affirmative right, rather than merely to protect employees from an employer's defense. No Board decision subsequent to *Meyers Industries*, however, has held an individual employee's refusal to work in unsafe conditions protected under section 7.[201]

U.S.C. § 2000e-5(b) (1982).

198. 29 U.S.C. § 143 (1982). For the relevant portion of the text of § 502, see *supra* note 188.

199. *See* NLRB v. Knight Morley Corp., 251 F.2d 753, 759 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958).

200. These employees would fall in one of workplace contexts (3)-(8). *See supra* text following note 174.

201. In *Meyers Industries* the Board did not address the question of whether § 502 would apply. 268 N.L.R.B. at 493 n.1 (1984), *rev'd sub. nom.* Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985). The General Counsel had moved to amend its complaint to include the allegation that § 502 supported the contention that Meyers had wrongfully discharged the employee for refusing to drive an unsafe truck. The ALJ and the Board denied the General Counsel's motion to amend on grounds that the General Counsel had not raised or litigated the § 502 issue at the hearing before the ALJ. *Id.* In one Board case decided after *Meyers* the Board disagreed with the ALJ's finding that § 502 protected an employee's refusal to perform a rustproofing assignment without safety equipment. *See* Goodyear Tire and Rubber Co., 269 N.L.R.B. 881 (1984). The Board asserted: "It is well settled that Section 502 applies only where it has been *objectively* established that the working conditions are abnormally dangerous." *Id.* (footnote omitted) (emphasis added); *see also* Gibralter Steel Corp., 273 N.L.R.B. No. 128, 1984-85 NLRB Dec. (CCH) ¶ 17,167 (Dec. 14, 1984) (General Counsel failed to prove that individual, unconcerted activity fell within § 502); Southwire Co., 272 N.L.R.B. No. 194, 1984-85 NLRB Dec. (CCH) ¶ 16,899 (Nov. 23, 1984) (rejecting a § 502 argument because the employee "did not refuse to perform work because he believed an abnormally dangerous condition existed . . . [but] because his fear of heights prevented

As the dissent argued in *City Disposal*, the decision to affirm the *Interboro* doctrine may lessen the importance and usefulness of the grievance arbitration processes[202] and, therefore, of grievance and arbitration clauses in collective bargaining agreements.[203] Before *City Disposal* an assertion of a collective right could not, in and of itself, sustain an unfair labor practice charge in courts not accepting the *Interboro* doctrine.[204] Today, an individual employee's honest and reasonable assertion of a collective bargaining agreement right, construed in light of *City Disposal*, is sufficient to support a section 8(a)(1) unfair labor practice complaint.[205] Employees who have been discharged or otherwise disciplined for asserting a right contained in the collective bargaining agreement now may choose either to bypass the grievance arbitration mechanism entirely and file a section 8(a)(1) charge or to file a complaint with the NLRB after an unfavorable grievance arbitration outcome. Because the Board has the power to defer to a grievance arbitration process,[206] however, an employee taking either of these routes risks Board deferral to the grievance arbitration system that the collective bargaining agreement has established.

In *Interboro* and *City Disposal* neither the Board nor the courts enforcing the Board's order deferred to the results of the grievance or arbitration proceedings.[207] In two recent decisions, however, the Board has reestablished broad deferral policies to arbitration awards[208] and prearbitral dispute resolution.[209] Certainly,

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him from performing the task.").

202. 104 S. Ct. at 1517-19 (O'Connor, J., dissenting).

203. *See infra* note 211 and accompanying text (discussing *City Disposal*'s potential impact on collective bargaining and substantive collective bargaining provisions).

204. *See City Disposal*, 104 S. Ct. at 1517 (O'Connor, J., dissenting); *supra* note 131.

205. *See* 104 S. Ct. at 1516 (O'Connor, J., dissenting). The dissent found this aspect of the *Interboro* doctrine particularly worrisome. *Id.* at 1517 (O'Connor, J., dissenting); *see also supra* notes 131-33 and accompanying text.

206. *See* Collyer Insulated Wire, 192 N.L.R.B. 837 (1971) (Board deferral of prearbitral disputes); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955) (Board deferral to arbitration awards).

207. In *Interboro* the parties did not arbitrate the dispute; the Board actually skirted the issue by declaring that the employee complaints *were* grievances. 157 N.L.R.B. at 1298. In *City Disposal* the Court noted that the union declined to process the grievance the employee filed after his discharge because the grievance lacked "objective merit." 104 S. Ct. at 1509. The Court, however, never discussed this fact.

208. The Board recently returned to its practice of deferring to "adequately considered" arbitration awards that it originally announced in Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). *See* Olin Corp., 268 N.L.R.B. 573, 574 (1984) (3-1 decision) ("[A]n arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."); *see also* Altoona Hosp., 270

an employee who loses his grievance protesting an *Interboro*-type discharge has nothing to lose by filing a section 8(a)(1) charge. Thus, *City Disposal* may pose a further challenge to the strength of the grievance arbitration process and raise additional questions about the degree of deference the Board should pay to collective bargaining agreement grievance arbitration procedures and their outcomes. An unresolved tension, therefore, has developed between the *City Disposal* holding and the Board's signaled return to a broad deferral to arbitrated and prearbitral dispute resolutions.[210]

City Disposal also is likely to affect both the negotiation and the substantive terms of collective bargaining agreements. In light of *City Disposal*'s acceptance of the *Interboro* doctrine, the union will want to have as many clauses as possible enumerating specific employee rights and employer responsibilities in the collective bargaining agreement. Conversely, and perhaps even more importantly, employers are motivated not to agree to provisions granting specific contractual rights to the employees in the collective bargaining agreement because now an individual employee as well as a group of employees can invoke and attempt to enforce the provisions. Although these types of conflicting objectives are not new, much more is now at stake. Because most of the substantive disputes underlying *Interboro*-type discharges have been the subjects of mandatory collective bargaining,[211] at least the potential exists for increased conflict at the bargaining tables.

N.L.R.B. No.179, 1983-84 NLRB Dec. (CCH) ¶ 16,440, at 28,110 (1984) (applying *Olin* standard and deferring to arbitrator's judgment). In *Olin* the Board stressed the importance of arbitration in the resolution of labor disputes and advocated a high degree of deferral to arbitration awards. 268 N.L.R.B. at 574.

209. In a recent decision the Board also resurrected Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), and reinstated an unadulterated policy of deferral to prearbitral dispute resolution, including § 8(a)(1) and 8(a)(3) cases. United Technologies Corp., 268 N.L.R.B. 557 (1984) (3-1 decision).

210. If, as in *City Disposal*, the Board fails to defer to an existing grievance arbitration mechanism in future constructive concerted activities cases, the Board will be undercutting its *Olin-United Technologies* deferral standards. On the other hand, if the Board implements its *Olin-United Technologies* standards, the Board will have limited the practical effect of *City Disposal*. *But see* Note, *supra* note 38, at 93-94.

211. Section 8(d) of the NLRA imposes on the employer and the union a duty to bargain over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d)(1982). The subjects most often underlying constructive concerted activities cases—job safety and compensation—clearly fall within the scope of mandatory bargaining. *See supra* notes 172-74 and accompanying text.

C. *Shortcomings of the Current Doctrines*

The Supreme Court's analysis and decision in *City Disposal* contains no fatal errors. The *Interboro* constructive concerted activities doctrine, although a legal fiction, is a reasonable construction of section 7. Although both the language and history of section 7 of the NLRA support the conclusion that the Act intended to foster collective, not individual action,[212] the judicial history of American labor law, and, indeed, American law in general, is replete with generous statutory interpretations. The Board and the courts should construe the provisions of the Act in a way that will effectuate as nearly as possible the Act's purposes.[213] For the most part, *City Disposal* has accomplished that task. By protecting *individual* action, however, *City Disposal* encourages individual employees to act on their own even when the presence of a union and a collective bargaining agreement makes collective action readily accessible and, indeed, preferable. Thus, the principal problem with *City Disposal* is its potential to undercut collective activity in general and, specifically, the grievance arbitration mechanism.[214]

Meyers Industries, on the other hand, is more objectionable and potentially more prodigious than *City Disposal*.[215] *Meyers In-*

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212. *See* Note, *supra* note 27, at 370-71, 376-77 (1983); Note, *supra* note 162, at 993.

213. *See supra* note 2. One commentator has suggested that "[t]he best interests of labor would be served if the legislature deleted the requirement of 'concerted activity' from section 7." Comment, *supra* note 38, at 174.

214. *See supra* notes 202-10 and accompanying text.

215. The Board has relied on *Interboro* only a few times since the Supreme Court approved the *Interboro* doctrine in *City Disposal*. *See* ABF Freight Sys., Inc., 271 N.L.R.B. No. 6, 1984-85 NLRB Dec. (CCH) ¶ 16,510 (June 29, 1984) (employee refusal to drive an allegedly unsafe truck not concerted under the *Interboro* doctrine because the employee's invocation of his collective bargaining agreement right was not "reasonable and honest"); Vanport Sand and Gravel, Inc., 270 N.L.R.B. No. 205, 1984-85 NLRB Dec. (CCH) ¶ 16,487 (June 25, 1984) (employer unlawfully discharged an employee for filing a grievance protesting infringement of collective bargaining agreement seniority rights); Jersey Central Power & Light Co., 269 N.L.R.B. 886 (1984) (employer unlawfully discharged an employee for intending to file a grievance asserting right to compensation that the collective bargaining agreement secured).

Since overturning the *Alleluia Cushion* doctrine, the Board has invoked the *Meyers Industries* standard many times. *See, e.g.*, Mannington Mills, Inc., 272 N.L.R.B. No. 15, 1984-85 NLRB Dec. (CCH) ¶ 16,714 (Sept. 21, 1984) (employee representative to company's safety committee was not engaged in "concerted activity" as defined in *Meyers Industries* when he told the foreman that the employees would no longer finish the previous shift's loading operations because, although this was a "long-standing complaint," other employees had not authorized the representative to make such a threat); Jefferson Elec. Co., 271 N.L.R.B. No. 177, 1984-85 NLRB Dec. (CCH) ¶ 16,630 (Aug. 21, 1984) (employee's filing of state OSHA complaint held not concerted under *Meyers Industries* because, although other employees had voiced the same safety complaint to management, the discharged employee

dustries, unlike *City Disposal*, applies to *all* employees regardless of whether they are unionized, governed by a collective bargaining agreement, or protected by statutorily granted rights. The Board is likely to apply the rule set forth in *Meyers Industries* to all individual concerted activity cases as the first step in its analysis, and to apply the *Interboro* doctrine only when there is a relevant collective bargaining agreement provision. The rule laid down in *City Disposal* is now but an exception to the general rule set forth in

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had not solicited their support); Schreiber Materials and Cartage Co., 268 N.L.R.B. 1457 (1984) (union employee's filing and refusing to retract workers compensation claim not "concerted" under the *Meyers Industries* standard); Alcan Cable, 269 N.L.R.B. 184 (1984) (neither employee's workers compensation claim nor complaint filed pursuant to employer's internal complaint procedure constituted "concerted activities"); Spartan Plastics, Inc., 269 N.L.R.B. 546 (1984) (conferral and collaboration of fellow employees sufficient under *Meyers Industries* standard to make employee's complaint questionnaire a concerted activity); Briley Marine, 269 N.L.R.B. 697 (1984) (employee's filing of workers compensation claim under the Jones Act, 46 U.S.C. § 688 (1982), not concerted activity under *Meyers Industries* doctrine); Harris Corp., 269 N.L.R.B. 733 (1984) (employee's letter of complaint to employer regarding wages and working conditions held concerted under *Meyers Industries* because fellow employees participated in the employee's complaint by making suggestions about the content and language of the letter); Goodyear Tire and Rubber Co., 269 N.L.R.B. 881 (1984) (employee refusal to perform rustproofing job without safety equipment held not concerted under the *Meyers Industries* standard); Wabco Constr. and Mining Equip. Group, 270 N.L.R.B. No. 126, 1983-84 NLRB Dec. (CCH) ¶ 16,421 (1984) (employee's filing of workers compensation claim not concerted activity); United Pac. Reliance Ins., Inc., 270 N.L.R.B. No. 142, 1983-84 NLRB Dec. (CCH) ¶ 16,389 (1984) (employee's lottery to protest employer's wage policies held a purely personal protest and, thus, not concerted under *Meyers Industries*); Bearden and Co., 272 N.L.R.B. No. 135, 1984-85 NLRB Dec. (CCH) ¶ 16,798 (Oct. 25, 1984) (employer's refusal to recall the employee not unlawful because employee's filing claim for unemployment compensation during layoff not concerted activity under the *Meyers Industries* standard).

The Board has continued to apply its *Meyers Industries* test even after the D.C. Circuit reversed and remanded the Board's *Meyers Industries* decision. *See, e.g.*, John H. Cooney, Inc., 275 N.L.R.B. No. 88, [1985-86 Transfer Binder] NLRB Dec. (CCH) ¶ 17,327 (May 31, 1985) ("In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."); Herrick & Smith, 275 N.L.R.B. No. 62, 119 L.R.R.M. (BNA) 1144 (May 14, 1985) (meeting not concerted under *Meyers Industries* because "its real teeth involved individual complaints made on an individual basis"); Spencer Trucking Corp., 274 N.L.R.B. No. 206, 119 L.R.R.M. (BNA) 1085 (Mar. 29, 1985) (individual employee's request for pink slip to demonstrate support for discharged fellow employees concerted under *Meyers Industries*); Rayglo Corp., 274 N.L.R.B. No.157, [1984-85 Transfer Binder] NLRB Dec. (CCH) ¶ 17,173 (Mar. 19, 1985) (group of employees' refusal to work concerted under *Meyers Industries*); Advance Cleaning Serv., 274 N.L.R.B. No. 141, [1985-86 Transfer Binder] NLRB Dec. (CCH) ¶ 17,395 (Mar. 13, 1985) (group of employees' refusal to work overtime concerted under *Meyers Industries*); SECO Elec. Co., 274 N.L.R.B. No. 106, 1984-85 NLRB Dec. (CCH) ¶ 17,147 (Mar. 7, 1985) (employee's complaint to state agency over employer's alleged failure to pay prevailing wage rate not concerted under *Meyers Industries*); United Parcel Serv., Inc., 274 N.L.R.B. No. 93, 1984-85 NLRB Dec. (CCH) ¶ 17,131 (Feb. 28, 1985) (employee's refusal to honk truck horn at delivery sites in residential areas because he thought it violated the law not concerted under *Meyers Industries*).

Meyers Industries, which is not only historically pre-*Alleluia Cushion* but also pre-*Interboro*.[216] Further, the most disturbing aspect of the *Meyers Industries* decision is its condonation of employers who discharge employees for filing occupational health and safety complaints,[217] unemployment compensation claims,[218] and workers compensation claims.[219]

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216. *Meyers Industries*, 268 N.L.R.B. at 496-97. See *supra* notes 48-51, 154, 173 and accompanying text for discussion of the historical roots of the *Meyers Industries* standard in NLRB v. Guernsey-Muskingum Elec. Co-op., Inc., 285 F.2d 8 (6th Cir. 1960); for the language drawn from Pacific Electricord Co. v. NLRB, 361 F.2d 310 (9th Cir. 1966); for the first prong of the test in ARO, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979); and for the relationship between the *Meyers Industries* test and the standard advocated by Justice O'Connor in her *City Disposal* dissent.

217. *See* Herbert F. Darling, Inc., 267 N.L.R.B. 476 (1983) (2-1 decision), *rev'd and remanded sub nom.* Ewing v. NLRB, 732 F.2d 1117 (2d Cir. 1984). The Board, in a pre-*Meyers Industries* decision, held that an employer's refusal to recall from layoff a union employee who had filed a request for inspection under the OSHA was not a § 8(a)(1) violation. The Board based its ruling on the grounds that the employee's complaint had not been the cause of the discharge. The Second Circuit reversed, agreeing with the ALJ's finding that the employer refused to recall the employee because of his complaint, and remanded to the Board for a determination whether *Alleluia Cushion* or *Meyers Industries* governed the case. On remand, the Board decided to apply *Meyers Industries*, but found no violation of § 8(a)(1) because the employee's OSHA complaint was not with or on the authority of other employees, and therefore not concerted activity within the *Meyers Industries* standard. Herbert F. Darling, Inc., 273 N.L.R.B. No. 52, 1984-85 NLRB Dec. (CCH) ¶ 16,904, at 29,025-26 (Dec. 14, 1984) (2-1 decision). The Second Circuit reversed and remanded the case again in light of the D.C. Circuit's reversal of *Meyers Industries* in *Prill v. NLRB*. Ewing v. NLRB, 768 F.2d 51, 54 (2d Cir. 1985). Although the court noted that, unlike the D.C. Circuit in *Prill*, it was not reviewing "the original decision in *Meyers*, but only the *Meyers* rule as it is applied to *Ewing*," *id.* at 55, it proceeded to "consider whether it is within the Board's discretion to protect the rights of workers such as Ewing in light of *City Disposal*," *id.* In so doing, the court did not express any opinion regarding the proper interpretation of "concerted activities," but directed the Board to reconsider its decision in light of *Prill* and *City Disposal*, and to consider "whether Ewing's lay off for a supposed safety complaint had a 'chilling effect' on the collective rights of other employees." *Id.* (citation omitted).

Interestingly, the Board *is* willing to find a § 8(a)(1) violation when an employer threatens to retaliate against employees who jointly file complaints with OSHA, *see* Certified Serv., Inc., 270 N.L.R.B. No.67, 1983-84 NLRB Dec. (CCH) ¶ 16,271 (Apr. 30, 1984), but not when that same employer fires an individual employee for filing an OSHA complaint, *id.* at 27,815. The Board found that the employer's threatening remarks "wonld reasonably tend to interfere with employees in the exercise of rights under the Act." *Id.* Arguably, the employer's dismissing an employee for filing a safety complaint conld have the same chilling effect on both individual and joint complaints.

For an analysis of the effect of the Board's decision in *Meyers Industries* on nonunion employee rights to protest unsafe working conditions, see *Hazardous Decisions*, *supra* note 196 (arguing that *Meyers Industries'* removal of *Alleluia Cushion* protection coupled with the limited protection of § 11(c) of the OSHA has left nonunion employees without reasonable means of dealing with unsafe working conditions).

218. *See* Bearden and Co., 272 N.L.R.B. No. 135, 1984-85 NLRB Dec. (CCH) ¶ 16,798 (Oct. 25, 1984).

219. *See, e.g.*, Schreiber Materials and Cartage Co., 268 N.L.R.B. 1457 (1984) (union

Although each of these two recent decisions has its own defects, the most worrisome problems may appear when the Board and the courts read *City Disposal* and *Meyers Industries* together. The two "concerted activities" analyses are inconsistent, both in their analytical approach to section 7 and in their resulting outcomes in individual concerted activity cases. Primarily because the Board expanded the *Alleluia Cushion* doctrine in the cases leading up to *Meyers Industries*, the Board's overruling of *Alleluia Cushion* has a much greater impact now than it would have had soon after the Board promulgated the *Alleluia Cushion* doctrine.[220] To have overruled the original *Alleluia Cushion* doctrine would have been to hold that an individual employee's assertion of a statutory occupational safety right designed to protect all employees would not constitute a concerted activity.[221] Instead, under *Meyers Industries*, to be concerted, an individual employee's activity cannot be by and on behalf of himself alone, but instead must be with or on behalf of fellow employees.[222] This language is not only broad and far-reaching, but also in direct contradiction to the analytical framework of *Interboro* as approved by the Supreme Court.

Referring back to the hypothetical set forth in section A of part IV,[223] two otherwise identical employees transporting toxic wastes without adequate safety equipment would be in two very different situations under the current constructive concerted activities analysis. An employer could not lawfully discharge the employee protected by an applicable collective bargaining agreement provision[224] for *individually* asserting his collective bargaining agreement right honestly and reasonably. An employer could, on the other hand, discharge the employee who individually asserts a

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employee); Alcan Cable, 269 N.L.R.B. 184 (1984) (nonunion employee's state workers compensation claim and employer's internal complaint procedure claim); Briley Marine, 269 N.L.R.B. 697 (1984) (workers compensation claim pursuant to Jones Act, 46 U.S.C. § 688 (1982)); Central Ga. Elec. Membership Corp., 269 N.L.R.B. 635 (1984).

220. Member Zimmerman, who dissented in *Meyers Industries*, raised this argument in his dissent from a recent Board decision which held that an employer's refusal to recall an employee from layoff because the employee filed an unemployment compensation claim was not a violation of § 8(a)(1). Bearden and Co., 272 N.L.R.B. No.135, 1984-85 NLRB Dec. (CCH) ¶ 16,798, at 28,875 (Oct. 25, 1984) (Zimmerman, Member, dissenting) (arguing that, by correcting the overextension of the *Alleluia Cushion* doctrine, the Board is "wrongfully contracting the plain meaning of protected concerted activity.").

221. *See supra* note 73 and accompanying text (discussing *Alleluia Cushion* doctrine).

222. *See supra* text accompanying note 154.

223. *See supra* text following note 174.

224. This employee could be in either workplace context (1) or (2). *See supra* text following note 174.

statutory right honestly and reasonably when that employee is protected "only" by a federal statute[225] prohibiting the carrying of toxic wastes without adequate safety equipment. Because the second employee does not have the benefit of an applicable collective bargaining agreement right, the provisions of section 7 apply differently to him than to the first employee. The employee lacking a collective bargaining agreement right must either act with or on behalf of other employees to secure "concerted" activity status. This line-drawing is unacceptable in both analytical and practical terms.

D. Proposal: A Unified Standard for Concerted Activities

In accordance with the objective of the NLRA, the concern in all constructive concerted activity cases should be that the respective parties do not interfere "with the legitimate rights of the other."[226] The constructive concerted activity doctrine should, to the fullest extent possible, strike a balance between the competing interests of employers and employees. Employers' primary concerns are that employees will file spurious charges, complaints, and grievances, and that the employer will be unable to discharge lawfully an employee who harasses the employer with gripes and meritless complaints. On the other hand, employees are concerned primarily with securing the advantage of rights bargained for and rights obtained through legislation and about losing their jobs as a result of asserting those rights.

In light of the objectives of the NLRA, the equities of each position, and what the Supreme Court has established as a reasonable interpretation of section 7, the Board and the courts should deem an individual employee's activity to be concerted when the employee reasonably and in good faith asserts a right secured either by an existing collective bargaining agreement *or* by an em-

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225. This employee could be in any one of workplace contexts (3), (5), or (7). *See supra* text following note 174.

226. 29 U.S.C. § 141(b) (1982); *see also supra* note 2. One commentator wisely has recognized that an employer's retaliation against an employee for asserting his legal rights is detrimental not only to the employee but also to the employer. *See* Johnson, *supra* note 8, at 877 ("Retaliating against employees . . . will compound whatever grievance the employees have and may lead to more demonstrations of dissatisfaction . . . . [B]y suppressing the rights of his employees, the employer may not only subject himself to legal liability but may well endanger his coveted status as a non-union employer."). *But see* Note, *supra* note 162, at 1014 ("Allowing employer retaliation against individuals may effectively diminish the possibility of subsequent group activity.").

ployment-related statute.[227] Further, in a union context, the Board and the courts should require an employee, before filing an unfair labor practice charge, to invoke the union's support and exhaust all available grievance arbitration procedures unless the immediacy of the situation or of the matter asserted justifies individual action.[228] For example, in a union setting, an employee is much more warranted in individually confronting a problem relating to safe working conditions than in embarking on a lone crusade to protest an employer compensation, vacation, or work assignment policy. The Board and the courts should not expect an employee faced with a hazardous working condition to risk his health and safety first and file a grievance later.[229] An employee faced with an infringement of his seniority rights, however, should seek redress through the union and established grievance procedures. To hold otherwise would diminish not only the role of the grievance arbitration institution, but also the union's historical function of enforcing collective bargaining agreements. An adverse ruling on an employee grievance or at arbitration should not preclude the employee from filing a section 8 charge. The Board and the Administrative Law Judges, however, should follow the broad deferral standards set forth in *Olin* and *United Technologies*.[230]

This unified approach would combine the best features of the *City Disposal* and *Alleluia Cushion* standards while alleviating the problems of the arbitrary boundaries between concerted and unconcerted activities that the separate *Interboro* and *Meyers Industries* standards now create.[231] First, this unified approach would

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227. Statutory rights merit the same degree of protection under § 7 as collective bargaining agreement rights. To deny § 7 protection to individual assertions of employment related statutory rights would hinder the effectuation of the policies and objectives that other labor legislation has established. A constructive concerted activities doctrine that does not apply to assertions of statutory rights also potentially deprives employees of the opportunity to assert basic rights, such as the right to a safe work place and the right to equal employment opportunity. Furthermore, the invocation of a statutory right affecting all employees is at least as much for the purpose of mutual aid or protection as the invocation of a collective bargaining agreement right.

228. *See* Note, *supra* note 38, at 93-94.

229. Under the present rules the employee faces a difficult choice, or as one commentator has phrased it, "the dilemma of probable discharge or continued work under unsafe conditions." *Hazardous Decisions*, *supra* note 196, at 230.

230. *See supra* notes 208-10 and accompanying text. This "remedy-exhaustion limitation," of course, would not apply in a nonunion setting, unless there were some type of formal internal dispute resolution mechanism.

231. *City Disposal* was decided two months after *Meyers Industries*. Both the Supreme Court majority and the dissent in *City Disposal* took note of the earlier NLRB case but made only limited comments on the discrepancy between the two decisions. *See* 104 S.

satisfy the employee's legitimate interests. The approach would allow for a consistent interpretation of "concerted activities" covering individual employee rights that either a contract or statute secures. This approach also would protect the individual employee from retaliatory discharge for asserting or exercising either of those rights. Section 7 "concerted activities" would have a uniform definition in union and nonunion settings. Under this uniform approach, both employees in the toxic waste hypothetical[232] would receive equal treatment under section 7.

Second, this unified approach would protect the employers' legitimate interests. This unified standard would still allow an employer to discharge a malevolent employee who harasses the employer with spurious complaints. To merit section 7 protection[233] under this proposal for a unified *City Disposal-Alleluia Cushion* standard, an employee complaint would have to be: (1) grounded in a collective bargaining agreement or in a statute;[234] (2) reasonable and in good faith;[235] (3) pursued in any applicable grievance or arbitration forums;[236] and (4) for the purpose of "mutual aid or protection."[237] A bogus claim could not overcome all these hurdles and attain protection under section 7.

The best, most effective means of establishing the proposed analysis would be through an amendment to the NLRA. Specifically, legislative articulation of a section 7 right expressly protect-

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Ct. at 1510 n.6 ("The Board . . . distinguished [*Meyers Industries*] from the cases involving the *Interboro* doctrine, which is based on the existence of a collective-bargaining agreement. The *Meyers* case is thus of no relevance here."); *id.* at 1517 n.2 (O'Connor, J., dissenting) ("The Court and the Board . . . agree that the mere fact that an asserted right can be presumed to be of interest to other employees is not a sufficient basis for labeling it 'concerted.' ").

232. *See supra* text following note 174.

233. This unified proposal would make no change in the past and current requirement that § 7 protection will accrue only to concerted activities that are not violent, unlawful, insubordinate, or otherwise unprotected. *See supra* notes 117, 127, 181 and accompanying text.

234. This criterion would hold "concerted" individual employee activities in workplace contexts (1)-(3), (5), and (7), but leave "unconcerted" activities in contexts (4), (6), and (8), in which there is neither an applicable collective bargaining agreement provision nor a statute. *See supra* text following note 174.

235. This standard incorporates the majority holding in *City Disposal*. *See supra* note 121 and accompanying text.

236. This approach pays heed to the *City Disposal* dissent's and to the Board's recent concern that appropriate deference be granted to the grievance arbitration process as a preferred forum, if available, for resolution of collective bargaining right disputes. *See supra* notes 135-36, 206-10 and accompanying text.

237. In cases involving statutory rights, the "mutual aid or protection" ordinarily could be inferred from the substantive nature of the statutory right asserted.

ing individual assertions of collective bargaining agreement rights and employment-related statutory rights would resolve the uncertainty in this area[238] and eliminate concern about tortuous interpretations of the Act. No reason, however, exists to anticipate a congressional response to *City Disposal* and *Meyers Industries*. Congress has not amended the NLRA since enacting the Landrum-Griffin Act in 1959, despite the need for resolution of these issues, which have been the subject of NLRB and judicial consternation for many years. In the absence of congressional clarification of these questions, the Board and the courts should recognize and apply the proposed unified *City Disposal-Alleluia Cushion* analysis. As an initial step, the Board, in its upcoming reconsideration of the "concerted activities" definition, should abandon the *Meyers Industries* standard, and extend section 7 coverage to individual assertions of statutory rights.

V. Conclusion

The Supreme Court and the NLRB have handed down decisions recently that redefine constructive concerted activities. In *City Disposal* the Supreme Court, by adopting the *Interboro* doctrine, resolved the split between the circuit courts on the issue whether and in what circumstances individual activities can be "concerted activities" under section 7 of the NLRA. Under the Supreme Court's ruling an individual's activity is concerted if it is an honest and reasonable assertion of a right that a collective bargaining agreement secures. In the absence of a collective bargaining provision to buttress an employee's claim, the employee must act with or on behalf of fellow employees. In *Meyers Industries* the NLRB replaced the *Alleluia Cushion* doctrine with the rule that an employee's assertion of an employment-related statutory right is not "concerted." The Board held that an individual employee's assertion of a statutory right, or any other claim that a collective bargaining agreement does not secure, will be concerted only if the employee acts with or on the authority of fellow employees. Taken separately, the two decisions create serious problems. *City Disposal* threatens to undermine the grievance arbitration mechanism by allowing some alleged collective bargaining agreement violations

238. The amendment could add an additional sentence to the end of § 7:
For purposes of this section, concerted activities shall include an individual employee's reasonable and good faith assertion, made for the purpose of mutual aid or protection, of a collective bargaining agreement right or employment-related statutory right.

to support independently an unfair labor practice claim without deferral to grievance arbitration procedures or awards. *Meyers Industries* would expose employees not governed by a collective bargaining agreement to the threat of employer retaliation against legitimate assertions of employment-related statutory rights.

Furthermore, these two decisions, when read together as one constructive concerted activities doctrine, draw arbitrary lines that effect inequitable outcomes. All things being equal, an employee's assertion of a right that a collective bargaining agreement secures will constitute concerted activity, while another employee's assertion of the same or similar right that only a statute secures will not be concerted. Which of the two divergent constructive concerted activities doctrines will apply hinges solely upon the existence of a collective bargaining agreement provision. Thus, section 7 now effectively favors union employees over nonunion employees. Furthermore, section 7 favors collective bargaining rights over statutorily granted rights, because even a union employee is unable to assert a statutory right that is not also the subject of a provision in the collective agreement.

The best approach to determine whether an individual employee has engaged in concerted activity would be to reinstate the *Alleluia Cushion* doctrine or to extend *City Disposal* to cover statutory as well as collective bargaining agreement rights. A unified *City Disposal-Alleluia Cushion* standard would effectuate more nearly the purposes of the NLRA and other employment-related legislation without creating the inconsistencies and inequities that exist under the current analysis. An amendment to the NLRA expressly addressing and clarifying the questions that individual employee activity cases have raised would best remedy the inadequacies of present doctrinal analysis. If Congress, however, continues to leave these questions and ambiguities to judicial and administrative agency interpretation, the NLRB and the courts should implement and apply consistently a uniform constructive concerted activities definition, such as the proposed *City Disposal-Alleluia Cushion* standard, and reject the current inconsistent analyses. In the search for an ideal constructive concerted activities doctrine, the Supreme Court has taken one step forward and the NLRB has taken one step backward.

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