PROTECTED CONCERTED ACTIVITY IN THE NON-UNION CONTEXT: LIMITATIONS ON THE EMPLOYER'S RIGHTS TO DISCIPLINE OR DISCHARGE EMPLOYEES

Judith J. Johnson*

The fundamental purpose behind passage of the National Labor Relations Act1 was to promote the peaceful settlement of labor disputes by providing legal remedies for the invasion of certain rights of employees.

The purpose of the Act was not to guarantee to employees the right to do as they please but to guarantee them the right of collective bargaining for the purpose of preserving industrial peace. The policy of the Act is thus set forth, 29 U.S.C.A. sec. 151; "the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the effect of burdening or obstructing commerce."

Inherent in this statement of purpose is the idea that the Act was designed to counterbalance the employer's powerful bargaining position by allowing employees the use of economic pressure to improve working conditions both with and without the mediation of a union.3 Therefore, in addition to providing the fundamental safeguards for employees' rights to organize labor unions and to bargain collectively, the Act confers important rights on employees not engaged in union activities or organization. Section 7 of the Act guarantees the rights of employees "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

* Associate, Jolly, Miller & Milam, Jackson, Mississippi; B.A., 1969, University of Texas; J.D., 1974, University of Mississippi.
other mutual aid or protection . . .”4 The relevant portion of this
section in the non-union context is the right to engage in “concerted
activities” for “mutual aid or protection.”5

Section 7 protects employees’ rights by providing that employer
interference, restraint, or coercion of employees in the exercise of their
rights is an unfair labor practice under section 8(a)(1).6 Section 10(c)
empowers the National Labor Relations Board to order any affirmative
action that effectuates the purpose of the Act, including reinstatement
with or without back pay, as a remedy for the commission of an unfair
labor practice.7 By recognizing in section 10(c) that employees may be
discharged for “cause,”8 the Act also preserves the employer’s common
law right, subject to the limitations of statute and contract, to discharge
an employee at will. In the absence of a union contract, the statutory

5 Concerted activity has been defined as referring “both to employees’ actions and
the legal status of those actions, and as a result the term ‘protected concerted activity’
has been utilized to indicate such activity which is protected by law from employer’s
interference.” 27 VAND. L. REV. 201, 202 n.8 (1974). Indeed, some writers suggest that the
legal definition of concerted activity could be better conveyed by the term “protected
activity” since the actual concert among employees has no significance unless it is in
furtherance of some objective viewed by both the Board and the courts as valid. Note,
Concerted Activity Under Section 7 of the National Labor Relations Act, 1955 U. ILL. L.F.
6 29 U.S.C. § 158(a)(1) (1976). Section 8 sets out specific unfair labor practices of
employers in addition to the general prohibition of § 8(a)(1). These include: domination
or interference with the development of labor organizations; giving financial or any other
support; discriminating in the hiring or treatment of employees to affect membership of
labor organizations; discharging or discriminating against an employee for filing charges
or testifying under § 8; and, refusing to bargain collectively. See 29 U.S.C. § 158(a)(2)-(5)
(1976).
617, 620 (9th Cir. 1977) (back pay order supports public policy of Act); NLRB v. Martin
A. Gleason, Inc., 534 F.2d 466, 478-79 (2d Cir. 1976) (back pay order is to reimburse actual
losses of wages and deter future violations); Marriott Corp. v. NLRB, 491 F.2d 367, 371
(9th Cir. 1974) (back pay orders allowed only to mitigate damages and prevent further
violations); NLRB v. Waukesha Lime & Stone Co., 343 F.2d 504, 509-10 (7th Cir. 1965)
(discriminatory refusal to rehire not requisite for reinstatement); NLRB v. Ellis & Watts
Prod., Inc., 297 F.2d 576, 577 (6th Cir. 1962) (reinstatement and back pay is remedial
relief, not a fine or penalty). It should be noted that reinstatement and back pay are
merely types of relief that may be appropriate and do not limit the remedial power of the
NLRB. NLRB v. Waumbec, 114 F.2d 226, 235 (1st Cir. 1940). Indeed, reinstatement and
awarding back pay are sanctions in addition to the NLRB’s general power to issue orders
to cease and desist against the party engaging in unfair labor practices. 29 U.S.C. § 160(c)
(1976).
8 29 U.S.C. § 160(c) (1976); see NLRB v. Hartmann Luggage Co., 453 F.2d 178, 181-
82 (6th Cir. 1971) (reinstatement not allowed if refusal to rehire is based on legitimate
and substantial business reasons).
limitation on the employer’s right to discipline or discharge an employee remains because “[t]he mantle of protection of concerted activities . . . extends to both union and non-union employees.”

To the extent possible, this Article will be devoted to the situation in which there is no union or union organizational activity. It should be recognized that since the National Labor Relations Act does not distinguish between the statutory rights of union and non-union employees, many of the cases involving the protected concerted activities of union members are persuasive, if not binding, authority in the non-union context. The limitations placed by the Act on employers’ rights will be delineated by an examination of the four factors upon which the courts have placed emphasis—definition of the term “concerted,” proper purposes of concerted activity, the type of concerted activity involved, and the ways that a protected activity may lose its protection.

I. Defining The Term “Concerted”

“[F]or employee activity to be protected under the Act, the activity must not only have a lawful objective and be carried out by lawful and proper means, but it must also be ‘concerted’.” Employees’ actions in the nature of individual complaints are not concerted and are therefore not protected. For example, an employee who sought sympathy from other employees for his opposition to the employer’s dress code was discharged for disrupting the workforce. The Board, ruling that such activities are purely personal rather than concerted, upheld the discharge. Similarly, one employee’s circulation of a petition demanding the discharge of his foreman was held not to be concerted activity since

\footnotesize{\textsuperscript{9}} See Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (discharge upheld since not violative of any statute and employee was not covered under a union contract). See generally Annot., 83 A.L.R.2d 532 (1962) (setting out limitations on discharge of employees).

\footnotesuperscript{10} Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1347 (3d Cir. 1969), cert. denied, 397 U.S. 935 (1970); see Trustees of Boston Univ. v. NLRB, 548 F.2d 391, 392 n.1 (1st Cir. 1977) (nonunionized employees entitled to protection of NLRA); NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) (section 7 of NLRA protects employees with no bargaining representative).

\footnotesuperscript{11} NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1082 (8th Cir. 1977).

\footnotesuperscript{12} See NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 718-19 (5th Cir. 1973) (not concerted activity when individual bargained over his own contract provisions); Southwest Latex Corp. v. NLRB, 426 F.2d 50, 56-57 (5th Cir. 1970) (upheld discharge of an employee who classified his gripes as his own).


\footnotesuperscript{14} Id. at 305.

\footnotesuperscript{15} Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 753-54 (4th Cir. 1949). The court noted that the employees signed the petition “without thought of mutual aid or protection, and with no purpose other than to help [the discharged employee] get rid of an
the petition was merely an extension of a personal quarrel the employee had had with the foreman. Therefore, if a protest can be characterized as purely personal and there are no other persons who are involved or who would have benefited had the employee succeeded, the activity is not concerted. However, the employee’s effort is concerted if it contains some element of collective activity.

Although concerted activity usually connotes activity with fellow employees, the protection afforded by section 7 is more extensive since the definition of employee under the Act is not restricted to employees of the same employer. Thus, if an employee indicates support for a group of striking employees, he may be engaged in protected concerted activity since he is acting in concert with the striking employees regardless of whether the strikers are employees of his employer. Even when a non-union employee refuses to cross a picket line, he is engaged in concerted activity because he has “pledged his troth with the strikers, joined in their common cause, and has thus become a striker himself.”

unpopular supervisor who had angered him.” Id. at 754. The court reasoned that “the act was never intended to protect this sort of unwarranted interference with management.” Id.

16 The Joanna Cotton court noted that the defiant and insulting attitude of the employee toward his supervisor necessitated his discharge if discipline within the plant was to be maintained. Id. at 753. But cf. Jeannette Corp., 217 N.L.R.B. 653, 656-57 (1975) (discharge of employee for discussing salary demands with fellow employees unlawful despite fact that the discussion violated a company rule on keeping salary figures confidential).

17 See Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (discussions of employees’ rights are not concerted activities when not in preparation for group action); Continental Mfg. Corp., 155 N.L.R.B. 255, 257-58 (1965) (validated discharge of employee for letter written criticizing management activities since not an effort to aid fellow employees).

18 See Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) (discharge of two employees for circulating a petition attacking company policies held unlawful); Tex-Logs, Inc., 112 N.L.R.B. 968, 972-73 (1955) (two employees discussing wage rates with management on behalf of others is concerted activity even though other employees subsequently deny they were authorized to do so).


20 Compare NLRB v. Circle Bindery, Inc., 536 F.2d 447, 452 (1st Cir. 1976) (discharge of employee for reporting to his union about his non-union employer using union label on products was unlawful even though action was to protect union, not fellow employees) with Cervantes, 87 N.L.R.B. 877, 880 (1949) (activity between employee and agricultural worker of the same employer not concerted since agricultural worker not employee under NLRA). The Board in Cervantes said: “[W]e do not believe that one ‘employee’ and nonemployee together may engage in protected concerted activities within the meaning of the Act.” Id. at 880-81.

21 NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1301 (5th Cir. 1970). In Southern Greyhound Lines the court held that nonstriking employees who refused to cross a picket line must be treated as “strikers” and therefore protected from discharge. Id. at
Likewise, an employee’s statement to one non-union employee expressing sympathy for a threatened strike has been deemed a concerted act because it was regarded as an expression of support for a group action in the interest of other employees. However, the employee’s motive must be to support the common cause. For example, an employee who refuses to cross a picket line because of fear is not engaging in a concerted action.

In Mushroom Transportation Co. v. NLRB, the Court of Appeals for the Third Circuit enunciated the most expansive view ever accepted by either the Board or a court of appeals for ascertaining whether an activity is concerted. In the Mushroom case an employee advised his co-workers of their rights regarding terms and conditions of employment. In its effort to characterize this action the court made the following analysis:

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qual-

1301; accord, NLRB v. Union Carbide Corp., 440 F.2d 54, 55 (4th Cir.) (concerted activity when nonstriking employees stayed home and refused to cross a picket line set up by fellow employees), cert. denied, 404 U.S. 826 (1971); NLRB v. Difio Lab., Inc., 427 F.2d 170, 171 (6th Cir.) (unlawful to discharge two employees for honoring picket line set up by a union of which they were not members), cert. denied, 400 U.S. 833 (1970). In Difio, the court went so far as to say that whether the striking union did or did not want the non-union employees to honor the picket was irrelevant as long as the employees thought such action was in their best interest. 427 F.2d at 172.

Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 342-43 (9th Cir. 1968). The court here focused not on the “preparation for group action” aspect of the statement but rather on the fact “that it had some relation to group action in the interest of the employees.” Id. at 342-43 (emphasis added by Signal Oil court) (quoting Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964)).

Taking a different view, the Seventh Circuit held in NLRB v. Illinois Bell Tel. Co., 189 F.2d 124 (7th Cir. 1951) that when eight employees refused to cross a picket line as a matter of principle and not to further a cause of their own they were not engaged in protected concerted activity. Id. at 127-28; accord, NLRB v. Rockaway News Supply Co., 197 F.2d 111, 114-15 (2d Cir. 1952) (discharging an employee because of his refusal to cross a picket line at a plant which his duties required him to enter was not an unfair labor practice).

“One who refuses to cross a picket line by reason of physical fear does not act on principle. He makes no common cause, and contributes nothing to mutual aid or protection in the collective bargaining process.” NLRB v. Union Carbide Corp., 440 F.2d 54, 56 (4th Cir.), cert. denied, 404 U.S. 826 (1971). In Union Carbide, two employees refused to cross a picket line as a matter of principle, a third refused out of fear of personal injury. The court ordered the two men of principle reinstated but allowed the discharge of the fearful one to stand. 440 F.2d at 56. The court seemed to reason that the emotion of fear is self-centered and contrary to the spirit of concerted activity. But see Cinch Mfg. Corp., 91 N.L.R.B. 371, 381 (1950) (refusal to cross picket line was concerted activity even though motivated by fear).

330 F.2d 683 (3d Cir. 1964).
ify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees. This is not to say that preliminary discussions are disqualified as concerted activities merely because they have not resulted in organized action . . . . [I]nasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition.26

Yet the Third Circuit held that the employee's activity was not concerted since its sole purpose was to provide co-workers with advice concerning what each might do as an individual without involving fellow employees or the union.27 Since the advice therefore did not contemplate some group action, the employee's activity was held to be merely individual rather than concerted.

The Third Circuit's test is but one point on a spectrum, however, since the National Labor Relations Board and the various courts of appeals continue to devise and apply their own definitions of the term "concerted." Several courts of appeals construe the term literally, and find activities to be concerted only if two or more employees are involved.27 Other courts of appeals and the Board find the activities of even a single employee to be concerted if such activities are engaged in for a concerted purpose.28 The seminal argument for this more expansive
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construction of the term was advanced by the Second Circuit in *NLRB v. Interboro Contractors, Inc.*, in which the court held that the efforts of a single employee "to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees." This view, generally referred to as the *Interboro rule*, has been described as constructive concerted activity since the participation of other employees in the activity is inferred from the fact that the individual activity protects the rights of all employees.

The theory that a single employee can engage in concerted activity if his activity also benefits other employees has been followed by the Board even in non-union situations. In *Alleluia Cushion Co.*, an employee was discharged for filing a complaint under the California Occupational Safety and Health Administration. Although it was undisputed that the employee had acted alone, the Board held that "since minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent [of fellow employees] and concert of action emanates from the mere assertion of such statutory rights."

The *Interboro* rule, however, has been specifically rejected by some courts of appeals. In *NLRB v. Northern Metal Co.*, the rule was characterized as contrary to the clear wording of the Act especially since

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pay even though he acted completely on his own); cf. *NLRB v. C & I Air Conditioning, Inc.*, 486 F.2d 977, 978 (9th Cir. 1973) (since complaint about job site safety was not shown to be for mutual aid and protection it was not protected activity).

2 388 F.2d 495 (2d Cir. 1967).

3 Id. at 500.

3 See generally Note, *Constructive Concerted Activity and Individual Rights: The Northern Metal—Interboro Split*, 121 U. Pa. L. Rev. 152 (1972). For discussion of the historical development of the concept of concerted activities see Note, *The Requirement of “Concerted” Action Under the NLRA*, 53 Colum. L. Rev. 514 (1953). Since to be protected the activity must be "for the purpose of collective bargaining or other mutual aid or protection," it has been argued that the use of the term "concerted" is redundant. *Id.* at 529. A likely effect of deleting the qualifier "concerted" would be an increase in court decisions holding actions by individuals to be protected if they advance any element of a collective bargaining agreement, even where the immediate purpose and benefit is solely personal.

22 The Third Circuit in *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971) labeled the *Interboro* rule a legal fiction, in that "[t]he Act surely does not mention ‘concerted purposes’." *Id.* at 884 (emphasis in original).

21 221 N.L.R.B. 999 (1975).

24 *Id.* at 1000. See also *Triangle Tool & Eng'r, Inc.*, 226 N.L.R.B. 1354, 1357 (1976) (employee who talked to other employees about overtime wages due them was engaged in concerted activity even though none of the others took any action).

3 See note 27 supra.

440 F.2d 881 (3d Cir. 1971).
the Act does not on its face encompass activities engaged in by single employees even for concerted purposes. The Third Circuit reasoned that the term "concerted" only includes acts that are mutually contrived, planned or agreed on.

In NLRB v. Buddies Supermarkets, Inc., the Fifth Circuit denied enforcement of the Board's order and criticized its reliance on Interboro. The court characterized a discharged employee's efforts to obtain more favorable terms of employment for himself as individual complaining beyond the scope of the protection afforded by section 7. The court found the Board's reliance on Interboro misplaced in part because the statutory basis for the Interboro rule was, according to the court, suspect. The Fifth Circuit did observe, however, that the activity of a single employee could be concerted in certain situations.

In non-union contexts the problems that arise from the Interboro-Northern Metal split are compounded by the absence of a collective bargaining agreement. Although some courts of appeals reject the Interboro rule when no union contract is extant, those courts that accept the rule consider as concerted activity a protest by one employee regarding those working conditions of vital concern to other employees. Moreover, unless there is evidence of disavowal by other employees, the Board will deem such individual actions to have been impliedly consented to by non-union workers. Therefore, the issue is not whether the

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37 Id. at 884.
38 Id.
39 481 F.2d 714 (5th Cir. 1973).
40 Id. at 719.
41 Id. at 720.
42 Id. at 719.
43 Id. at 720. The court cited Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 342 (9th Cir. 1968) (concerted activity when employee spoke in support of a threatened strike) and NLRB v. Guernsey-Muskingum Elec. Coop., Inc., 285 F.2d 8, 12-13 (6th Cir. 1960) (employee voicing the concerns of fellow employees on their behalf).
44 See NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719 (5th Cir. 1973) (Interboro inapplicable outside collective bargaining context); cf. NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1083-84 (8th Cir. 1977) (distinguished Interboro from collective bargaining context but failed to indicate whether Interboro rule applies in non-collective bargaining situation).
45 See Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708-09 (1st Cir. 1975) (concertedness requirement relates to the end rather than the means). It was noted in Ethan Allen that if the rule was otherwise an individual who desired to institute unionization would not be protected. "If [the employer] could so extinguish seeds, it would have no need to uproot sprouts." Id. at 708.
46 See Pink Moody, Inc., 237 N.L.R.B. No. 7, 98 L.R.R.M. 1463, 1463-64 (1978) (employee's complaint about truck that other employees had to drive was protected); C & I Air Conditioning, Inc., 193 N.L.R.B. 911, 911 (1971) (employee's complaint about safety conditions is concerted activity though he acted alone); Carbet Corp., 191 N.L.R.B.
employee is enforcing a term of the collective bargaining agreement, but whether he is either seeking to enforce a statute enacted to protect employees or protesting working conditions of concern to other employees.

Although the Board takes this position, not all courts agree. For example, in Dawson Cabinet Co., the Board ordered reinstatement of an employee who refused to accept a new job temporarily unless she was paid as much as the males performing the job. The Board held that the employee, in refusing to work for less pay, was engaged in protecting the Equal Pay Act rights of all other female employees. The Eighth Circuit, however, denied enforcement of the Board's order, holding that the complainant had acted alone since there was no evidence that other employees shared her concern that the employer was paying women less for the same job than men.

In Hunt Tool Co., it appeared that the Board had established the outer boundary of its definition of "concerted." In the Hunt case, an employee filed suit against his employer under both the Jones Act and the Longshoreman's and Harbor Worker's Compensation Act for

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892, 892 (1971) (employee's complaint about ventilation system was concerted even though he was not officially authorized to complain for others).

The Board has stated:

Even individual protests are protected as concerted activity 'if the matter at issue is of moment to the group of employees complaining and if the matter is brought to the attention of management by a spokesman, voluntary or appointed for that purpose, so long as such person is speaking for the benefit of the interested group.'


Id. at 293.

Id. at 292.

NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1083-84 (8th Cir. 1977). In another Board decision, the employer was held to have violated § 8(a)(1) by discharging two employees who had attempted to obtain overtime wages to which they were entitled, and who had also cooperated with the Department of Labor in its investigations of these alleged violations. G.V.R., Inc., 201 N.L.R.B. 147, 147 (1973). The Board found that the two employees had conferred on this matter and were clearly united in their determination to obtain the wages to which they were entitled. The Board went further, however, and held that any single employee covered by a federal statute governing wages, hours, and conditions of employment who participates in a compliance investigation of his employer or who protests his employer's non-compliance is engaged in protected-concerted activity for mutual aid and protection. Id.; accord, White's Gas & Appliance, Inc., 202 N.L.R.B. 494, 495 (1973) (pursuit of overtime pay claims held concerted activity); Thurston Motor Lines, Inc., 159 N.L.R.B. 1265, 1306-07 (1966) (contrary to public policy to remove complaints to public authorities from protection of NLRA).

damages resulting from an on-the-job injury.\textsuperscript{52} Although several decisions have held that an employee may be engaged in protected concerted activity when he files suit against his employer,\textsuperscript{53} if the suit is a purely personal claim, at least under the analysis in \textit{Hunt}, the activity is individual rather than concerted. However, in its continuing expansion of the \textit{Interboro} rule, the Board has recently overruled \textit{Hunt Tool Co.} on the theory that the filing of a claim, such as the one in \textit{Hunt}, is of common interest to other employees who might be similarly situated in the future.\textsuperscript{54}

The Board has continued to expand the \textit{Interboro} rule to cover not only situations in which an employee seeks to enforce a collective bargaining agreement\textsuperscript{55} or a statute enacted for the benefit of employees,\textsuperscript{56} but also to cover situations in which an employee's complaints are directed toward employment conditions that are of concern to other employees.\textsuperscript{57} For example, in \textit{Diagnostic Center Hospital Corp.},\textsuperscript{58} an employee had written a letter to her employer protesting the employer's failure to grant a wage increase and alleged discriminatory practices.\textsuperscript{59} The Board found that the discharged employee had been engaged in protected concerted activity when she wrote the letter even though she had not been designated to act for the other employees and even though they were not informed of the letter.\textsuperscript{60} Since evidence showed that the other employees shared her concern and interest in the subject matter of the letter, the employee who wrote the letter was acting concertedely on behalf of her fellow employees.\textsuperscript{61} Thus, so long as there is

\textsuperscript{52} Id. at 145.
\textsuperscript{55} New York Trap Rock Corp., 148 N.L.R.B. 374, 375 (1964) (attempts to implement collective bargaining agreement affects all employees so it is therefore protected concerted activity); Merlyn Bunney, 139 N.L.R.B. 1516, 1519 (1962) (single employee's efforts to enforce collective bargaining contract is concerted activity).
\textsuperscript{57} See Waco Insulation, Inc., 223 N.L.R.B. 1486, 1487 (1976) (in addition to seeking a raise employee complained about working conditions), modified, 567 F.2d 596, 602 (4th Cir. 1977).
\textsuperscript{58} 228 N.L.R.B. 1215 (1977).
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 1217.
\textsuperscript{61} Although the Board held that the employee's action was a concerted activity, the discharge was upheld because the evidence failed to show that the employer knew at the time of the employee's discharge that she had written the letter. \textit{Id.} at 1216. For a discussion of this knowledge requirement in the determination of "concerted activity," see text accompanying notes 68 through 74 infra.
evidence that the issue in question is of common concern to other workers, the affected workers need not have designated the complainant as their spokesman in order for his activities to be deemed concerted.\(^2\)

This analysis should be contrasted with the more traditional view of concerted activity followed by those courts of appeals that reject the *Interboro* rule.\(^3\)

The mere fact that the men did not formally choose a spokesman or that they did not go together to see Mr. Scott does not negative concert of action. It is sufficient to constitute concerted 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.\(^4\)

The positions of the Board and the anti-*Interboro* courts may be distinguished according to the degree of mobilization each requires. The courts under consideration deem an action to be concerted only if a reasonable inference can be drawn from the evidence that the employees have decided to press their grievance against management.\(^5\) On the other hand, the Board merely requires that the matter at issue be of common concern.\(^6\) In short, the Board, unlike the courts here under discussion, does not require evidence of group mobilization. The Board has summarized its own position in this regard as follows:

The Board has held too often to warrant citation of authority here that where an individual employee turns to his employer alone to improve his condition of employment and is in no sense joined in his action by any other workman, he has not engaged in concerted activities in the statutory sense and may be discharged with impunity.

When an individual workman demands that the employer change the hours of work for the entire group, his success or failure affects them all. Does it follow from this that he was acting in concert with them and was therefore protected against discharge for such individual personal conduct? Perhaps. If . . . the rest of employees think as did the

\(^2\) See Detroit Forming Inc., 204 N.L.R.B. 205, 212 (1973) (an attempt to enlist fellow employees in common action to better their conditions is protected concerted activity even if others refuse to join in cause).

\(^3\) See note 27 supra.


\(^6\) See Diagnostic Center Hosp. Corp., 228 N.L.R.B. 1215, 1217 (1977) (activity is concerted if it relates to a matter of common concern).
sole activist, agree with his thoughts that the employer should change the work schedule, but whatever he does he does alone, is that activity then to be deemed concerted and protected? Again, perhaps. Assume, finally, that while agreeing in principle with the sole actor, the rest of the employees make it clear they wish to disassociate themselves from his activity, want nothing to do with it, refuse to sign his petition to the employer, is he then engaged in statutory concerted activity? [No.]

It must be noted, however, that yet another factor enters the equation. Even if an activity would be concerted under one or more of the definitions that have been considered, the acting employee may not be protected unless at the time of discipline or discharge the employer had knowledge of the concerted nature of the activity in question. This requirement derives from the common law doctrine that an employer has the right to dismiss his employees at will. This right has been abrogated by federal labor law only to the extent that it is exercised to deter protected concerted activities. Thus, in Standard Brands, Inc., two employees complained to various company officials about their supervisor’s handling of the department. Yet, since the official who actually discharged one of the complaining employees was not aware that there were two employees acting in concert, no violation was found by the Board. The courts have reasoned that if the employer “from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they choose to remain silent, bear the risk of being discharged.”

68 See NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 717 (5th Cir. 1973) (record must show employer's knowledge of concerted activity); Texas Aluminum Co. v. NLRB, 435 F.2d 917, 919 (5th Cir. 1970) (employer's knowledge of concerted activity required, but may be inferred from circumstances); Southwest Latex Corp. v. NLRB, 426 F.2d 50, 56 (5th Cir. 1970) (discharge upheld since record reflected that employer was without knowledge of concerted activity); Indiana Gear Works v. NLRB, 371 F.2d 273, 276-77 (7th Cir. 1967) (employer had no knowledge that an employee's critical cartoons were concerted activity).
69 NLRB v. Condensor Corp., 128 F.2d 67, 75 (3d Cir. 1942); see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) (the Act recognizes right of employer to select employees if not motivated by intent to intimidate or coerce); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 721-22 n.22 (5th Cir. 1973) (upheld discharge on basis of employee's dishonesty); NLRB v. I.V. Sutphin Co.-Atlanta, Inc., 373 F.2d 890, 893 (5th Cir. 1967) (allowed discharge of employee who had threatened other employees).
70 196 N.L.R.B. 1006, 1006-08 (1972).
71 Id. at 1006-08. But see NLRB v. Transport Clearings, Inc., 311 F.2d 519, 523 (5th Cir. 1962) (knowledge of office manager imputed to general manager).
72 NLRB v. Ford Radio & Mica Corp., 258 F.2d 457, 465 (2d Cir. 1958). This reasoning
Of course, this knowledge requirement is a double-edged sword. An otherwise legal firing is unlawful if the employer is motivated even in part by a belief that the employee is engaging in protected concerted activity. Indeed, even if the employer is mistaken in his belief that the discharged employee was engaged in protected activity, the firing is nevertheless illegal.\textsuperscript{73} The issue is not whether there are independent, legitimate grounds for the discharge, but whether the discharge was illegally motivated.\textsuperscript{74}

As the previous discussion indicates, the determination of concerted status involves many factors. When the factual question of employer knowledge or belief at the time discharge is considered along with the conflicting definitions of "concerted" promulgated by the Board and the various courts of appeals, it becomes apparent in this context that the formulation of a general principle of black letter law is impossible. The determination of protected status must be approached case-by-case and forum-by-forum. Such uncertainty, however, is detrimental to both the workers and employers. It must be recalled that the determination of concerted status is the threshold question upon which federal statutory protection hinges. Moreover, many companies employ workers in more than one federal appellate circuit. Simple fairness would seem to require that a single, uniform standard be adopted. The present posture

\textsuperscript{73} See Henning & Cheadle, Inc. v. NLRB, 522 F.2d 1050, 1062-53 (7th Cir. 1975) (question is whether activity as perceived by employer is protected); NLRB v. Garner Tool & Die Mfg., Inc., 493 F.2d 263, 268 (8th Cir. 1974) (suspicion of protected activity is exception to rule that employer have knowledge); NLRB v. Ritchie Mfg. Co., 354 F.2d 90, 98-99 (8th Cir. 1965) (actual participation in concerted activity is not necessary when suspected participation motivates discharge).

\textsuperscript{74} This is the generally accepted rule under Board precedent. A discharge may be based on legitimate reasons, but if it is "partly in reprisal for protected concerted activity, it is unlawful." Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574, 575 (1976), enforcement denied, 574 F.2d 891, 891-92 (6th Cir. 1978) (record failed to support Board's finding that discharge was based on participation in protected activity).

If an employee is discharged for any legitimate reason, the Act is not violated, provided that the employer does not "substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate for an employee's concerted activities." Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1352 (3d Cir. 1969), cert. denied, 397 U.S. 935 (1970); cf. Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337 (4th Cir. 1976) (burden of proof is on Board to show that legitimate grounds were "pretextual"). See also NLRB v. Hanes Hosiery Div., 413 F.2d 457, 457-58 (4th Cir. 1967) (absence from work station was pretext for discriminatory discharge); Frank Paxton Lumber Co., 235 N.L.R.B. No. 83, 98 L.R.R.M. 1072, 1073 (1978) (evidence showed that discharge for violation of work rules was pretextual).
of the law brings to mind remarks made by Samuel Johnson in another context.

He that is thus governed, lives not by law, but by opinion; not by a certain rule to which he can apply his intention before he acts, but by an uncertain and variable opinion, which he can never know but after he has committed the act on which the opinion shall be passed. He lives by a law (if a law it be), which he can never know before he has offended it . . . . [M]isera est servitus ubi jus est aut incognitum aut vagum. 75

II. PROPER OBJECTIVES OF PROTECTED CONCERTED ACTIVITY

Activities must be concerted to be protected, but not all concerted activities are protected. 76 To be protected, the concerted activity must be engaged in for “mutual aid and protection.” This phrase has been broadly construed and generally deemed to include any activity the purpose of which is to affect the well-being of a group of employees. 77 Usually the objectives of the activity must relate in some way to terms and conditions of employment. 78 Protests regarding matters only indirectly related to working conditions will not be protected absent some significant nexus with employment relationship. In G & W Electric Specialty Co. v. NLRB, 79 an employee who sought support for a petition during working hours and on company premises was discharged for violating a company rule against solicitation. 80 The petition criticized the

75 J. Boswell, Life of Johnson 497 (W. Chapman ed. 1970) (it is miserable to serve when rights are unknown or vague).
76 NLRB v. Superior Tool & Die Co., 309 F.2d 692, 695 (6th Cir. 1962); see NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255-56 (1939) (to be protected, concerted conduct must be lawful); Shelly & Anderson Furn. Mfg. Co. v. NLRB, 497 F.2d 1200, 1203 (9th Cir. 1974) (to be protected, conduct must: (1) be work related, (2) further group interest, (3) seek specific remedy, and (4) be lawful); Hagopian & Sons, Inc. v. NLRB, 395 F.2d 947, 951 (6th Cir. 1968) (to be protected, concerted activity must concern conditions of employment).
78 Compare G & W Elec. Specialty Co., 360 F.2d 873, 876 (7th Cir. 1966) (employees’ credit union activities where employer was in no way involved were deemed not to be for mutual aid or protection) with Eastex, Inc. v. NLRB, 98 S. Ct. 2505, 2512-13 (1978) (employees’ newsletter advocating certain legislative action deemed protected activity) and Kaiser Eng’rs v. NLRB, 538 F.2d 1379, 1384-85 (9th Cir. 1976) (employees’ lobbying legislators regarding national immigration was protected). See generally Getman, supra note 3, at 1218.
79 360 F.2d 873.
80 Id. at 875.
operation of a credit union created and operated by the employees. The petition did not request corrective action from the employer; indeed, the matter was not even subject to the employer's control. In denying enforcement of the Board's order the Seventh Circuit held that the Board's finding that such activities were for mutual aid and protection was contrary to the intent of the Act and went beyond the Act's concern with labor-management relations.

Yet, confronted with similar facts, the Ninth Circuit in *Kaiser Engineers v. NLRB* found the activity to be concerted and within the protection of section 7. In *Kaiser*, the employees, civil engineers, sent a letter to Congress opposing changes in the immigration laws that would have permitted the importation of alien engineers. Kaiser considered the letter to be an embarrassment to the company and discharged the worker who had drafted it. Although federal immigration policy is clearly outside the control of management, the court held that the issue was closely related to the employment security of the engineers. For this reason, the situation in *Kaiser* was deemed distinguishable from that in *G & W Electric Specialty Co.* In that case the circulated petition dealt with the status of employees as depositors in a credit union; in *Kaiser*, the controversial letter related to the status of the engineers as employees. Thus, section 7 protection can extend to matters beyond the control of management.

Similarly, participation in sympathy strikes, refusals to cross picket lines and other acts in support of fellow employees or union

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81 *Id.* at 876.
82 *Id.* at 876-77. For criticism of this rationale see Getman, supra note 3, at 1218-22.
83 538 F.2d 1379 (9th Cir. 1976).
84 *Id.* at 1385.
85 *Id.*
86 Illustrative of this principle is Bethlehem Shipbldg. Corp. v. NLRB, 114 F.2d 930 (1st Cir. 1940), in which employees' endorsing a change in workmen's compensation laws in opposition to the position of the employer was protected. *Id.* at 941; accord, Eastex, Inc. v. NLRB, 98 S. Ct. 2505, 2512-13 (1978) (distribution of newsletter opposing incorporation of right-to-work provision into state constitution was protected).
87 See NLRB v. C.K. Smith & Co., 569 F.2d 162, 165 (1st Cir. 1977) (sympathy strike by employees against common employer is protected), *cert. denied*, 98 S. Ct. 3070 (1978); Newspaper Prod. Co. v. NLRB, 503 F.2d 821, 830 (5th Cir. 1974) (sympathy strikers entitled to same protection as actual strikers).
members have traditionally been regarded as protected concerted activities despite the fact that they involve matters outside the participating employee’s own relationship with his employer. Perhaps the best justification for the protection of such activities is that, although the dispute does not immediately concern the employee, the employee knows that by supporting the strike or honoring the picket line he is assuring himself of the reciprocal support of those whom he is helping if and when he becomes the primary striker. “[T]he solidarity so established is ‘mutual aid’ in the most literal sense, as nobody doubts.”

Myriad other objectives have been held to be proper goals of protected concerted activity. One of the most common is protest over the safety of working conditions. Violations of section 8(a)(1) have been found in situations in which the employer had disciplined or discharged employees for refusing to work under conditions they believed to be dangerous.


See General Tire & Rubber Co. v. NLRB, 451 F.2d 257, 259 (1st Cir. 1971) (employee who crossed picket line but refused to do "struck work" was protected); NLRB v. Peter Cailler Kohler Swiss Chocolate Co., 130 F.2d 503, 505-06 (2d Cir. 1942) (resolution protecting employer's action against another strike was protected); Fort Wayne Corrugated Paper Co. v. NLRB, 111 F.2d 869, 874 (7th Cir. 1940) (employee's union activities outside scope of his employment relationship protected). See generally Newborn, Restrictions on the Right to Strike on the Railroads: A History and Analysis (II), 24 LAB. L.J. 234, 248 (1973); Oldham, supra note 64, at 1004.

See NLRB v. Peter Cailler Kohler Swiss Chocolate Co., 130 F.2d 503, 505-06 (2d Cir. 1942).

See Elam v. NLRB, 395 F.2d 611, 614 (D.C. Cir. 1968) (work stoppage by mailboys in mailroom of newspaper in protest of lack of safety devices on machines protected); Morrison-Knudsen Co. v. NLRB, 358 F.2d 411, 413 (9th Cir. 1966) (action of employee complaining about lack of safety goggles and other poor working conditions protected even though complaining employee was not subjected to those conditions); NLRB v. Belfry Coal Corp., 331 F.2d 738, 740 (6th Cir. 1964) (refusal of two employees to work in area of mine declared unsafe by state board protected); Modern Carpet Indus., Inc., 236 N.L.R.B. No. 132 (1978) (refusal to work with lead that had been stored with radioactive material protected); Du Tri Displays, Inc., 231 N.L.R.B. No. 128 (1978) (protests over excessive chemical fumes protected). Contra, United States Steel Corp. v. United Mine Workers, 393 F. Supp. 942, 948 (W.D. Penn. 1975) (men in mine cannot refuse to go to work simply because they feel some safety hazard involved). At least one court has even allowed employees to protest future dangerous conditions. See Bob's Casing Crews, Inc. v. NLRB, 458 F.2d 1301, 1304 (5th Cir. 1972) (action of employee in informing employer that crew hired to lay down casing wanted relief crew to pick up drill pipe because they would be too tired to do it safely was protected even though protest concerned future conditions instead of current ones).

The courts and the Board have also been active in protecting conduct which protests
equipment has usually been held to be protected. Employees may not be safe from discharge or discipline if the protests regard risks inherent in the nature of the job since such protests essentially amount to a protest against the job itself. This analysis is not applicable, however,

conditions that are merely unpleasant as opposed to dangerous. See NLRB v. Washington Aluminum Co., 370 U.S. 9, 15-16 (1962) (walkout by employees because shop was too cold to work in protected as concerted activity despite fact that employer had made a good faith effort to raise temperature in machine shop); NLRB v. Elias Bros. Restaurant, 496 F.2d 1165, 1166-67 (6th Cir. 1974) (protest by waitresses that work area was too hot, floor was wet, and lack of spoons protected); NLRB v. Okla-Inn, 488 F.2d 498, 503 (10th Cir. 1973) (court upheld walkout of maids caused by generally poor working conditions); NLRB v. KDI Precision Prods. Inc., 436 F.2d 385, 386-87 (6th Cir. 1971) (ultimatum of "fans or walkout" protected in protest over hot working conditions); NLRB v. Southern Silk Mills, 208 F.2d 155, 155 (1953) (spontaneous walkouts by employees in protest of excessive heat protected); Rockford Newspapers, Inc., 229 N.L.R.B. 429, 433 (1978) (discharge because of complaints about drafts in working area violates NLRA); Interlake, Inc., 218 N.L.R.B. 1043, 1049 (1973) (although work in furnace duct was normally hot and dirty, where heat was unbearable refusal to work was protected).

In addition to these cases, there are other sources of protection for employees' refusing to work in unsafe conditions. Section 502 of the Taft-Hartley Act states "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 [shall not] be deemed a strike under this chapter." 29 U.S.C. § 143 (1976). Although this statute can be important in a non-union context, it is inapplicable in an organized plant since the bargaining agreement may contain a "no-strike" clause. See Elam v. NLRB, 395 F.2d 611, 614 (D.C. Cir. 1968) (refusal of mailboys to work on unsafe machine protected); Pink Moody, Inc., 237 N.L.R.B. No. 7 (1978) (refusal to drive truck with defective brakes may not be disciplined); Essex Int'l, Inc., 213 N.L.R.B. 260, 265-66 (1974) (employees may not be disciplined for refusing to work on broken machine made temporarily operable by employer).

In addition to these cases, there are other sources of protection for employees' refusing to work in unsafe conditions. Section 502 of the Taft-Hartley Act states "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 [shall not] be deemed a strike under this chapter." 29 U.S.C. § 143 (1976). Although this statute can be important in a non-union context, it is inapplicable in an organized plant since the bargaining agreement may contain a "no-strike" clause. See NLRB v. Knight Moreley Corp., 251 F.2d 753, 759 (6th Cir. 1958) (walkout in protest of abnormally dangerous condition does not violate no-strike clause in labor contract). The employee may also turn to appropriate provisions of the Occupational Safety and Health Act of 1970, which allow the employee to complain to the Occupational Safety and Health Administration that the working conditions are unsafe. See Occupational Safety and Health Act of 1970, 84 Stat. 1590 (codified in scattered sections of 5, 15, 18, 29, 42, 49 U.S.C.). However, where the employee is confronted with a hazardous working condition that could result in death or serious injury, the employee may refuse to work until the condition is corrected and be protected in his refusal even though he failed to pursue the normal OSHA procedures. 29 C.F.R. § 1977.12(b)(2) (1977). See also Note, Imminent Danger: A Gap in Occupational Safety and Health Protection, 5 Ohio N.U.L. Rev. 479 (1978).

See Reed v. NLRB, 430 F.2d 331, 333-34 (10th Cir. 1970) (employee walkout in protest of dangers encountered during winter logging in Wyoming unprotected because inclement conditions were inherent aspect of job); United States Steel Corp. v. United Mine Workers, 393 F. Supp. 942, 948 (W.D. Penn. 1975) (men in mine cannot refuse to work just because a safety hazard is involved); Mal Landfill Corp., 210 N.L.R.B. 167, 170-72 (1974) (since operation of a landfill inherently involves the risk of fire, where employer has complied with all federal and state standards any employee protest over fire hazards is unprotected).
when the inherent risks of the job are greatly increased by outside influences such as occasional inclement weather. As when the job is inherently dangerous, the employees are considered to have assumed the risks involved and only those protests which are against an increase in the level of danger are protected.

An area that is often related to safety protests is the filing of a complaint with a third party against the employer for safety violations. For instance, it may be unlawful to discharge or discipline an employee who threatens to file a complaint with the federal Occupational Safety & Health Administration. As noted above in the discussion of concerted activity, whether such conduct by an employee acting alone is protected may depend on the forum one is in and the circuit in which one is located. Nonetheless, an employee's efforts to enforce an employer's statutory duties relating to safety have been protected when the employee filed complaints with various governmental agencies.

The filing of a complaint in an attempt to force the employer to comply with other statutory responsibilities has also been protected

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84 See Union Boiler Co., 213 N.L.R.B. 818, 820-22 (1974) (refusal of employees to work overtime because rainy weather had reduced visibility and greatly increased danger of slipping while cleaning inside of silo protected); American Homes Systems, 200 N.L.R.B. 1151, 1155 (1972) (refusal of carpenters to work outside in sub-zero weather protected).
85 Compare Interlake, Inc., 218 N.L.R.B. 1043, 1049 (1975) (although work in furnace duct was normally hot, where duct was so hot normal equipment was ineffective, employees are protected in refusing to work) with Mal Landfill Corp., 210 N.L.R.B. 167, 170-72 (1974) (since operation of a landfill inherently involves risk of fire, employees may not protest presence of fire hazards).
87 See notes 27 through 43 and accompanying text supra. See also Cloke, Concerted Activity and the National Labor Policy, 5 SAN FERN. U.L. REV. 289 (1976).
86 See Socony Mobil Oil Co. v. NLRB, 357 F.2d 662, 663-64 (2d Cir. 1966) (employer may not discipline or discharge an employee who filed a complaint with the appropriate governmental agency with regard to the unsafe operation of a vessel); Walls Mfg. Co. v. NLRB, 321 F.2d 753, 754 (D.C. Cir.) (employee's action in sending a letter to state department of health informing the agency of the unsanitary conditions at employer's premises protected), cert. denied, 375 U.S. 923 (1963); B & P Motor Express, 230 N.L.R.B. 653, 655 (1977) (employee who filed safety complaint with Department of Transportation may not be disciplined); GTE Lenkurt, Inc., 215 N.L.R.B. 190, 199 (1974) (employee may file safety complaint with OSHA without being subject to discharge); Detroit Forming, Inc., 204 N.L.R.B. 205, 212-13 (1973) (employee who files complaint with the local health department is safe from discharge).
88 See Rockford Newspapers, Inc., 229 N.L.R.B. 429, 431 (1978) (filing sex discrimination charge with EEOC is a protected concerted activity); King Soopers, Inc., 222 N.L.R.B. 1011, 1018 (1976) (filing of race discrimination charge with EEOC protected); G.V.R., Inc., 201 N.L.R.B. 147, 152-53 (1973) (filing charge with Department of Labor with regard to employer's requirement of kickbacks from employees does not subject employee to discharge); Advance Carbon Prod., Inc., 198 N.L.R.B. 741, 747-48 (1972) (employee who filed race discrimination charge with Fair Employment Practices Commis-
under the theory that the complaint was filed for the mutual aid and protection of all employees. In fact, this reasoning has been used to protect from discharge an employee who filed suit against the employer to collect wages wrongfully withheld by the employer, as well as other wage-related protests. Employees may also lawfully protest a change in either the pay system or the output requirements of a

100 Alleluia Cushion Co., 221 N.L.R.B. 999, 999-1001 (1975) (where one employee seeks to enforce an employer's statutory duties, the activity will be deemed concerted). This appears to be the Board's viewpoint at the present time. The courts, however, are less likely to accept this argument. See NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1082-84 (8th Cir. 1977) and cases cited therein.

101 See Auto Club, 231 N.L.R.B. No. 99 (1977) (filing suit to collect commissions wrongfully withheld protected); Ambulance Serv. of New Bedford, Inc., 229 N.L.R.B. 106, 109-10 (1977) (employee who filed criminal complaint against employer who continuously dishonored paychecks is protected from discharge); Trinity Trucking & Materials Corp., 221 N.L.R.B. 364, 364-66 (1975) (recognizing fact that discharge of employee solely because he filed a civil suit to collect on dishonored paychecks may be unfair labor practice), supplemented, 227 N.L.R.B. 792 (1977). Despite this rule, the Board has expressly stated that an employee is not protected in filing a civil suit against the employer for recovery of personal injury damages. See Hunt Tool Co., 192 N.L.R.B. 145, 146 (1971) (upholding discharge of employee who filed personal injury suit under Jones Act).

102 See Community Hosp. of Roanoke Valley, Inc. v. NLRB, 538 F.2d 607, 609-10 (4th Cir. 1976) (employees' actions in writing letter to newspaper and appearing on television with regard to low salary of nurses protected); Fairmont Hotel Co., 230 N.L.R.B. 874, 878 (1977) (protests over tipping arrangements held to be protected); Pacific Pollution Control, Inc., 227 N.L.R.B. 293, 296-97 (1977) (protests made to boss by employees when they had not been paid or reimbursed for expenses held protected); Hamlet Steak House, Inc., 197 N.L.R.B. 632, 635 (1972) (waitresses who protest tipping arrangement are engaged in protected activity).

103 Hale Mfg. Co., 228 N.L.R.B. 10, 12-13 (1977) (employees' request that plant drop bonus plan in favor of straight hourly wages protected); Empire Gas, Inc., 224 N.L.R.B. 628, 629-30 (1976) (protest letter that argued against company's new bonus plan and for old commission arrangement held protected activity); Rinkie Pontiac Co., 216 N.L.R.B. 239, 242 (1975) (protesting of car dealer's implementation of a new insurance program with incentive pay features held protected); Blue Star Knitting, Inc., 216 N.L.R.B. 312, 316 (1975) (employees who protested piecework rates cannot be disciplined); Browning Indus.
job, as well as any order to work what they consider to be excessive overtime. However, if an employer refuses to perform overtime work his action is protected only if his status is that of a striker. Thus, in such a situation, he may not continue to work his regular hours.

Protests of the discharge of a fellow employee have been held to be proper objectives of protected concerted activity. On the other hand, employees have only a limited right to protest the discharge of a supervisor or management's selection of a new supervisor. Only if the super-

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104 See Digital Equip. Corp., 226 N.L.R.B. 1278, 1283 (1976) (invalidated discharge of employee who considered a production quota to be unfair); American Motors Corp., 214 N.L.R.B. 455, 462 (1974) (efforts to discourage the wearing of "Fight Speed Up" T-shirts held to interfere with protected activity).

105 See Ford Motor Co., 221 N.L.R.B. 663, 668 (1975) (employees may not be discharged for protesting employer's overtime policy); Imperial Bedding Co., 216 N.L.R.B. 934, 938 (1975) (same); Barkus Bakery, Inc., 214 N.L.R.B. 478, 481 (1974). But see C.G. Conn, Ltd. v. NLRB, 108 F.2d 390, 396 (7th Cir. 1939) (discharge of employees unilaterally attempting to set out conditions concerning overtime held not violative of NLRA).

106 See First Nat'l Bank v. NLRB, 413 F.2d 921, 925 (8th Cir. 1969); see NLRB v. John S. Swift Co., 277 F.2d 641, 646 (7th Cir. 1960) (discharge of employees who refused to work overtime held lawful under NLRA).

107 See United Merchants & Mfr., Inc. v. NLRB, 554 F.2d 1276, 1278 (4th Cir. 1977) (concerted work stoppage by unrepresented employees in protest of discharge of fellow employees is protected); NLRB v. Imperial Bedding Co., 519 F.2d 1073, 1075 (5th Cir. 1975) (a strike in protest of the suspension of fellow employee is protected); Pepsi Cola Bottling Co., 449 F.2d 824, 829-30 (5th Cir.) (refusal to work or leave plant until reinstatement of employees held not so illegal as to warrant discharge), cert. denied, 407 U.S. 910 (1971); Howard Mfg. Co., 227 N.L.R.B. 1858, 1866 (1977) (picketing plant in protest of supervisor's discharge is protected); Eagle Int'l, Inc., 221 N.L.R.B. 1291, 1298 (1975) (discharge and refusal to reinstate employees protesting discharge of fellow employees is an unfair labor practice). But see Cone Mills Corp. v. NLRB, 413 F.2d 445, 454 (4th Cir. 1969) (eight employees stopping work to protest discharge of fellow employee not protected because of rebellious attitude and infringement of employer's rights).

108 Section 2(11) of the NLRA defines a supervisor as: (A)n individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires use of independent judgment.

29 U.S.C. § 152(11) (1976). Compare Great W. Sugar Co., 137 N.L.R.B. 551, 556-57 (1962) (staff with both supervisory and rank-and-file activities not considered supervisors) with Whitmeyer Lab., Inc., 114 N.L.R.B. 749, 751 (1955) (contrary holding). The trend in later cases has been to allow the supervisor to retain rank-and-file status with regard to union membership and bargaining powers. See Gaf Corp. v. NLRB, 524 F.2d 492, 497 (5th Cir. 1975) (rank-and-file machinist who was acting maintenance supervisor and in line for promotion not a supervisor under Act); Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151,
visor's responsibilities are related to the employee's own employment does even a limited right exist to attack the managerial decision.\footnote{1158 (7th Cir.) (lead engineer does not possess enough managerial powers to be supervisor), \textit{cert. denied}, 400 U.S. 831 (1971). \textit{But see E.I. DuPont De Nemours & Co.}, 210 N.L.R.B. 395, 397 (1974) (foremen promoted to supervise a new but temporary departmental plant ineligible to vote as employees even though told that their tenure was temporary).} Although their power to protest the selection of a supervisor is narrowly circumscribed, employees are usually protected in activities that protest the improper conduct of a supervisor. In \textit{Leslie Metal Arts Co.} the employees complained that a supervisor failed to take disciplinary measures against an employee who was misbehaving on the job. The Board held that since supervisors are responsible for maintaining proper working conditions, an employee's protest of a failure to satisfy this duty was protected.\footnote{1159 It should be noted that protests concerning either the hiring or discharging of supervisors are generally unprotected. \textit{See NLRB v. Crimptex, Inc.}, 517 F.2d 501, 504 n.5 (1st Cir. 1975) (strike is unprotected if its purpose is to obtain the removal of a supervisor); \textit{American Art Clay Co. v. NLRB}, 328 F.2d 88, 91 (7th Cir. 1964) (walkout by employees after announcement of change to foreman held not protected under the Act); \textit{Cleaver-Brooks Mfg. Corp. v. NLRB}, 264 F.2d 637, 641 (7th Cir.) (discharge of four employees' protesting appointment of a new foreman was lawful), \textit{cert. denied}, 361 U.S. 817 (1959); \textit{NLRB v. Reynolds Int'l Pen Co.}, 162 F.2d 690, 684 (7th Cir. 1947) (employee's action in protesting the demotion of a foreman is not concerted activity). \textit{Contra}, \textit{Howard Mfg. Co.}, 227 N.L.R.B. 1858, 1866 (1977) (picketing plant in protest of supervisor's discharge is protected); \textit{see Magna Visual v. NLRB}, 516 F.2d 876, 877 (8th Cir. 1975) (employees' protesting the promotion of an unpopular co-employee to supervisor protected); \textit{NLRB v. Phoenix Mut. Life Ins. Co.}, 167 F.2d 983, 988 (7th Cir.) (discharge of employee who drafted letter to employer concerning the selection of a cashier held unlawful), \textit{cert. denied}, 335 U.S. 845 (1948).} Similarly, employees may within the protection of section 7 object to a supervisor's rude manner of directing the department.\footnote{1160 \textit{Id.} at 326.} However, a protest of a supervisor's policies is not protected if it is made in bad faith to undermine the supervisor's authority with the intent to

\footnote{1158 (7th Cir.) (lead engineer does not possess enough managerial powers to be supervisor), \textit{cert. denied}, 400 U.S. 831 (1971). \textit{But see E.I. DuPont De Nemours & Co.}, 210 N.L.R.B. 395, 397 (1974) (foremen promoted to supervise a new but temporary departmental plant ineligible to vote as employees even though told that their tenure was temporary).}
have him removed in favor of a more lenient supervisor.114

As a general rule, when the object of employee protest is a discretionary act of management, the means of protest that will be protected are relatively restricted. Thus, while a walkout might be an appropriate response to unsafe working conditions,115 a grievance meeting might be the only protected response to management's selection of supervisory personnel deemed undesirable by the workers.116 This doctrine, although far from absolute, is apparently based on the theory that management, in order properly to perform its managerial functions, must be free from the threat of employee economic reprisals against the exercise by management of its discretion in traditional areas of managerial perogative.117 It should be noted that this view is corollary with the view taken by the courts of employee protest of matters beyond the control of management.118 Issues over which management has no control are like issues over which management historically has had exclusive control119 in that neither is directly within the recognized sphere of negotiable employer-employee relations. Therefore, the courts, while not entirely prohibiting concerted activity in these areas, will in both instances strictly scrutinize the methods of protest.120

114 See NLRB v. Red Top, Inc., 455 F.2d 721, 728 (8th Cir. 1972) (attempting to replace manager for improper motives is not protected); Socony Mobil Oil Co. v. NLRB, 357 F.2d 662, 664 (2d Cir. 1966) (if complaint is filed in bad faith it is not protected activity); cf. Walls Mfg. Co. v. NLRB, 321 F.2d 753, 754 (D.C. Cir. 1963) (letter to sanitation commission protected activity since no intent to maliciously injure the employer).


116 For a guide on grievance procedure see B. CRANE & R. HOFFMAN, SUCCESSFUL HANDLING OF LABOR GRIEVANCES (1965).

117 See Getman, supra note 3, at 1211-18.

118 See G & W Elec. Specialty Co. v. NLRB, 360 F.2d 873, 876 (7th Cir. 1976) (employee credit union not a matter over which the company had control; nevertheless, discharge of employee who was complaining about credit union held lawful).

119 See notes 108 through 114 and accompanying text supra.

120 As long as the purpose of the concerted activity is a proper one, "the wisdom of a concerted activity, or the lack of justification therefore is irrelevant to the determination of its status as protected." NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 344 (1938). For example, in NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962), the fact that the heater in the plant was being repaired was irrelevant to whether the walkout to protest the extreme cold was protected. Id. at 17-19. Therefore, as long as the objective of the employees can be termed for mutual aid or protection, it is a proper subject for protected concerted activity without regard to the good faith actions of the employer. See generally Lopatka, Protection Under the National Labor Relations Act and Title VII of the Civil Rights Act for Employees Who Protest Discrimination in Private Employment, 50 N.Y.U.L. REV. 1179, 1184-95 (1975).
III. TYPES OF CONCERTED ACTIVITIES WHICH ARE PROTECTED

The collective bargaining agreement of unionized employees usually defines how grievances are to be presented, and by-passing the established procedures for grievance can result in the loss of section 7 protection for concerted activities that would have been protected otherwise. This principle is vividly illustrated in *Emporium Capwell Co. v. Western Addition Community Organization.* In that case, the Supreme Court denied the protection of the National Labor Relations Act to racial protests by minority employees who had by-passed the union grievance procedures. Although the collective bargaining agreement prohibited racial discrimination, it also established a mechanism for the presentation of complaints. The Court held that the activities were not protected under section 7 because the Act prohibits employees from circumventing use of their elected representative in an attempt to engage in direct bargaining with the employer.

For non-union employees, protected concerted activity generally does not involve an extended use of economic pressure such as a lengthy strike, but, rather, tends to be "a show of feelings rather than an effort to engage in economic combat." Yet, theoretically, because of the absence of a collective bargaining agreement and a representative to speak for them, employees in a non-union plant have more freedom to choose the means of presenting grievances to their employer. In *NLRB v. Washington Aluminum Co.*, the employees of a non-union plant staged a walkout to protest the lack of heat in the plant. The Supreme Court determined that since the employees had no bargaining representative and no established grievance procedure, they were forced to present their grievance through the best means available. Nevertheless, not all such activities are protected. In *Washington Aluminum*, the

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122 Id. U.S. at 70.
123 Id. at 53.
124 Id. at 70; accord, *NLRB v. Tanner Motor Livery*, Ltd., 419 F.2d 216, 218 (9th Cir. 1969) (two employees who went on strike without first going through union grievance procedures not protected); *Brown v. Sterling Aluminum Prods. Corp.*, 365 F.2d 651, 656-57 (8th Cir. 1966) (relocation of plant affects union as a whole and only union has right to negotiate); *NLRB v. Draper Corp.*, 145 F.2d 199, 202-03 (4th Cir. 1944) (wildcat strikers not protected when union is carrying on negotiations).
125 Getman, supra note 3, at 1197.
127 Id. at 11-12.
128 Id. at 14.
Court condoned the walkout only because it was not unreasonable, "unlawful, violent or in breach of contract," nor was it "indefensible." In addition, of course, the activity must also satisfy the definition of "concerted" and be for the purpose of mutual aid or protection to be entitled to protection. Despite these restrictions, the courts and the Board have held many different types of activity in a non-union context to be protected. Examples include circulating and presenting petitions, writing letters to the employer or to fellow employees, displaying leaflets in the plant, picketing, arranging and assuming leadership roles at meetings to present grievances, individual and group presentation of grievances, strikes and other work stoppages, forming grievance committees, lobbying before the legislature on matters relating to employment, appearing on television to protest employee's writing letter to co-employees protesting elimination of pay system and urging work stoppages held protected conduct).

See International Ass'n of Machinists v. NLRB, 415 F.2d 113, 115 (8th Cir. 1969) (invalidated prohibition of distribution of leaflets in non-working area during off time).

See, e.g., NLRB v. Babcock & Wilcox Co., 498 F.2d 43, 48 (3d Cir. 1974) (peaceful picketing held protected activity); Artware, Inc., 198 F.2d 637, 642 (6th Cir.) (right to strike includes peaceful picketing regardless of resulting damage to employer's business), cert. denied, 344 U.S. 897 (1952).

See Frank Paxton Lumber Co., 235 N.L.R.B. No. 83, 98 L.R.R.M. 1072, 1072-73 (1978) (employee had group of employees over to his house to prepare a list of grievances).

See Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1354 (3d Cir. 1969) (protected activity when two employees presented grievance to management concerning latter's failure to contribute to profit sharing plan).

See NLRB v. Washington Aluminum Co., 370 U.S. 9, 15 (1962) (employees protected when they walked off job because of cold working conditions); NLRB v. Lasaponara & Sons, Inc., 541 F.2d 992, 998 (2d Cir. 1976) (work stoppage to protest having to work on Palm Sunday protected activity).

See Columbia Univ., 236 N.L.R.B. No. 84 (1978) (protected activity when employee formed grievance committee to protest unfair policies).

See Kaiser Eng'r v. NLRB, 538 F.2d 1379, 1385 (9th Cir. 1976) (engineers who
ployment conditions, writing letters to newspapers, honoring picket lines, and filing a suit or a complaint with a state or federal agency against the employer.

As has been indicated, the techniques by which employee dissatisfaction can be expressed are myriad. Nevertheless, the single most powerful weapon at the disposal of employees is the strike. A strike may be defined as a voluntary refusal on the part of employees to work as a response to management's failure to agree to an employee demand. If the strike is lawful, it may not be construed as a repudiation of the employment relationship; under the Act, strikers remain employees for remedial purposes. However, if a strike has an illegal purpose or loses its protection for any other reason, the strikers are considered to have forfeited their status as employees and are not entitled to reinstatement. Not only does the law distinguish between legal and illegal

lobbied legislators regarding changes in national policy affecting their job security were protected); Bethlehem Shipbldg. Corp. v. NLRB, 114 F.2d 930, 937 (1st Cir. 1940) (the right of self organization includes appearance before legislative committees).

See Community Hosp. of Roanoke Valley, Inc. v. NLRB, 538 F.2d 607, 610 (4th Cir. 1976) (nurse protected when she appeared on television and gave statements concerning the number of nurses employed and wages).

See Reading Hosp. & Medical Center, 226 N.L.R.B. 611, 614 (1976) (employee cannot be discharged for openly considering writing a letter to a newspaper about working conditions in a hospital).

See Kellog Co. v. NLRB, 457 F.2d 519, 522 (6th Cir. 1972) (employees protected when they honored picket line of another union); William S. Carroll, Inc., 232 N.L.R.B. No. 148 (1977) (employee protected even though his failure to cross picket line caused employer to lose some business); Wheeling Elec. Co., 182 N.L.R.B. 218, 222 (1970) (refusing to cross picket line is protected activity).

See Altex Ready Mixed Concrete Corp. v. NLRB, 542 F.2d 295, 297 (5th Cir. 1976) (filing a labor-related civil action in good faith was a protected activity); Leviton Mfg. Co. v. NLRB, 486 F.2d 686, 689 (1st Cir. 1973) (labor-related civil action is protected if brought in good faith); Ambulance Serv. of New Bedford, Inc., 229 N.L.R.B. 106, 109-10 (1977) (employee's filing suit to recover wages owed when employer's check bounced held protected activity).

See NLRB v. Whitfield Pickle Co., 374 F.2d 576, 582 (5th Cir. 1967) (filing unfair labor practice charges is protected activity); Nash v. Florida Indus. Comm'n, 205 So. 2d 700, 703 (Fla.) (employer may not hinder employee who wishes to file unfair labor practice charges), aff'd, 389 U.S. 235 (1967); G.V.R., Inc., 201 N.L.R.B. 147, 153-54 (1974) (employee protected when he told government interviewers that employer required kickbacks on government contract job).


Id. at 256; see NLRB v. Mackey Radio & Tel. Co., 304 U.S. 333, 347 (1938) (strike in connection with a current labor dispute is not renunciation of employment relation).

strikes, it further differentiates between two categories of legal strikers. When the strike is actuated by such typical concerns as wages or employment terms and conditions, generally in a non-union context, the employees are considered economic strikers. Economic strikers are entitled to reinstatement only if permanent replacements have not been hired during the strike. In contradistinction, workers protesting unfair labor practices by management, such as failure to bargain in good faith, are viewed as unfair-labor-practice strikers and are entitled to unconditional reinstatement. Thus, neither strikes nor strikers are of a single species. It is therefore essential that both labor and management properly characterize the nature of the strike in which they are involved in order to define clearly the respective rights of each side.

Moreover, it must be noted that a strike is a double-edged sword. The infliction of economic injury flows in both directions. It is true that management's productivity may be substantially impaired, if not entirely destroyed, by a strike. It is equally true that an employee has no right to be paid while he is striking. This latter fact certainly militates against frivolous or unreasonably lengthy strikes.

Furthermore, the principle is deeply imbedded in our common law tradition that rights do not exist independently of responsibilities. In addition, the federal regulatory scheme that the NLRB sought to inculcate was designed to establish relative equality in bargaining power between labor and management. Thus, if the employer can fill positions during a strike, he should be free to do so. Moreover, employees should

181 First Nat'l Bank v. NLRB, 413 F.2d 921, 925 (8th Cir. 1969).
182 See Adams Potato Chips, Inc. v. NLRB, 430 F.2d 90, 91 (6th Cir.) (employers must bargain in good faith with their employees about "wages, hours, and other terms and conditions of employment"), cert. denied, 401 U.S. 975 (1970). See also 29 U.S.C. § 158(d) (1976).
183 See generally NLRB v. Shenandoah-Dives Mining Co., 145 F.2d 542, 547 (10th Cir. 1944) (enforced order requiring employer to reinstate striking employees when their positions had been filled by unfair labor practice since their replacements were hired after strike had terminated); Cox, The Right to Engage in Concerted Activities, 26 IND. L.J. 319, 319 n.3 (1953).
184 See NLRB v. Montgomery Ward & Co., 157 F.2d 486, 496 (8th Cir. 1946) (though employees undoubtedly had right to strike they could not continue to work, accept wages, and refuse to do work at employer's damage); C.G. Conn, Std. v. NLRB, 108 F.2d 390, 396-97 (7th Cir. 1939) (employee cannot be on strike and at work simultaneously); John S. Swift Co., 124 N.L.R.B. 394, 396-97 (1959) (employees may not work regular hours and then "strike" after hours to avoid overtime work).
185 Cone Mill Corp. v. NLRB, 413 F.2d 445 (4th Cir. 1969). "Few rights, including the right to strike in protest, exist without corresponding duties and obligations to those against whom the right is being asserted. When one attempts to exercise a claimed right, he cannot, in all fairness, disregard his corresponding duty and obligation with impunity." Id. at 454.
not be free to enjoy the benefits of employment without accepting the duties of being employed. Therefore, employees who engage in an in-plant work stoppage and who refuse either to resume their work or to leave the plant can be lawfully discharged.\textsuperscript{154} Similarly, slow-downs\textsuperscript{157} and sporadic work-stoppages are not protected.\textsuperscript{158} The logic supporting this rule has two components. First, the ability to engage in "partial strikes" tilts the legislatively-mandated balance of power too far in the favor of labor.\textsuperscript{159} Second, it is unjust to accept the benefits of employment without accepting the commensurate responsibilities of being an employee—preimminently, the duty to work for the person that pays one's salary. In addition, the "partial strike" subjects the employer to potentially devastating economic damage with no countervailing threat to employees. It is, therefore, hardly astonishing that "partial strikes" are generally not protected.\textsuperscript{160}

Although most strikes are called by unions, strikes by non-unionized workers are also protected within the limitations previously

\textsuperscript{154} Id. at 454.

\textsuperscript{157} See Glass Guard Indus., Inc., 218 N.L.R.B. 176, 185 (1975) (employees validly discharged for engaging in slow-down). Though slow downs would obviously be effective for employees, there is a general attitude of public condemnation of occupying a job and receiving pay while refusing to perform. Cox, supra note 153, at 338. But see Schatzki, Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activity, 47 Tex. L. Rev. 378, 379-82 (1969) (advocating the protection of partial strikes).

\textsuperscript{158} See Automobile Workers v. Wisconsin Employment Relation Bd., 336 U.S. 245, 264-65 (1949) (state employment agency may prohibit intermittent, unannounced work stoppages); Cincinnati Gasket, Packing & Mfg., Inc., 146 N.L.R.B. 851, 863-64 (1964) (discussing union during working hours and refusing to work overtime had a detrimental effect on production and was not protected); Pacific Tel. & Tel. Co., 107 N.L.R.B. 1547, 1549-50 (1952) (hit and run work stoppages not protected).

\textsuperscript{159} See Cox, supra note 153, at 339. "Slowdowns and similar disobedience on the job cost the employees nothing and, if they were protected activities, management would be helpless to resist. Hence such weapons are too effective to permit them to be part of the employee's arsenal." Id.

\textsuperscript{160} See Getman, supra note 3, at 1231-38. The theory underlying nonprotection for partial strikes was summarized by the Eighth Circuit:

Employees may seek to change any term or condition of their employment and their ultimate sanction is a strike . . . [W]hat makes any work stoppage unprotected . . . [is] . . . the refusal or failure of the employee to assume the status of strikers, with its consequent loss of pay and risk of being replaced. Employees who choose to withhold their services because of a dispute . . . may properly be required to do so by striking unequivocally. They may not simultaneously walk off their jobs but retain the benefits of working . . . . A work stoppage does not lose its presumptive protection merely because it is limited in duration. If employees have not been replaced while they were away from work, they must be reinstated when they offer to return.

\textit{First Nat'l Bank v. NLRB, 413 F.2d 921, 923-24 (8th Cir. 1964). But see Schatzki, supra note 157, at 379-82.}
indicated. In one leading case, *First National Bank v. NLRB*, non-union employees ceased working at the end of their regular shift to protest excessive overtime demands by the employer. Relying on the doctrine that workers cannot simultaneously be on strike and expect to continue to work for pay, management refused to permit the "strikers" to return to work during ordinary hours. Nevertheless, the Eighth Circuit declared this wholesale firing to be illegal. The court reasoned that since the strike was in itself a protected concerted activity, the fact that it took place at the end of the work day did not strip it of its protected status. Furthermore, since the employees were not unionized, they had not by collective bargaining established channels through which protests could be registered, and had therefore not violated the terms of a collectively-bargained-for agreement. Thus, management could legally discharge only those economic strikers for whom it had found replacements during the course of the strike.

In *First National Bank*, the employee action was essentially what might be termed a symbolic strike. This sort of strike, being a singular and isolated event, is not intended to inflict serious economic damage upon the employer but rather graphically to bring to the employers' attention the grievance of the workers. Such activities are generally presumed to be strikes protected under section 7, especially if the workers are not unionized and therefore have no bargained-for procedures for expressing worker dissatisfaction. This presumption may, however, be rebutted by evidence that the work stoppage is part of an on-going scheme for future intermittent "stikes." Under the latter circumstances, the employees' behavior is no longer consistent with their duty either to assume the status of bona fide strikers or to resume working.

Nevertheless, if workers have no established grievance procedures, short spontaneous work stoppages may be protected so long

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161 413 F.2d 921 (8th Cir. 1969).
162 Id. at 923.
163 Id.
164 Id. at 925-26.
165 Id. at 926. The court distinguished these circumstances from the facts in NLRB v. R.C. Can Co., 328 F.2d 974, 979 (5th Cir. 1964), where the employees were in the process of negotiating a new contract when a "wildcat strike" occurred. Id.
166 Id. at 925.
169 See NLRB v. Pepsi Cola Bottling Co., 449 F.2d 824, 827-30 (5th Cir. 1971) (peaceful sit-down of 97 employees protected). See also Stewart Die Casting Corp. v. NLRB, 114
as there are no threats or acts of violence and the work place is not seized. Moreover, in accordance with the principle that unorganized workers must express their dissatisfaction as best they can, such employees are entitled to remain on company property in order to bring their grievance to the attention of management. Of course, the work stoppage must be of brief duration and may not be part of an intended pattern of periodic refusals to work. In addition, even where there is an extant grievance procedure, it may with impunity be circumvented by the workers if it was unilaterally promulgated by management. Thus, the employer may not protect itself from unauthorized expressions of worker dissatisfaction by establishing on its own arbitrary and unreasonably narrow means through which protests can be registered.

Obviously, the purpose of a strike is to bring economic pressure to bear on the employer. Yet, since the exercise of section 7 rights overbalances any loss occasioned by a short term interruption of production, adverse economic impact upon the company does not deprive the work stoppage of protection. Nevertheless, if the impact is significant or if misconduct is involved, protection may be forfeited. In addition, as a general rule, a strike may not retain its protected status if it inflicts economic harm upon the company without simultaneously conferring some compensatory gain upon workers. Consequently, wanton and

F.2d 849, 855-56 (7th Cir. 1940) (since employer treated employees who staged a sit-down the same as strikers of a subsequent strike those in the sit-down were protected), cert. denied, 312 U.S. 680 (1941).


See Crenlo v. NLRB, 529 F.2d 201, 204 (8th Cir. 1975) (nonviolent legitimate work stoppage protected); NLRB v. J.I. Case Co., 198 F.2d 919, 922 (8th Cir. 1952) (employees retain protection for stoppage to present grievance); NLRB v. Kennametal, Inc., 182 F.2d 817, 819 (3d Cir. 1950) (employees have right to meet with management to present grievances).

See Essex Int'l, 213 N.L.R.B. 260, 266-67 (1974) (refusal of employees to return to work until allegedly defective equipment was repaired was protected activity even though the employees did not utilize the grievance procedure set up unilaterally by the employer).

See Crenlo v. NLRB, 529 F.2d 201, 204 (8th Cir. 1975) (shutdown of work for approximately one hour to compel management to discuss pay raise was protected); Columbia Univ., 236 N.L.R.B. No. 84, 98 L.R.R.M. 1353 (1978) (shortlived interruption of services to protest the discharge of employee was protected activity).

See AMP, Inc., 218 N.L.R.B. 33, 36 (1975) (discharge of employee for protesting the firing of another employee unlawful despite fact that employee closed production to make protest). For an application of the principle see Columbia Univ., 236 N.L.R.B. No. 84, 98 L.R.R.M. 1353 (1978). But see NLRB v. Lasaponara & Sons, 541 F.2d 992, 998 (2d Cir. 1976) (concerted refusal to work on religious holiday as protest of holiday work protected even though employer suffered heavy economic loss because of heavy holiday production schedule).

NLRB v. Lasaponara & Sons, 541 F.2d 992, 998 (2d Cir. 1976); see Dobbs House,
purely punitive strikes are not protected.

The strike is, as previously indicated, the most powerful weapon in the arsenal of section 7 rights. Yet, in a non-union context, a prolonged strike is rarely fruitful and therefore seldom used. Like letters, petitions, and meetings, strikes by non-union workers are generally utilized as a means of expressing employee sentiment rather than as an economic weapon.

A matter closely related to the right to strike is the right to honor lawful picket lines. As a general rule, the picket line the employee refuses to cross must be lawfully protected under the Act in order for the employee's refusal, in turn, to be protected. The scope of this protection is not as substantial as might be expected. Indeed, the employer may permanently replace, but may not discharge, an employee who refuses to cross a picket line. The employer must, however, establish that the refusal to work substantially interfered with the employer's business operations and that this disruption could not be remedied by merely assigning the recalcitrant employee's work to another employee. One cannot help but wonder if the nicety of this distinction between replacement and discharge is not a distinction without a difference.

Inc. v. NLRB, 325 F.2d 531, 532 (5th Cir. 1963) (departure of waitresses at dinner hour unprotected). An example of unprotected activity was a strike timed to coincide with the moment when molten iron was ready to be poured off at a foundry, and lack of sufficient help to carry out the operation could have caused substantial property damage and loss to the employer. NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409, 411 (5th Cir. 1955).

See NLRB v. Insurance Agents' Union, 361 U.S. 477, 489 (1960) (use of economic weapons often induces one to come to terms desired by another); McGraw Lab., 206 N.L.R.B. 602, 604 (1973) (a strike to bring pressure upon an employer to change terms and conditions of employment is an economic weapon designed to cause the employer to meet the demands of the strikers).

Illustrative of this point is Capital Times Co., 234 N.L.R.B. No. 62, 97 L.R.R.M. 1184 (1978), where the Board considered a situation in which an employee had honored a picket line set up by state employees. Since state employees are not covered by the Act, they are not defined as "employees." The Board, in upholding the right of the employer to discipline the employee, stated: "An employee cannot engage in concerted activities within the meaning of section seven with nonemployees who are not entitled to the protection of the Act." Id.


That the discharge-replacement distinction is a distinction without a difference has not been unremarked. See Schatzki, supra note 157, at 382-92. This distinction has also been criticized by the Supreme Court. NLRB v. Rockaway News Supply Co., 345 U.S. 71, 75 (1952). See generally R. GORMAN, LABOR LAW 353-54 (1976).
IV. Circumstances Which Cause the Loss of Protection Under Section 7

Although the activities discussed above are usually protected, there are circumstances which, if present, deprive these activities of protection. For the purposes of this article, such circumstances will be categorized as follows: (1) disloyalty; (2) use of unreasonable means; (3) disruption of business; (4) threats, violence or illegal conduct; and (5) opprobrious, egregious or flagrant conduct.\(^{182}\)

A. Disloyalty

Although it has been stated that "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer,"\(^ {183}\) this blanket condemnation is so broad that it is not so clear as it might seem.\(^ {184}\) The problem is further compounded by the propensity of both the Board and the courts to decide similar cases in different ways on the basis of minor factual differences.\(^ {185}\) Nonetheless, since disloyalty removes the cloak of section 7 protection from employee actions, the labor attorney should be aware of the situation in which such acts have been found to violate the duty of loyalty owed to the employer.

In *NLRB v. Knuth Brothers, Inc.*,\(^ {186}\) a union employee in a non-union, subcontractor plant ignored orders from the prime contractor and directly communicated with the ultimate customer to inform the consumer that a non-union plant had been awarded the subcontract.\(^ {187}\) The Seventh Circuit rejected the employee's contention that his actions were protected, since he had acted in reckless disregard of Knuth Brothers'
rights by tampering with its business relationships. As a result of this disloyalty, the employee's discharge was upheld.

*Knuth Brothers* involved elements of breach of confidence in that the employee deliberately disobeyed the order from the prime not to reveal the non-union status of the subcontractor. Even though employees are generally entitled to use any information that comes to their attention in the normal course of work, if the information is confidential in nature, it may not be disclosed. On the other hand, in *Jeanette Corp.*, an employer's rule that salary information be kept confidential did not remove protection from an employee's discussion of wage rates with other employees for the purpose of seeking raises for herself and other clericals. This holding is, however, clearly consistent with the general rule that an employer's policy cannot inhibit protected concerted activity.

Although an employee who deliberately makes false or malicious statements about the employer could well be subject to discharge or discipline, a good faith defense appears to be available to employees

158 Id. at 956.


This case should be contrasted with *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447 (1st Cir. 1976) in which the court held that similar acts did not constitute disloyalty. The only distinction between the two cases is the fact that in *Circle Bindery* the employee told a union representative who in turn informed the customer of the fact that a non-union plant was working on the job, instead of calling the customer himself, as was done in *Knuth Brothers*. *Id.* at 450.

159 537 F.2d at 952.


162 217 N.L.R.B. 653 (1975), enforced, 532 F.2d 916 (3d Cir. 1976).

163 217 N.L.R.B. at 656. The court reasoned that the employer's prohibition of employees' discussing wage rates among themselves was clearly an impediment to protected concerted activity. *Id.*

164 See *Transportation Lease Serv., Inc.*, 232 N.L.R.B. No. 21, 96 L.R.R.M. 1254 (1977) (Act proscribes any employer's inhibition of employees' exercise of protected concerted activity). Illustrative of this proposition is the case of *Howard Mfg. Co.*, 227 N.L.R.B. 1858 (1977), in which it was found that a walkout that was otherwise protected did not lose its protection because of the employer's rule that employees could not leave their stations without permission. *Id.* at 1865.

165 See, e.g., *NLRB v. Local 1229, I.B.E.W.*, 346 U.S. 366, 477 (1953) (malicious leaflets to public held to constitute disloyalty); *Indiana Gearworks v. NLRB*, 371 F.2d 273, 275 (7th Cir. 1967) (malicious cartoons posted in plant held unprotected).
whose protests are based on false information. The Board has stated that, "[e]mployees do not forfeit the protection of the Act if, in voicing their dissatisfaction with matters of common concern, they give currency to inaccurate information provided it is not deliberately or maliciously false." Therefore, employees have been protected when they filed suit against their employer even though the suit was found to be groundless, because it was filed in good faith and was thus not prompted by malice. Since the test for this aspect of disloyalty is the presence of malice, each case will turn on its particular facts.

Since virtually all activities protected under section 7 are, at least arguably, acts of disloyalty to the employer, the courts are forced to apply some sort of balancing test as between these competing rights. Thus, the courts will deny section 7 protection only upon a showing that the disloyalty is so egregious that it overshadows the employees' rights under the Act.

B. Unreasonable Means to the End

In order for the activity to be protected, the type of concerted activity used must be reasonably related to the ends sought to be achieved.

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180 Walls Mfg. Co., 137 N.L.R.B. 1317, 1319 (1962), enforced, 321 F.2d 753 (1963), cert. denied, 375 U.S. 923 (1963). See also Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) (distribution of handbill that contained only two minor errors was not so distorted as to show malicious intent).

181 Trinity Trucking & Materials Corp., 221 N.L.R.B. 364, 365 (1975), supplemented, 227 N.L.R.B. 792 (1977); see Marlin Firearms Co., 116 N.L.R.B. 1834, 1834-40 (1962) (employee protected since statements were not made with intent to maliciously injure the employer).

182 In NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953), public distribution of leaflets disparaging the employer was held to be disloyal and indefensible. Id. at 477. Similarly, in Indiana Gearworks v. NLRB, 371 F.2d 273 (7th Cir. 1967), the display of cartoons maliciously ridiculing management was held to be unprotected. Id. at 275.

Yet in National Hosp. Ass'n, 230 N.L.R.B. 54 (1977), the Board extended protection to the distribution of protest leaflets that contained sarcastic and insulting material on the ground that the employees were seeking to change what they believed were inappropriate management decisions and were not maliciously seeking to harm the company. See also Tower Foods, Inc., 221 N.L.R.B. 1260, 1267 (1975) (distribution of letter to co-employees accusing employer of incompetence, lack of foresight, racial discrimination, and favoritism in hiring and firing held protected activity); cf. NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 63-64 (1964) (strikers may appeal to the customer's sympathy by encouraging them to boycott employer's product for the duration of strike).

183 See Getman, supra note 3, at 1238-40.

Perhaps the Supreme Court said it best in the case NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953). "[T]he activities [were] characterized as 'indefensible' because they were found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities." Id. at 477.
The landmark decision in this area is *NLRB v. Washington Aluminum Co.* In that case employees staged a walkout to protest the extreme cold in the shop. The Supreme Court stated that since the employees had "no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer . . . they had to speak for themselves, as best they could." The Court noted the absence of an established procedure to present grievances to the company, and stated that when circumstances were considered in view of the extremely cold conditions, the concerted activity of the men in leaving their jobs was a perfectly natural and reasonable thing to do. The Court concluded that:

[Section] 7 does not protect all concerted activities . . . . The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those which are unlawful, violent, or in breach of contract. Nor can they be brought under this Court's more recent pronouncement which denied the protection of § 7 to activities characterized as "indefensible" because they were there found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities . . . . Indeed, concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.

In such a case, a spontaneous walkout is protected regardless of whether the employees make their demands before, during or after the concerted activity.

The walkout in *Washington Aluminum* should be contrasted with cases in which the courts determined that a walkout was an unreasonable and therefore unprotected means to the end sought by the workers. In *Dobbs House, Inc. v. NLRB*, the employer's waitresses were discharged for leaving the restaurant in order to protest the apparent discharge of a supervisor. The Fifth Circuit stated that although concerted activity in protest of a change in supervisory personnel is protected when the supervisory position in question is directly related to the employees'
own employment, the method of protest used must be reasonably related to the desired goal. The court then held that since the departure en masse of the waitresses at the dinner hour was not a reasonable method of protesting the supervisor’s discharge, the concerted activity had lost its protection.

As a comparison of Washington Aluminum and Dobbs House reveals, reasonableness of employee actions depends largely upon the nature of the goal the employees hope to achieve through their actions. As long as their purpose is to protest matters that are of direct concern to them, greater leeway will be allowed to the employees’ choice of methods. However, as the object of the protest approaches matters traditionally within the discretion of management, the means used must be ever more reasonable, and, at some point, at least by inference, must involve only expressions of sentiment, not economic pressure on the employer.

C. Disruption of Business

The right of employees to engage in protected concerted activity must be balanced against the employer’s right to maintain order and control in the plant. Southwestern Bell Telephone Co. illustrates this principle well. Some of the employees of the Telephone Company began wearing sweatshirts displaying the slogan “Ma Bell is a Cheap Mother” in protest of the employer’s wage offers made in the context of collective bargaining. The employer directed the employees to remove or to cover the shirts during work time. No violation of section 8(a)(1) was found because this demand by the employer was determined to be reasonable.

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200 Id. at 537. Compare NLRB v. Ford Radio & Mica Corp., 258 F.2d 457, 463 (2d Cir. 1958) (concerted activity to influence the hiring, firing or conditions of employment of supervisory personnel is unprotected) and NLRB v. Coal Creek Coal Co., 204 F.2d 579, 582 (10th Cir. 1953) (strike to protest discharge of a supervisor is not concerted activity for mutual aid or protection) with NLRB v. Guernsey-Muskingum Elec. Coop., Inc., 285 F.2d 8, 12 (6th Cir. 1960) (protesting the appointment of an unqualified foreman held protected activity since it would adversely effect employees’ jobs) and NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir. 1948) (discharge of employees for protesting the hiring of an incompetent cashier unlawful).

201 325 F.2d at 539.

202 Id. Of similar import is the case Henning & Cheadle, Inc. v. NLRB, 522 F.2d 1050 (7th Cir. 1975), where employees had walked off the job to protest the firing of a supervisor. The court found that, because of important departmental deadlines, the activity was not a reasonable method for the employees’ use in communicating their concern to the employer. The walkout was therefore unprotected such that the employees were subject to discipline. Id. at 1055.

203 See Getman, supra note 3, at 1211.


205 200 N.L.R.B. at 667-68.
and necessary to maintain discipline and harmonious employee-employer relations in the operation of the business. The Board held that in view of the controversial nature of the language and the fact that it was subject to a profane construction, the employer could legitimately ban the shirts as a reasonable precaution against discord and bitterness between the employees and management, and to assure decorum and discipline in the plant.

In contrast to the Southwestern Bell case, a grievance meeting was held to be protected in NLRB v. Sutherland Lumber Co. even though it lasted thirty minutes, and even though the discussion was loud, heated, and replete with earthy expressions. There were customers in the yard adjoining the shed in which the meeting was being held, and one customer came to the shed to find out what was going on. The employer argued that these circumstances constituted a disruption of his business. However, the court found that the type of language used was used by others in the yard and was condoned by the company, and that the meeting did not constitute a disruption of business.

D. Threats, Violence, or Illegal Conduct

A strike in violation of law is not protected. In Southern Steamship Co. v. NLRB, a strike that violated mutiny laws was held unprotected; similarly, in The American News Co., a strike to force a wage increase prior to its approval by the War Labor Board was held to be unprotected.

There will certainly be situations, however, when the strike, al-

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112 Id. at 671; accord, Caterpillar Tractor Co. v. NLRB, 230 F.2d 357, 358-59 (7th Cir. 1956) (upheld employer’s ban on badges bearing “Don’t be a scab”); Boeing Airplane Co. v. NLRB, 217 F.2d 369, 374-75 (9th Cir. 1954) (bar of union buttons was legitimate in a “highly explosive” rival union situation). But cf. NLRB v. Mayrath Co., 319 F.2d 424, 426-27 (7th Cir. 1963) (sanctioned the use of insignia which did not interfere with discipline).

113 200 N.L.R.B. at 671.

114 452 F.2d 67 (7th Cir. 1971).

115 Id. at 69-70.

116 Id. Compare American Hosp. Ass’n, 230 N.L.R.B. 54, 57 (1977) (distribution of publication by employees that criticized management policies was not inherently disruptive of discipline, nor was it offensive, obscene, or obnoxious) with Diagnostic Center Hosp. Corp., 228 N.L.R.B. 1215, 1217 (1977) (employee’s phone call protesting working conditions was protected though made outside normal chain of authority and may have jeopardized employer’s relationship with another institution).

117 316 U.S. 31 (1942).

118 Id. at 40.

119 55 N.L.R.B. 1302 (1944).

120 Id. at 1305.
though replete with threats and acts of violence, does not itself violate any specific law. In such a situation, only those employees who have engaged in illegal acts will lose their section 7 protection.\textsuperscript{221} The landmark case in this area is \textit{NLRB v. Fansteel Metallurgical Corp.}\textsuperscript{222} The activity in question in the \textit{Fansteel} case was a sit-down strike during which employees seized and retained possession of the company's property for a period of several days and committed various acts of violence.\textsuperscript{223} The Court held that depriving the employer of its right to possession of its property was an unlawful act, no matter how reprehensible the employer's pre-strike conduct might have been.\textsuperscript{224} The Supreme Court stated that "[t]o justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society."\textsuperscript{225}

\textbf{E. Opprobrious, Egregious or Flagrant Conduct}

Behavior of this type generally arises during a discussion of grievances. Employees forfeit section 7 protection only in "flagrant cases in which misconduct is so violent or of such nature as to render the employee unfit for further service."\textsuperscript{226} The standard for determining whether statements or conduct by employees at a grievance meeting are so opprobrious as to remove the protection of the Act is guided by the same principles applicable to a debate during collective bargaining. Thus frank, if not always complimentary, exchanges of views must be expected if such sessions are to be natural and not stilted.\textsuperscript{227} Probably the best description of what constitutes unprotected behavior comes from the case of \textit{NLRB v. Red Top, Inc.}\textsuperscript{228} In upholding the discharge

\textsuperscript{221} See \textit{NLRB v. Thayer Co.}, 213 F.2d 748, 757 (1st Cir. 1954) (only those employees who visited homes of non-striking employees and threatened them to respect picket line were not entitled to reinstatement).

\textsuperscript{222} \textit{Id.} at 240 (1939).

\textsuperscript{223} \textit{Id.} at 248-49.

\textsuperscript{224} \textit{Id.} at 253-54.

\textsuperscript{225} \textit{Id.} at 253. \textit{But see} Republic Creosoting Co., 19 N.L.R.B. 267 (1940), in which the Board recognized that conduct on the picket line must be viewed tolerantly because of the friction that usually results from industrial confrontation. "[T]he emotional tension of a strike almost inevitably gives rise to a certain amount of disorder and . . . conduct on a picket line cannot be expected to approach the etiquette of the drawing room or breakfast table." \textit{Id.} at 288.

\textsuperscript{226} \textit{Firch Bakery Co.}, 232 N.L.R.B. No. 120, 97 L.R.R.M. 1192, 1193 (1977) (quoting \textit{Bettcher Mfg. Corp.}, 76 N.L.R.B. 526, 527 (1948)).

\textsuperscript{227} \textit{See} Crown Central Pet. Corp., 177 N.L.R.B. 322, 323 (1969) (reprimand and suspension of two employees for accusing a company official of lying during a grievance proceeding was unlawful).

\textsuperscript{228} 455 F.2d 721 (8th Cir. 1972).
of certain employees, the court found that the employees had been

[Insolent, insubordinate, and intimidating; they utilized false
charges, threats of physical violence and threats of activity detrimental
to the welfare of the business operation . . . . It is of course under-
standable that tempers may flare in the course of grievance meetings
and that harsh and rough words may be exchanged between the parties
without giving rise to a basis for discharge consistent with the protec-
tions afforded under §7 of the Act. The use of the term egregious to
denote the adjectival type of conduct warranting a basis for discharge
is general in nature but appears on this record to be an apt description
of the activities of the three committee members who were discharged.
Egregious is defined in Webster's New World Dictionary as
"outstanding for undesirable qualities; remarkably bad; flagrant." We
agree . . . that the conduct was insulting, threatening and disloyal to
the employer's interests; we also view such conduct as flagrant.229

The misconduct at the meeting must generally be of a continuous na-
ture; thus an isolated expletive230 or a question regarding management
"pay offs"231 is not sufficient to justify discharge of the employee. The
courts are again faced with a balancing test in these cases since the
probability of impulsive behavior by employees during the exercise of
their rights232 must be viewed in light of the employer's right to maintain
order and respect.233

CONCLUSION

All employers should be well aware of the obligations they owe to

229 Id. at 727-28.
who responded "piece work my ass" to efforts of management to put employees on a
piecework basis was held to be engaged in protected activity as a spokesman for other
employees); Bettcher Mfg. Corp., 76 N.L.R.B. 526, 527, 533 (1948) (discharge of employee
for calling employer a crook and a liar during a mass negotiating session between employer
and employees held unlawful).
231 NLRB v. Ben Perkin Corp., 452 F.2d 205, 207 (7th Cir. 1971).
232 See Longview Furniture Co., 100 N.L.R.B. 301 (1952) where the Board stated:
[T]he language of these employees . . . must be regarded as an integral and
inseparable part of their [protected concerted activity] . . . . [T]o suggest
that employees in the exercise of their rights and in the heat of picket line
animosity must trim their expression of disapproval to some point short of
utterances here in question, would be to ignore the industrial realities of speech
in a workaday world and to impose a serious stricture on employees in the
exercise of their rights under the Act.
Id. at 304.
233 NLRB v. Thor Power Co., 351 F.2d 584, 587 (7th Cir. 1965).
their employees under statutes such as Title VII of the Civil Rights Act\textsuperscript{234} and the Fair Labor Standards Act.\textsuperscript{235} However, unless their employees are unionized or have been approached by a union, few employers realize that they have obligations under the National Labor Relations Act as well. It is hoped that this Article has made clear some of the limitations the Act places on the rights of an employer in a non-union context. Nonetheless, one final caveat must also be adduced. When an employer becomes aware that protected concerted activity is taking place in his plant, he should be aware of both the legal and the practical consequences of suppressing such activity. A minor grievance may be only the tip of the iceberg. The dissatisfaction may be the beginning of union organizational activity, or it may be nothing more than it appears to be. In either case, the employer should deal with the situation circumspectly and redress any grievance his employees may have to the best of his ability without taking adverse action against them and without exhibiting animosity toward them. Retaliating against employees who engage in protected concerted activity, in addition to violating their legal rights, will compound whatever grievance the employees have and may lead to more demonstrations of dissatisfaction. A disgruntled workforce tends to favor unionization and economic retaliation against the employer more often than does a workforce with whom the employer has maintained a good relationship. Therefore, by 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.
