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Commentaries on the National Labor Relations Board: 1977

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INTRODUCTION

Recently the National Labor Relations Board (NLRB) has rendered a number of significant decisions¹ concerning certain fundamental employee rights under section 7 of the National Labor Relations Act (NLRA).² This article is a brief distillation of these decisions. The essence thus distilled reflects major doctrinal trends. It suggests a renewed recognition by the NLRB of basic employee rights, particularly those of free choice and speech in labor disputes. It further indicates a pronounced emphasis by the NLRB both upon prompt realization of those rights and meaningful protection against their infringement.

I. EFFECTUATING EMPLOYEE FREE CHOICE

Section 7 guarantees to employees the rights to organize, join and bargain collectively through representatives of their own choosing. The statutory declaration of these rights of free choice is made broadly and essentially without limitation. The question has long plagued the Board whether qualifications should be placed on such rights, for constitutional or statutory reasons, where the employees' free choice of representative may fail to meet some ideal standard. For example, may the employees choose and may the Board certify as bargaining representative a union that engages in a pattern or practice of racial discrimination, or a union that lies to obtain the employees' votes?³ The

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1. Portions of this article had their origins in Modjeska, *The NLRB 1977: Significant Decisions of the Board and General Counsel*, 103 MIDWEST LAB. L. CONF. 2.01 (Ohio Legal Center Institute 1977).

2. Section 7 provides that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157 (1970).

3. Under § 9 of the Act the Board administers representation determination procedures. Section 9(a) provides that a representative selected by the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all unit employees. Section 9(b) authorizes the Board to determine the appropriate unit. Section 9(c) sets forth the procedure for ascertaining whether a majority of employees desire union representation. Under § 9(c), if a union files an

Board dealt with such issues in several major decisions during 1977, and as shown below the decisions reflect a current Board swing in the direction of unrestricted employee free choice.

A. *The Discriminatory Union*

In the trilogy of *Handy Andy, Inc.*,⁴ *Bell & Howell Co.*,⁵ and *Murcel Manufacturing Corp.*,⁶ the Board held that it was neither required by the Constitution nor permitted by the NLRA to withhold certifications or bargaining orders from labor unions that practice or engage in racial or other invidious discrimination.⁷ The Board announced that such issues will not be resolved in pre-certification or pre-bargaining order proceedings but rather in section 8(b)(1)(A) and (2) unfair labor practice proceedings⁸ under the duty of fair representation doctrine of *Miranda Fuel Co.*⁹ In so holding, the Board overruled its 1974 decision in *Bekins Moving & Storage Co.*¹⁰ and also rejected the principles

election petition with the Board, alleging that a substantial number of employees wishes to be represented for collective bargaining and that the employer declines to recognize the union, the Board investigates to determine whether a question concerning representation exists. If the Board finds that a question concerning representation exists it directs a secret ballot election and certifies the election results. 29 U.S.C. § 159(a)-(c) (1970). *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965); *Ray Brooks v. NLRB*, 348 U.S. 96 (1954); *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330-31 (1946); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 152-53 (1941); *AFL v. NLRB*, 308 U.S. 401, 405-06 (1940). Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. 29 U.S.C. § 158(a)(5) (1970). *Linden Lumber Div., Sumner & Co. v. NLRB*, 419 U.S. 301 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

4. 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354 (1977) (Chairman Murphy with Members Fanning and Penello for the majority, Member Walther concurring, and Member Jenkins dissenting).

5. 230 N.L.R.B. No. 57, 95 L.R.R.M. 1333 (1977) (Chairman Fanning with Members Murphy and Penello for the majority, Member Walther concurring, and Member Jenkins dissenting).

6. 231 N.L.R.B. No. 80, [1977-78] LAB. L. REP. (CCH) ¶ 18,493 (NLRB 1977) (Chairman Fanning with Members Murphy and Penello for the majority, Members Jenkins and Walther concurring).

7. In *Handy Andy* the Board held that a union's alleged discriminatory practices did not preclude certification of the union after a decertification election proceeding. *Accord*, *Trumbull Asphalt Co., Inc.*, 230 N.L.R.B. No. 100, 96 L.R.R.M. 1100 (1977). In *Bell & Howell* the Board held that a union's alleged discriminatory practices did not preclude issuance of a bargaining order in a § 8(a)(5) proceeding testing an underlying certification. *Accord*, *FDI, Inc.*, 231 N.L.R.B. No. 168, 96 L.R.R.M. 1628 (1977). In *Murcel Mfg.* the Board held that a union's alleged discriminatory practices did not preclude issuance of a bargaining order based on authorization cards. Thereafter in *Local 393 Plumbers*, 232 N.L.R.B. No. 83, 97 L.R.R.M. 1153 (1977) the Board applied *Handy Andy* to a jurisdictional dispute and refused to withhold § 10(k) certification because of alleged union discriminatory practices.

8. Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7. . ." 29 U.S.C. § 158(b)(1)(A) (1970). *E.g.*, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *NLRB v. Drivers Local 639*, 362 U.S. 264 (1967). Section 8(b)(2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [discrimination to encourage or discourage union membership]. . ." 29 U.S.C. § 158(b)(2) (1970). *E.g.*, *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961); *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667 (1961).

9. 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

10. 211 N.L.R.B. 138 (1974). The Board there stated:

Were we, as an arm of the Federal Government, to confer the benefits of a certification upon a labor organization which is shown to be engaging in a pattern and practice of

of *NLRB v. Mansion House Center Management Corp.*,¹¹ in which the Eighth Circuit held that the Board was precluded by the fifth amendment from issuing a bargaining order in favor of a union that practices racial discrimination.¹² The Board announced in *Handy Andy*, "The duty of fair representation has become the touchstone of the Board's concern with invidious discrimination by unions."¹³

Detailed analysis of *Handy Andy* is beyond the scope of this article.¹⁴ A few passing comments may be in order, however, concerning the Board's restrictive views on the constitutional implications of its authority. The due process clause of the fifth amendment proscribes the federal government's practice of or participation in invidious discrimination.¹⁵ In *Green v. Connally*,¹⁶ for example, the court held that the Internal Revenue Code must be construed to deny federal tax exemptions to racially discriminatory private schools, and to deny deductions to persons making gifts to such schools. The three-judge court, in an opinion by Circuit Judge Leventhal, held that:

The Code must be construed and applied in consonance with the Federal public policy against support for racial segregation of schools, public or private.

. . . .
Clearly the Federal Government could not under the Constitution give direct financial aid to schools practicing racial discrimination. But tax exemptions and deductions certainly constitute a Federal Government benefit and support. While that support is indirect, and is in the nature of a matching grant rather than an unconditional grant, it would

invidious discrimination, the power of the Federal Government would surely appear to be sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment.

Id. at 138-39. For applications of the *Bekins* analysis see, e.g., *Vari-Tronics Co., Inc.*, 230 N.L.R.B. No. 171, 95 L.R.R.M. 1519 (1977); *Williams Enterprises, Inc.*, 212 N.L.R.B. 880 (1974); *Grants Furniture Plaza, Inc.* 213 N.L.R.B. 410 (1974).

11. 473 F.2d 471 (8th Cir. 1973). The court there stated: "Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimizes and perpetuates such invidious practices. Certainly such a degree of federal participation in the maintenance of racially discriminatory practices violates basic constitutional tenets." *Id.* at 477.

12. See generally Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?* 42 U. CHI. L. REV. 1 (1974); Comment, 123 U. PA. L. REV. 158 (1974).

13. 94 L.R.R.M. at 1362.

14. For a fuller analysis of *Handy Andy*, see 1976-77 *Annual Survey of Labor Relations and Employment Discrimination Law*, 18 B.C. IND. & COM. L. REV. 1045, 1103-17 (1977).

15. *Bolling v. Sharpe*, 347 U.S. 497 (1954). See also *Shelley v. Kraemer*, 334 U.S. 1 (1948) and *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), involving the analogous "state action" concept under the equal protection clause of the fourteenth amendment. In *Burton* the Court pointed out that private conduct which abridges individual rights does "violence" to the equal protection clause if "to some significant extent the State in any of its manifestations has been found to have become involved in it." *Id.* at 722. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1147-74 (1978).

16. 230 F. Supp. 1150 (D.D.C. 1971), *aff'd*, 404 U.S. 997 (1971). See *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972).

be difficult indeed to establish that such support can be provided consistently with the Constitution.¹⁷

The grant of representative status to a union, whether by section 9 certification or section 8(a)(5) bargaining order, carries powers and responsibilities of major import.¹⁸ The Board plays a major role in the process of awarding and enforcing that bargaining representative status.¹⁹ There would accordingly seem to be substantial merit to the argument that to grant representative status to a union that engages in a pattern or practice of invidious discrimination places the Board in the position of "sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment."²⁰ For it would seem that if the Board grants representative status to a union that practices discrimination, it may be found to have placed "its power . . . and prestige" behind the discrimination and to have granted "federal Government benefit and

17. 330 F. Supp. at 1163-65 (D.D.C. 1971). See *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Garner v. Louisiana*, 368 U.S. 157 (1961) (separate opinion of Justice Douglas); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

18. The collective bargaining representative receives not only wide responsibility but also authority to meet that responsibility. See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 339 (1953). A statutory bargaining representative under the NLRA exercises a grant of powers "comparable to those possessed by a legislative body. . . ." *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944). This point was made by Mr. Chief Justice Stone in a discussion of statutory bargaining representatives under the Railway Labor Act, 45 U.S.C. §§ 51-63 (1970), but is equally true of statutory bargaining representatives under the NLRA: "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ." 322 U.S. at 202 (1944). *Accord*, *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Miranda Fuel Co.*, 140 N.L.R.B. 181, 184-85 (1962). The national labor policies of majority rule and union exclusivity extinguish the individual employee's power to control his own relations with the employer and give the majority representative the power to act for the benefit of all employees. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), in which the Court stated:

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. . . . Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to . . . refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them.

Id. at 180. See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). *E.g.*, *NLRB v. Katz*, 369 U.S. 736 (1962); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) (proscriptions against unilateral changes in wages, hours, and other terms and conditions of employment).

19. The Board has the power to create representative status, through either a representation or an unfair labor practice case. The Board can alter the representative status (AC petition), clarify it (UC petition), and terminate it (RD petition or sustaining an employer's withdrawal of recognition). See generally R. GORMAN, *LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 40-50, 108-16, 726-28 (1976). The Board can also enforce the continued existence of that status through remedial orders under § 8(a)(5) and 8(b)(3).

20. *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138, 139 (1974).

support” to such discrimination.²¹ Disqualification of a union that practices invidious discrimination may be a severe sanction, and one that intrudes upon the exercise by employees of important section 7 rights, but the short answer may be the constitutional mandate against the federal government’s practice of or participation in invidious discrimination.²² Indeed, the Board’s rejection in *Handy Andy* of a constitutional limitation on its certification authority²³ appears patently inconsistent with its indication that it will continue to deny the protections of its contract bar rules under its *Pioneer Bus Co.* doctrine,²⁴ and to revoke certifications under its *Hughes Tool Co.* doctrine,²⁵ in appropriate cases of discrimination.²⁶ Both *Pioneer Bus* and *Hughes Tool* were squarely predicated upon constitutional limitations upon the Board’s power and processes.²⁷

The Board will undoubtedly continue for some time to wrestle with the difficult and sensitive question of its role in the areas of racial and other invidious discrimination.²⁸ It may be contended that the

21. Compare the more remote and tangential governmental involvement in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

22. *Washington v. Davis*, 426 U.S. 229 (1976), would indicate that before a union could be denied a certification or bargaining order because of discrimination, discriminatory purpose or motive must be established.

23. Apart from the question of constitutional limitations, *NAACP v. FPC*, 425 U.S. 662 (1976), seems to undercut the Board’s position that it lacks statutory authority to withhold a certification or bargaining order from a union that practices invidious discrimination. In that case, the Court, confining itself to the statutory question and not reaching the constitutional issues, held that the FPC, under its statute, had the authority to consider a regulatee’s discriminatory practices where such practices were germane to the FPC’s task of setting rates. The Court also indicated that the FPC had statutory authority to adopt regulations concerning discriminatory practices because such practices would bear upon whether a regulatee should be granted or allowed to retain a license or permit. If discriminatory practices are relevant to the FPC’s licensing of a regulatee, the same practices by a “regulated” union would clearly seem relevant to the Board’s statutory role of certifying representatives and insuring fair representation by that representative.

24. *Pioneer Bus Co.*, 140 N.L.R.B. 54, 55 (1962).

25. *Metal Workers Local 1 (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964); *Hughes Tool Co.*, 104 N.L.R.B. 318, 319-24 (1953).

26. The Board also stated that it would continue to police election propaganda involving improper racial appeals. *E.g.*, *Coca-Cola Bottling Co. Consol.*, 232 N.L.R.B. No. 114, 96 L.R.R.M. 1289 (1977), and cases there cited.

27. In *Pioneer Bus*, in which the Board held that contracts that discriminate along racial lines will not bar an election, the Board stated: “Consistent with clear court decisions in other contexts which condemn governmental sanctioning of racially separate groupings as inherently discriminatory, the Board will not permit its contract-bar rules to be utilized to shield contracts such as those here involved from the challenge of otherwise appropriate election petitions.” *Pioneer Bus Co.*, 140 N.L.R.B. at 55 (1962). And in *Hughes Tool*, where the Board held that a certification should be rescinded because the unions executed and administered contracts and union membership policies along racial lines, the Board stated:

[T]he separate opinion disregards certain constitutional limitations upon the Board’s powers. . . . Specifically, we hold that the Board cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative. *Cf. Shelley v. Kraemer*, 334 U.S. 1; *Hurd v. Hodge*, 334 U.S. 24; *Bolling v. Sharpe*, 347 U.S. 497.

Hughes Tool Co., 147 N.L.R.B. at 1577-78 (1964).

28. See generally *W. GOULD, BLACK WORKERS IN WHITE UNIONS 163-206 (1977)*.

question has a simple and direct answer, namely, that the Board's only concern under the NLRA is with union-related discrimination.²⁹ This contention would find support in the text, structure and purpose of the Act itself, the absence in the legislative history of any congressional indication militating in favor of the Board's involvement, the Board's lack of expertise in the area, and the existence of Title VII and a host of other laws squarely dealing with employment discrimination. *Emporium Capwell Co. v. Western Addition Community Organization*³⁰ might be read as squarely holding that the Board is to leave racial and other non-union related discrimination to other agencies, such as the EEOC, that possess specific charters in those areas.

The better argument, however, would seem to be that, although the Board has been inconsistent and groping in what it has done, it has nevertheless in fact been involved in these areas of invidious discrimination since the early days of the Act. As noted above,³¹ the Board has responded to such discrimination by revoking certifications, refusing to apply its contract-bar doctrine, policing election propaganda, and applying *Miranda Fuel* protections. Neither Congress nor the judiciary has disapproved of these Board doctrines. *Emporium* may actually mean that the Board is permitted to enter the area of racial and other invidious employment discrimination but that it must do so cautiously. Indeed, the Supreme Court expressly noted in *Emporium* that it did "not call into question either the capacity or the propriety of the Board's sensitivity to questions of discrimination."³² Viewed against this background, *Handy Andy* may not in any real way signify Board withdrawal from the area of racial and other invidious discrimination, but may simply signify the Board's funneling of such problems away from the essentially nonadversary representation proceedings into the adversary unfair labor practice arena.

As noted above,³³ the Board now regards the *Miranda Fuel* doc-

29. Discrimination based upon union membership or nonpayment of union fines are such examples. See *Painters Local 1066 (W.J. Siebenoller, Jr., Paint Co.)*, 205 N.L.R.B. 651, 652-53, n.4 (1973); *IUOE Local 18 (Ohio Contractors Ass'n & William F. Murphy)*, 204 N.L.R.B. 681 (1973), *remanded*, 496 F.2d 1308 (6th Cir. 1974), *dec. on remand*, 220 N.L.R.B. 147 (1975).

30. 420 U.S. 50 (1975). The Court there held, relying heavily upon the principle of the exclusivity of the bargaining representative, that minority employee protests against the employer's allegedly discriminatory practices were not necessarily protected by § 7, even if the activity was arguably protected by Title VII. *But see Armco Steel Corp.*, 232 N.L.R.B. No. 110, 96 L.R.R.M. 1325 (1977). See generally, Cantor, *Dissident Worker Action, After The Emporium*, 29 RUTGERS L. REV. 35 (1975); Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?* 123 U. PA. L. REV. 897 (1975); 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 (1975).

31. See notes 24-26 and accompanying text *supra*.

32. 420 U.S. at 71-72 n.25. The Court also noted the Board's positions in *Hughes Tool Co. and Miranda Fuel Co.*

33. See text accompanying note 13 *supra*.

trine, under which breach of the duty of fair representation is an unfair labor practice, as the "touchstone" of the Board's dealing with invidious discrimination by unions. There is a risk in this new approach by the Board. Although *Miranda Fuel* has been Board policy since 1962, it is by no means judicially established and remains in many ways a very uncertain doctrine. The doctrine has so far been endorsed by only a few courts of appeals and has not yet been approved by the Supreme Court.³⁴ If *Miranda Fuel* remains viable, the Board's new approach may ultimately prove to be a realistic and practicable way of dealing with invidious discrimination. On the other hand, if the *Miranda Fuel* doctrine is short-lived the Board may well have painted itself into a corner..

In *Handy Andy* the Board gives a nod to the "national labor policy [that] embodies the principles of nondiscrimination as a matter of highest priority"³⁵ but then opts for the prompt recognition of employees' section 7 right "to bargain collectively through representatives of their own choosing." The Board has thereby put the primary and maximum focus upon the importance of employee free choice, and gives employees the essentially unrestricted right to select good or bad unions.³⁶

B. *The Lying Union*

The Board's focus upon employee free choice is evident in another major reversal. In *Shopping Kart Food Market, Inc.*,³⁷ the Board overruled its long-standing *Hollywood Ceramics Co.*³⁸ rule and held that the Board would no longer set aside representation elections because of misleading campaign statements. Under *Hollywood Ceramics* the Board viewed its function as one of limited intervention in elections,

34. Modjeska, *The Uncertain Miranda Fuel Doctrine*, 38 OHIO ST. L.J. 807 (1978). See generally Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation*, 126 U. PA. L. REV. 251 (1977); Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEXAS L. REV. 1119 (1973).

35. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 66 (1975).

36. In *Alto Plastics Mfg. Corp.*, 136 N.L.R.B. 850 (1962), the Board rejected the contention that it should withhold its election processes from an allegedly corrupt union. The Board indicated that if the union won the election and later failed to fulfill its statutory representative obligations the Board would entertain a motion to revoke the certification. *But see* *St. Louis Labor Health Institute*, 230 N.L.R.B. No. 1, 95 L.R.R.M. 1347 (1977).

37. 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705 (1977) (Members Penello and Walther for the majority, Chairman Murphy concurring, and Members Fanning and Jenkins dissenting in part). Because Member Walther has now left the Board *Shopping Kart* may well be a short-lived precedent.

38. 140 N.L.R.B. 221 (1962). The progenitor of *Hollywood Ceramics* was *Gummed Products Co.*, 112 N.L.R.B. 1092 (1955). See generally Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Christensen, *Free Speech, Propaganda and the National Labor Relations Act*, 38 N.Y.U.L. REV. 243 (1963).

seeking to maintain laboratory conditions and striking a balance between employees' rights to an untrammelled choice and the parties' rights to wage a free and vigorous campaign. The Board had devised the following formula in *Hollywood Ceramics* for striking this balance:

We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.³⁹

In *Shopping Kart*, the Board found that experience under the *Hollywood Ceramics* rule had been unsatisfactory. The rule had tended to impede the attainment of employee free choice and had produced a host of ill effects. Included among these ill effects were extensive analysis of campaign literature, curtailment of free speech, differing application of the rule between the Board and the courts, increased litigation, and a resultant decrease in the finality of election results. The Board noted that much of the difficulty lay in the vagueness and flexibility of the *Hollywood Ceramics* rule, as well as in a variety of dubious assumptions concerning the needs of employees for Board protection against campaign misrepresentation.⁴⁰ The Board stated that it would no longer view employees as "naive and unworldly [individuals] whose decision on as critical an issue as union representation is easily altered by the self-serving campaign claims of the parties," but rather that it would now view employees as "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."⁴¹ The Board concluded that while the Act's purposes would be best served by the demise of the *Hollywood Ceramics* rule, the Board would continue to intervene where a party engages in such deceptive campaign practices as improperly involving the Board and its processes, or using forged documents.⁴² Thus, the Board said that although it would not set an election aside because of the substance of a representation, it would

39. 140 N.L.R.B. at 224.

40. The Board recognized the validity of such critical analyses as Bok, *The Regulation of Campaign Tactics In Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964), and Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976). The full study by Professors Getman, Goldberg and Herman of the effect of pre-election campaigns upon employee predispositions in voting was published in J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976). By any analysis the book is a major contribution to the law.

41. 94 L.R.R.M. at 1707.

42. *E.g.*, Formco, Inc., 233 N.L.R.B. No. 5, 96 L.R.R.M. 1392 (1977); Silco Inc., 231 N.L.R.B. No. 23, 95 L.R.R.M. 1516 (1977), and cases there cited; J. Ray McDermott & Co., Inc., 215 N.L.R.B. 570 (1974); Cascade Corp., 205 N.L.R.B. 638 n.2 (1973); Sylvania Electric Products, Inc., 119 N.L.R.B. 824, 827-830 (1957); United Aircraft Corp., 103 N.L.R.B. 102 (1953). *But see* Fabricut, Inc., 233 N.L.R.B. No. 173, 97 L.R.R.M. 1004 (1977).

set an election aside where the representation is made in a deceptive manner. The Board explained:

The essential difference lies in the fact that while employees are able to evaluate mere propaganda claims, there is simply no way any person could recognize a forged document "for what it is" from its face since, by definition, it has been altered to appear to be that which it is not.⁴³

The Board also said that it would continue to review the propriety of other campaign conduct, apart from misrepresentations, that interferes with employee free choice.

A major theme behind the rhetoric of *Shopping Kart* is again the Board's recognition of employees' section 7 rights to bargain collectively through representatives of their choosing, be it a good or bad or even a lying union. To be sure, the decision has broader implications in its deregulation of employer pre-election speech. And one may conclude that the essence of *Shopping Kart* is the proposition that employees ignore, can evaluate, and/or are not affected by campaign representations. The fact remains that the union in *Shopping Kart* made a substantial misrepresentation⁴⁴ and that the Board found the employees could evaluate the statement for what it was. What it was, put simply, was a lie, and what the decision says, put equally simply, is that if employees want a lying union they can have one. So it goes.⁴⁵

II. EFFECTUATING UNASCERTAINABLE EMPLOYEE FREE CHOICE

Recent decisions of the General Counsel further reflect the NLRB's renewed attempts to fashion more effective remedies both to redress and to deter employer unfair labor practices which interfere with the exercise of free choice by employees.⁴⁶ Nowhere is the trend more evident than in the General Counsel's determination to seek a bargaining order as a remedy for employer unfair labor practices even when the union has never attained majority status.⁴⁷ The emphasis,

43. 94 L.R.R.M. at 1708.

44. The night before the election, the union told employees that the employer's profits during the preceding year were \$500,000; the evidence established that the profits had been about \$50,000. *Id.* at 1705.

45. *E.g.*, Cormier Hosiery Mills, Inc. and Central New Hampshire Dye, Inc., 230 N.L.R.B. No. 185, 95 L.R.R.M. 1461 (1977), in which the Board applied *Shopping Kart* in refusing to set aside an election based upon the union's misrepresentation that the employer had engaged in intercorporate manipulations by making a two million dollar loan that prevented employees from sharing equitably in the employer's profits.

46. *See generally*, Irving, *Remedies and Compliance—Putting More Teeth Into The Act* [1977] SW. LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS 1977, 349. The Board has wide remedial discretion and authority under the Act, subject to the limitation that its orders may not be punitive. *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651 (1961); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

47. Section 10(b) of the Act (29 U.S.C. § 160(b) (1970)) gives the Board or its agent broad discretionary authority concerning the issuance of unfair labor practice complaints *NLRB v. Indiana & Michigan Elec. Co.*, 318 U.S. 9, 18 (1943). Section 3(d) (29 U.S.C. § 153(d) (1970)) confers this power upon the General Counsel of the Board, and provides that he shall have

as in the cases discussed previously, is upon the maximum effectuation of employee free choice. However, these situations differ: When the employer's unfair labor practices render the actual choice of the employees unascertainable, that choice is presumed.

Thus, in two cases the General Counsel authorized issuance of complaints alleging that a bargaining order was an appropriate remedy for serious unfair labor practices in violation of sections 8(a)(1) and (3) despite the fact that the unions had failed to obtain authorization cards from a majority of the employees.⁴⁸ In one of the cases,⁴⁹ upon learning of the union's organizational campaign, the employer interrogated employees, gave employees the impression of being under surveillance, made threats of a plant shutdown, promised benefits, and advised employees of the futility of joining the union. When the union demanded recognition, the employer told the employees that its largest contractor would cancel its contract if the plant were unionized; shortly thereafter the employer laid off in inverse seniority a large number of employees, including the leading union adherents. The union had obtained authorization cards from a majority of the employees. The General Counsel therefore authorized a complaint on the ground that the employer had violated section 8(a)(5) of the Act by refusing to bargain with the majority representative. The investigation of the case, however, had also revealed that the authenticity of some cards was questionable. If the cards were not authenticated at the hearing it would not be possible to establish that the union had ever attained a majority. The General Counsel nevertheless authorized the complaint on the alternative ground that a bargaining order was still an appropriate remedy in view of the seriousness of the employer's unfair labor practices.

In the second case,⁵⁰ the employer unlawfully discharged seven employees the day after some of the employees began to sign union authorization cards. Three days later the employer refused the union's request for recognition, and the employees struck and joined a picket line along with the discharged employees. A week later the employer unlawfully discharged a clerical employee who had spoken with the pickets. The employer also threatened to discharge additional em-

"final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board. . . ." See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Saez v. Goslee*, 463 F.2d 214 (1st Cir. 1972), cert. denied, 409 U.S. 1024 (1972), and cases there cited. The General Counsel plays a major role not only in the enforcement but also in the formulation and development of national labor policy, and his decisions are thus highly relevant to any meaningful analysis of NLRA doctrine. Further, the General Counsel's refusal to issue a complaint is in fact an adjudication of unfair labor practice claims. 421 U.S. at 141, 148.

48. NLRB Gen. Counsel Q. Rep., [1977] 95 LAB. REL. REP. (BNA) 110, 114-15.

49. *Id.* at 115.

50. *Id.*

ployees to prevent their unionization, told employees that others had been discharged because of their union activity, and promised to give raises to the employees if they would abandon their union activity. Although the union could establish that it had secured a substantial number of authorization cards from the employees, it could not demonstrate that it had ever achieved majority status. The General Counsel nevertheless authorized a complaint seeking an order requiring the employer to bargain with the union as a remedy for the section 8(a)(1) and (3) violations.

In *NLRB v. Gissel Packing Co.*⁵¹ the Supreme Court held that the Board has the power to issue a bargaining order when independent unfair labor practices make holding a fair election impossible or improbable. The Court said that the Board could issue a bargaining order in exceptional cases marked by outrageous and pervasive unfair labor practices, the so-called *Gissel I* situation. As discussed more fully below, it is not clear from the Court's decision whether a remedial bargaining order can issue in such a situation if the union has never attained a majority. The Court also said that the Board could issue a bargaining order in less extraordinary cases marked by less pervasive practices which tend to undermine majority strength and to impede the election processes, the so-called *Gissel II* situation.⁵² No bargaining order is appropriate, said the Court, in the case of minor or less extensive unfair labor practices which have a minimal effect on the election machinery, the so-called *Gissel III* situation.⁵³

The cases before the Court involved *Gissel II* situations—"less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes"⁵⁴—where the unions had in fact attained

51. 395 U.S. 575 (1969).

52. The Court stated:

The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of the employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . . .

Id. at 614-15.

53. *E.g.*, *Frito-lay, Inc.*, 232 N.L.R.B. No. 119, 96 L.R.R.M. 1335 (1977); *Beasley Energy, Inc.*, 228 N.L.R.B. No. 16, 94 L.R.R.M. 1563 (1977); *General Stencils, Inc.*, 195 N.L.R.B. 1109 (1972), *enforcement denied*, 472 F.2d 170 (2d Cir. 1972).

54. 395 U.S. at 614.

the requisite majority status at one time. The *Gissel II* situations appear to be analogous to and consistent with prior rulings of the Court upholding bargaining orders where the union's once-attained majority status had been lost or dissipated due to employer unfair labor practices or employee turnover.⁵⁵ As noted above, however, it is not clear whether majority status is a prerequisite to issuance of a bargaining order in a *Gissel I* situation. Nor is it clear whether the Court even intended to speak authoritatively on the issue. The answer, for those (unlike this writer) skillful enough to extract it, lies in the following ambiguous passage in *Gissel*:

[T]he actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards^[56] the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *N.L.R.B. v. Logan Packing Co.*, 386 F.2d 562, 570 (C.A. 4th Cir. 1967); see also *N.L.R.B. v. Heck's, Inc.*, 398 F.2d 337, 338.⁵⁷

Both *NLRB v. Heck's, Inc.*, and *NLRB v. Logan Packing Co.*, cited by the Supreme Court, involved situations where the unions had in fact acquired a majority of authorization cards. The Fourth Circuit refused to approve bargaining orders in this situation because of its views that authorization cards were unreliable. In *Heck's* the court noted, "This is not one of those extraordinary cases in which a bargaining order might be an appropriate remedy for pervasive violations of § 8(a)(1)."⁵⁸ In *Logan Packing* the court similarly rejected the issuance of a bargaining order in the particular case before it as a

55. *E.g.*, *NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962); *Frank Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *NLRB v. P. Lorillard Co.*, 314 U.S. 512 (1942).

56. In *Gissel* the Court held, contrary to the Fourth Circuit, that authorization cards may be used as valid indications of a union's majority and to support a bargaining order. *Great Atl. & Pac. Tea Co.*, 230 N.L.R.B. No. 102, 96 L.R.R.M. 1245 (1977). Concerning the general problems of authorization cards see Note, *Refusal-To-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387 (1966); Note, *Union Authorization Cards* 75 YALE L.J. 805 (1966).

57. 395 U.S. at 613-14. Professor Gorman has said of this passage that "the Court appeared to suggest that it would not be necessary in such cases to inquire into majority status on the basis of cards." R. GORMAN, *LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING* 95 (1976).

58. *NLRB v. Heck's, Inc.*, 398 F.2d 337, 338 (4th Cir. 1968). The court upheld the Board's finding that the employer violated § 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)(1970)) by interrogation, threats of reprisal, creating the impression of surveillance, and offering benefits. The court also upheld the Board's finding that the employer violated § 8(a)(3) and (1) of the Act (29 U.S.C. § 158(A)(3), (1) (1970)) by unlawfully discharging one employee.

remedy for the employer's independent violations of section 8(a)(1).⁵⁹ The court added, however, in the dictum which formed the predicate for the ambiguity in *Gissel*, that in "exceptional" cases involving "outrageous" and "pervasive" unfair labor practices precluding the holding of a fair election the Board "may have the power" to issue a bargaining order as a remedy for the unfair labor practices.⁶⁰ Such an order would then be imposed, said the court, "without need of answering the question whether the union ever obtained majority status."⁶¹ The court cautioned that "[t]he remedy is an extraordinary one, however, and, in light of the guaranty of § 7 of employees' rights not to be represented, its use, if ever appropriate, must be reserved for extraordinary cases."⁶²

No case has been found in which the Board has issued a bargaining order without a finding that the union has at some point attained a majority.⁶³ The General Counsel now appears to have taken the position that *Gissel* approved a remedial bargaining order even when a union's majority status cannot be established if the employer's unfair labor practices are outrageous and pervasive and if (1) the union has established that a substantial number of employees, although less than a majority, have selected the union as a representative and (2) the evidence shows a causal connection between the unfair labor practices and the union's failure to attain majority status. The General Counsel appears to have taken the further position that even where such a causal connection is not established, a bargaining order is still appropriate when based upon the existence of outrageous and pervasive unfair labor practices along with the showing that a substantial number of employees, though less than a majority, have selected the union.

Both of the General Counsel's positions embody a "but-for" presumption; an inference is drawn that but for the employer's unfair labor practices, a majority of employees would have selected the union as their bargaining representative. The inference is more easily drawn when both (1) substantiality and (2) causal connection are present. When, for example, a union has steadily and progressively signed up

59. The court upheld the Board's findings that the employer engaged in unlawful interrogation and surveillance in violation of § 8(a)(1). The court did comment, however, that the evidence of violations was "minimal." *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 564 (4th Cir. 1967).

60. 386 F.2d at 570.

61. *Id.*

62. 386 F.2d at 570-71.

63. *E.g.*, *Loray Corp.*, 184 N.L.R.B. 557 (1970). For compilations of cases in which the Board and the courts have determined which unfair labor practices warrant *Gissel* bargaining orders when the union has attained majority status see *THE DEVELOPING LABOR LAW* (C. Morris, ed. 1971) (1976 Supp. at 74-77) and (1971-75 Cum. Supp. at 146-50). See generally Carson, *The Gissel Doctrine: When A Bargaining Order Will Issue*, 41 *FORD. L. REV.* 85 (1972); Comment, *Bargaining Orders Since Gissel Packing: Time to Blow the Whistle on Gissel?* 1972 *Wis. L. REV.* 1170.

a substantial number of employees in a short period, and following the employer's unfair labor practices, only a few or no employees sign up, the inference that but for the unfair labor practices the union probably would have attained a majority may be well-founded. In a situation where only the factor of substantiality is present, the drawing of the inference is necessarily more strained.

Under either position, the General Counsel's utilization of a but-for analysis places the emphasis upon the effectuation of employee free choice, even though that free choice is in fact unascertainable and the effectuation incorporates a legal fiction. A lesser emphasis appears to be placed upon the utilization of an extreme remedy simply to deter employer misconduct and to preclude the employer from profiting from the unfair labor practices. Viewed with the emphasis on employee free choice rather than employer deterrence, the General Counsel's theories are arguably far more permissibly remedial and far less impermissibly punitive. And the situation is therefore arguably quite different from that in the *Local 57, ILGWU v. NLRB (Garwin Corp.)*⁶⁴ runaway shop context in which a union would be imposed upon a unit of employees none or few of whom have ever designated the union as their bargaining representative.

These determinations of the General Counsel may well neither reach the Board nor pose the majority issue if they do reach the Board. The General Counsel will presumably continue to issue complaints in appropriate cases that do raise the issue. The General Counsel has taken a major step in furthering employee free choice. Whether section 3(d)⁶⁵ contemplates such action without more direct encouragement in Board or court decisions can be soundly debated. That a union that has *never* attained majority status is to be imposed upon employees and employer is a proposition of novel and major dimensions.⁶⁶ The *Gissel* passages discussed above are, at best ambiguous. On the one hand, it seems highly unlikely that the Supreme Court meant to announce such a proposition by way of vague dictum. Indeed, a substantial argument may be made that the proposition is so laden with fundamental policy issues and conflicts that go to the heart of the Act that the matter is appropriate only for Congress to determine. On the other hand, it obviously cannot be denied that *Gissel* is both ambiguous and suggestive. The better view would therefore seem to be that under the bifurcated structure of the NLRB, the General Counsel has a duty to place the issue before the Board for resolution. In this light, the General Counsel engaged in an appropriate exercise of his discretion by issuing the complaints.

64. 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967).

65. The General Counsel has essentially unreviewable discretion over whether to issue unfair labor practice complaints. *Vaca v. Sipes*, 386 U.S. 171, 183 (1967).

66. *But see* *ILGWU v. NLRB*, 366 U.S. 731 (1961).

III. AVAILABILITY OF BOARD PROCESSES TO PROTECT BASIC EMPLOYEE RIGHTS

Protection of employees who initiate and participate in unfair labor practice proceedings before the Board is essential to any meaningful protection against infringement of fundamental section 7 rights.⁶⁷ Section 8(a)(4) effects this protection by making it an unfair labor practice for an employer to discriminate against an employee for filing charges or giving testimony under the Act.⁶⁸ The extent to which the Board will go to protect fundamental employee rights is highlighted by the Board's recent extension of the section 8(a)(4) protections to non-employees.

In *General Services, Inc.*,⁶⁹ the Board held that an employer violated section 8(a)(4) by refusing to rehire a lawfully discharged supervisor because the supervisor had filed charges with the Board. Following his discharge by the employer, the supervisor filed a section 8(a)(1) and (3) charge with the Board, alleging that he had been discharged because of his union activity. Although the supervisor later admitted that he had been hired as a supervisor,⁷⁰ he stated in the charge that he was not told he was a supervisor until the two-week period between the start of his union activity and his discharge. Shortly after his discharge a Board agent advised the supervisor to ask the employer for reinstatement. When the supervisor asked one of the employer's managers if the employer was hiring, the manager advised the supervisor that if he wrote the employer's president he would probably be rehired. The supervisor gave the manager a letter requesting reinstatement, was assured by the manager that authorization to reinstate him would undoubtedly be forthcoming, and withdrew his section 8(a)(1) and (3) charge.

67. In *Nash v. Florida Industrial Comm.*, 389 U.S. 235, 238 (1967) the Court stated that: The National Labor Relations Act is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. . . . Implementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge. Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board. This is shown by its adoption of § 8(a)(4) which makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges. . . . And it has been held that it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file charges.

68. Section 8(a)(4) of the Act (29 U.S.C. § 158(a)(4) (1970)) provides specifically that "(a) It shall be an unfair labor practice for an employer - . . . (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act; . . ." Section 8(a)(4) has been liberally construed and includes not only charges and testimony but also the giving of sworn statements. *NLRB v. Scrivener*, 405 U.S. 117 (1972).

69. *General Serv., Inc.*, 229 N.L.R.B. No. 134, 95 L.R.R.M. 1174 (1977) (Chairman Fanning with Members Jenkins and Murphy for the majority, and Members Penello and Walther dissenting).

70. At the subsequent hearing on the § 8(a)(4) charge the supervisor testified that he had been hired as a supervisor.

About ten days later, the manager told the supervisor that the employer's president had been notified of the supervisor's charge and had also received the letter. He indicated that the president would not take any action on the reinstatement request at least until the charge was withdrawn and probably not until after seeing the results of an upcoming union election. The supervisor then filed a second section 8(a)(1) and (3) charge, again alleging that his initial discharge was unlawful. The Board's regional director dismissed the charge on the ground that the supervisor had been found to be a supervisor in an earlier representation proceeding. The supervisor then filed the instant section 8(a)(1) and (4) charges.

The Board held that the employer's refusal to rehire the supervisor because the supervisor had filed charges with the Board was violative of section 8(a)(4). The Board found that congressional exclusion of supervisors from the statutory definition of employee in section 2(3)⁷¹ was not intended to exclude supervisors from coverage under section 8(a)(4), and that supervisors must be included in order to protect and preserve the efficacy of the Board's remedial processes. The Board stated:

In this case, McCracken, unsure of his status as supervisor or employee, filed an 8(a)(3) charge with the Board alleging that he was discharged because of his union activity. Clearly, in order to perform its statutory function of determining whether an unfair labor practice occurred, the Board would have to rule on McCracken's status as statutory supervisor or rank-and-file employee. . . . [T]he purpose of Section 8(a)(4) is to insure that the Board will be able to make that unfair labor practice determination by protecting from reprisal employees who file unfair labor practice charges and thus encouraging them to report such allegations to the Board. We believe, therefore, that for the purpose of processing his charge McCracken must be considered an "employee" within the meaning of Section 8(a)(4).⁷²

Under the original NLRA the Board had held, with Supreme Court approval, not only that supervisors were included under the protections of section 8(a)(3) but also that supervisors had bargaining rights under section 9.⁷³ In the 1947 Taft-Hartley amendments Con-

71. Section 2(3) of the Act (29 U.S.C. § 152(3) (1970)) provides in part "The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor" The term "supervisor" is defined in § 2(11) (29 U.S.C. § 152(11) (1970)).

72. 95 L.R.R.M. at 1175-76. In their dissent Members Penello and Walther termed the majority's holding "a bizarre construction of the statute." 95 L.R.R.M. at 1178.

73. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947); *Jones & Laughlin Steel Corp.*, 66 N.L.R.B. 386 (1946). In *Packard Motor Car*, the Court stated:

[T]here is nothing in the Act which indicates that Congress intended to deny its benefits to foremen as employees, if they choose to believe that their interests as employees would be better served by organization than by individual competition. . . .

There is no more reason to conclude that the law prohibits foremen as a class from constituting an appropriate bargaining unit than there is for concluding that they are not within the Act at all.

330 U.S. at 490-91.

gress rejected the Board's policy of giving supervisors employee status under the Act, and provided in section 2(3) that "employee" does not include "any individual employed as a supervisor."⁷⁴ As stated by Mr. Justice Harlan:

When in 1947 the National Labor Relations Act was amended to exclude supervisory workers from the critical definition of "employees," § 2(3), it followed that many provisions of the Act employing that pivotal term would cease to operate where supervisors were the focus of concern. Most obviously, § 7 no longer bestows upon supervisory employees the rights to engage in self-organization, collective bargaining, and other concerted activities under the umbrella of § 8 of the Act⁷⁵

Accordingly, subsequent to the 1947 amendment it has been held generally that an employer does not violate section 8(a)(1) or (3) by discharging a supervisor for engaging in union activity.⁷⁶

Notwithstanding the general exclusion of supervisors from the protection of the Act, the Board has held that the discharge of a supervisor may violate section 8(a)(1) where the discharge in fact interferes with the protected section 7 rights of statutory employees. Such a situation may occur when supervisors are discharged for their failure to wage an effective antiunion campaign for their employer.⁷⁷ The rationale for this exception is that the net effect of the conduct is a reasonable fear on the part of employees that they too will suffer retaliation for their union activities. The Board has applied a similar rationale to find that the discharge of a supervisor for giving testimony to the Board, adverse to the employer and in vindication of employees' rights, violates section 8(a)(1).⁷⁸ Thus, such employer conduct may

74. See note 71 *supra*. Section 14(a) of Taft-Hartley (29 U.S.C. § 164(a) (1970)) preserved the right of supervisors to become union members but also made clear that supervisors were not to be regarded as employees. Section 14(a) states that:

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

See *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), *cert. denied*, 335 U.S. 908 (1948).

75. *Hanna Mining Co. v. District 2, MEBA*, 382 U.S. 181, 188 (1965). See generally *Florida Power & Light Co. v. IBEW Local 641*, 417 U.S. 790 (1974); *Beasley v. Food Fair, Inc.*, 416 U.S. 653 (1974); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *MEBA v. Interlake S.S. Co.*, 370 U.S. 173 (1962).

76. *E.g.*, *NLRB v. Inter-City Advertising Co.*, 190 F.2d 420, 422 (4th Cir. 1951), *cert. denied*, 342 U.S. 908 (1952).

77. See *NLRB v. Talladega Cotton Factory, Inc.*, 213 F.2d 209 (5th Cir. 1954).

78. *Oil City Brass Works v. NLRB*, 357 F.2d 466 (5th Cir. 1966); *NLRB v. Better Monkey Grip Co.*, 243 F.2d 836 (5th Cir. 1957), *cert. denied*, 355 U.S. 864 (1957). Chief Judge Rives stated in *Oil City* that:

The Board's order should be enforced as an inherent protection of its source of information necessary to protect rank-and-file employees in the exercise of their statutory rights. . . .

. . . .

. . . Rank-and-file employees have a right to have their privileges secured by the Act vindicated through the effective administrative proceedings provided by Congress.

restrain employees in the exercise of their section 7 rights and may also impede the functioning of the Board's processes for protection of those rights.⁷⁹

While the foregoing rationale may well justify the finding of a section 8(a)(1) violation when the supervisory discharge or other discrimination relates to the section 7 rights of rank-and-file employees, the rationale hardly justifies the general finding of an independent section 8(a)(4) violation in favor of supervisors. Section 8(a)(4) proscribes discrimination against an "employee," and section 2(3) makes clear that a supervisor is not an employee under the Act. The distinction appears particularly significant in a case such as *General Services*. The supervisor was discharged for cause, made legal by this statutory exclusion, not for activity which infringed in any way the exercise of section 7 rights by employees. The supervisor had no legitimate claim for relief before the Board, nor was the supervisor seeking to vindicate the rights of employees. To predicate the finding of a section 8(a)(4) violation upon the mere fact that the supervisor sought recourse before the Board, therefore, seems to be without foundation. Simple entry into the Board's regional offices should not by itself create statutory rights and protections.

General Services appears to be an extreme case. It would be gross understatement to suggest that the Board engaged in considerable straining and bootstrapping to find a violation. The decision is significant in that it illustrates the Board's concern that its remedial processes be and remain open to the fullest extent possible for the protection of employees' section 7 rights against dilution or infringement.⁸⁰

Included in this privilege is the right to have witnesses testify without fear of being penalized by their employer. As in the instant case, it may often be necessary to have supervisory personnel testify. It follows, therefore, that any discrimination against supervisory personnel because of testimony before the Board directly infringes the right of rank-and-file employees to a congressionally provided, effective administrative process, in violation of section 8(a)(1). . . .

357 F.2d at 471. See *The Permian Corp.*, 189 N.L.R.B. 860, 863-64 (1971). See also NLRB Gen. Counsel Q. Rep., [1977] 97 LAB. REL. REP. (BNA) 41, 42-43, where the General Counsel found that the employer violated § 8(a)(1) by discharging a managerial employee for aiding and advising statutory employees of their rights under the Fair Labor Standards Act.

79. *NLRB v. Carter Lumber, Inc.*, 507 F.2d 1262 (6th Cir. 1974); *NLRB v. Dal-Tex Optical Co.*, 310 F.2d 58 (5th Cir. 1962). See *NLRB v. Scrivener*, 405 U.S. 117 (1972).

80. Board concern that its processes be available for vindication of basic statutory rights is also reflected in the Board's retrenchment in the pre-arbitration deferral policies of *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). See *General American Transp. Corp.*, 228 N.L.R.B. No. 102, 94 L.R.R.M. 1483 (1977), in which the Board held that generally it would not defer to arbitration in cases involving employer discrimination or interference with protected rights, or in cases of union coercion of employees. See also *National Rejectors Inds.*, 234 N.L.R.B. No. 34, 97 L.R.R.M. 1142 (1978); *Roy Robinson, Inc.*, 228 N.L.R.B. No. 103, 94 L.R.R.M. 1474 (1977). There are also indications that the Board is retrenching in the post-arbitration deferral policies of *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955). See *Filmation Assoc., Inc.*, 227 N.L.R.B. No. 237, 94 L.R.R.M. 1470 (1977) (no deferral for alleged violations of § 8(a)(4)).

IV. PROTECTING EMPLOYEE FREE SPEECH

The right of employees to engage in free discussion of labor disputes and unionization is a bedrock principle of constitutional dimensions⁸¹ that is central to the organizational and other concerted activities protected by section 7.⁸² National labor policy "manifests a congressional intent to encourage free debate on issues dividing labor and management," and care must be taken to minimize intrusions or threats of intrusion which might "dampen the ardor of labor debate and truncate the free discussion envisioned by the Act"⁸³ It would seem that diminution of the right of employees to speak out in labor disputes would be the most effective means to curtail and negate unionization and collective bargaining. Again, the recent theme of the NLRB, both Board and General Counsel, appears to be a livelier recognition and reaffirmation of the fundamental section 7 right of employee free speech.

A. *Bumper Sticker Boycott and Press Release*

In one case the General Counsel authorized issuance of a complaint alleging that the employer violated section 8(a)(3) and (1) by imposing a disciplinary layoff upon a non-striking, non-bargaining unit employee who displayed bumper stickers on his car urging a boycott of the struck employer's products.⁸⁴ The employee was a member of the striking union but was in a different bargaining unit from the strikers. During the strike he parked his car in the employee parking

81. In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

Thornhill v. Alabama, 310 U.S. 88, 102-03 (1940). "The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Thomas v. Collins*, 323 U.S. 516, 532 (1944); *Schneider v. Irvington*, 308 U.S. 147 (1939); *Hague v. CIO*, 307 U.S. 496 (1939). See *NLRB v. Servette, Inc.*, 377 U.S. 46, 55 (1964); *NLRB v. Fruit Packers, Local 760*, 377 U.S. 58 (1964); *Local 399, Carpenters (K & K Constr. Co.)*, 233 N.L.R.B. No. 99, 96 L.R.R.M. 1575 (1977). *But cf.* *Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957) (limitations on *Thornhill* doctrine). See generally *Cox, Strikes, Picketing and the Constitution*, 4 *VAND. L. REV.* 574 (1951); Note, *The Invisible Hand and the Clenched Fist: Is There a Safe Way to Picket Under the First Amendment?*, 26 *HAST. L.J.* 167 (1976).

82. "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). *Accord.* *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Old Dominion Branch 496, NALC v. Austin*, 418 U.S. 264 (1974); *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *NLRB v. IBEW, Local 1229*, 346 U.S. 464 (1953).

83. *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 62, 64 (1966).

84. *NLRB Gen. Counsel Q. Rep.*, [1976] 95 *LAB. REL. REP.* [BNA] 81, 83-84. *But see* *Capital Times Co.*, 234 N.L.R.B. No. 62, 97 L.R.R.M. 1184 (1978).

lot and displayed on it bumper stickers that urged a boycott of the employer's products as well as support of the union. The General Counsel found that the boycott signs constituted a privileged appeal for support of the striking union's boycott of the employer made in the context of a labor dispute and for the purpose of protesting the employer's labor policies.⁸⁵ The signs did not disparage the quality of the employer's product, and did not contain any offensive language. The General Counsel also noted that the bumper stickers were visible for the most part by fellow employees during their nonwork time, and would have been seen by customers and plant visitors, if at all, merely in passing.⁸⁶ The General Counsel concluded that the "employee's display of these signs, undertaken in concert with other employees then on strike, was accordingly considered to be activity protected by the Act."⁸⁷ *NLRB v. Washington Aluminum Co.*⁸⁸ makes clear that section 7's broad protection of concerted activities is not unlimited, and that protection may be forfeited where the employee conduct is unlawful, violent, in breach of contract, or may be "classified as 'indefensible' by any recognized standard of conduct."⁸⁹ When employees involved in a labor dispute disparage the quality of the employer's product in a way which is unrelated to that labor dispute, their conduct is generally regarded as disloyal, and within the category of unprotected "indefensible" activity.⁹⁰ Closely related is the

85. Concerning the general rights of sympathy strikers see *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976); *Cedar Coal Co. v. UMW*, 560 F.2d 1153 (4th Cir. 1977); *U.S. Steel Corp. v. UMW Local 6321*, 548 F.2d 67 (3rd Cir. 1976); *Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284 (7th Cir. 1975), *cert. denied*, 423 U.S. 925 (1975); *Am. Tel. & Tel. Co. 231 N.L.R.B. No. 110*, 96 L.R.R.M. 1144 (1977); *NLRB Gen. Counsel Q. Rep.*, [1976] 95 LAB. REL. REP. [BNA] 81.

86. The § 7 concept of concerted activity for mutual aid and protection was recently extended by the General Counsel in a related area in a novel case involving a single employee's sympathy strike. *NLRB Gen. Counsel Q. Rep.*, [1977] 95 LAB. REL. REP. [BNA] 81, 81-83. The General Counsel found that an individual statutory employee was engaged in protected concerted activity when he refused to cross a possibly unlawful picket line maintained by non-statutory employees. The General Counsel stated:

Sympathy strikes are considered protected on the view that they act on the expectation or possibility that the primary strikers will "return the favor" in the event of a dispute between the sympathy strikers and their employer. . . . [I]n making common cause with the striking nonstatutory employees, the statutory employee could reasonably be taken to have acted on the assumption that their "return of the favor" would inure not simply to his benefit individually but to the benefit of his fellow employees and his bargaining representative—a Section 2(5) labor organization—as well.

Id. at 82.

87. *NLRB Gen. Counsel Q. Rep.*, [1976] 95 LAB. REL. REP. [BNA] 84.

88. 370 U.S. 9 (1962).

89. *Id.* at 17.

90. A leading example of employees' public criticism of their employer's product amounting to disloyalty because the criticism exceeded the legitimate bounds of the labor dispute is *NLRB v. Local 1229, IBEW (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953). The employees in that case distributed handbills which did not refer to the labor dispute but rather made a general attack upon the public policies of the employer and the quality of the employer's product.

Separable acts of insubordination or disobedience occurring simultaneously with participation in concerted activities are also regarded as indefensible conduct and thus unprotected by

boycott of the employer's product by employees actually employed and being paid wages and boycott activities that are patently inconsistent with the nature of the employment.⁹¹ As stated by the Sixth Circuit, "An employer is not required, under the Act, to finance a boycott against himself."⁹² While the Board and the courts frequently differ in this area,⁹³ and while the rationales of both are cloudy to say the least, it would seem that the conduct is unprotected when it can in fact or in effect be regarded as on-duty conduct by the employee.⁹⁴ When the conduct occurs during the employee's off-duty time, however, and is not somehow flatly inconsistent with the nature of the employment, there is no valid reason to treat the conduct as unprotected. Thus, for example, picket line appeals by off-duty restaurant employees to restaurant customers not to cross a picket line at the restaurant have been regarded as protected.⁹⁵

Under the foregoing doctrines the bumper sticker boycott by an on-duty employee presents a very close question. The employee had neither disparaged the employer's product, nor failed in any way to perform the work for which he was employed and being paid. To regard the employee's car in the parking lot as a constructive extension of the employee tantamount to on-duty picketing or similar activity seems an unwarranted strain. Absent disparagement or inadequate on-duty work performance there would appear to be no valid basis for limiting the employee speech involved, and the General Counsel's determination that the activity was protected seems eminently appropriate.

The Board's broad solicitude for the right of employees to speak

the umbrella of the concerted activity. Similarly, distinctions may have to be drawn where political appeals occur simultaneously with appeals concerning employment conditions. *E.g.*, *Eastex Inc. v. NLRB*, 550 F.2d 198, (5th Cir. 1977) *aff'd* 46 U.S.L.W. 4783 (U.S. June 22, 1978). See generally Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378 (1969); Getman, *The Protection of Economic National Labor Relations Act*, 115 U. PA. L. REV. 1195 (1967); Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951).

Breach of confidentiality by the employee, such as unauthorized use of disclosure of confidential information simultaneously with engagement in protected activity, is another prime example of conduct regarded as disloyalty. *American Arbitration Ass'n*, 233 N.L.R.B. No. 12, 96 L.R.R.M. 1431 (1977); *NLRB v. Knuth Bros., Inc.*, 537 F.2d 950 (7th Cir. 1976), *denying enforcement to* 218 N.L.R.B. 869 (1975). *But see* *Buddies Super Markets*, 223 N.L.R.B. No. 137, 92 L.R.R.M. 1008 (1976); *Circle Bindery, Inc.*, 218 N.L.R.B. 861 (1975), *enforced* 536 F.2d 447 (1st Cir. 1976); *Jeanette Corp.*, 217 N.L.R.B. No. 122, (1975), *enforced* 532 F.2d 916 (3rd Cir. 1976). *Cf.* *NLRB Gen. Counsel Q. Rep.* [1977], 97 LAB. REL. REP. 41, 44-45 (the General Counsel found that a union had violated § 8(b)(1)(A) by its attempt to bribe an employee to furnish the union with confidential records of the employer).

91. *E.g.*, *Boeing Airplane Co. v. NLRB*, 238 F.2d 188 (9th Cir. 1956); *The Hoover Co. v. NLRB*, 191 F.2d 380 (6th Cir. 1951).

92. *The Hoover Co. v. NLRB*, 191 F.2d 380, 390 (6th Cir. 1951).

93. See note 89 *supra*.

94. See *Southwestern Bell Tel. Co.*, 200 N.L.R.B. 667 (1972) (Board held that the employer could properly require employees to leave work if they persisted in wearing sweatshirts which read "Ma Bell is a Cheap Mother"); *Patterson-Sargent Co.*, 115 N.L.R.B. 1627 (1956).

95. *Edir, Inc. (Wolfie's)*, 159 N.L.R.B. 686 (1966).

out publicly concerning their grievances was further reflected in an analogous situation in *Automobile Club*.⁹⁶ In that case, the union and a group of employees filed a court action alleging that the employer had wrongfully deprived the employees of earned commissions and had converted the commissions to its own use. Thereafter the employees' attorney issued a press release which described the lawsuit. The press release claimed that for six years the employer had unlawfully denied and withheld commissions from the employees, discriminated against the employees, and wrongfully engaged in a "skim off" of the employees' commissions. The release also stated that the employees were loyal to the employer, believed they were engaged in selling "the best product in the world," and that they were proud to represent the employer.⁹⁷ Numerous newspapers printed stories based upon the press release. The employer regarded the press release as a "vitriolic attack" upon the employer's product. The employer suspended the employees and later discharged them when they refused to sign affidavits disavowing portions of the press release. The Board found that the issuance of the press release was protected concerted activity under section 7, and that the employer's suspension and discharge of the employees therefore violated section 8(a)(1).⁹⁸ Member Murphy joined in the majority opinion but further predicated her analysis on constitutional grounds. While she found some merit in the employer's position that the press release constituted a vitriolic attack on the product, in her view "the employees' rights to issue the press release are protected by the first amendment to the United States Constitution."⁹⁹

In the foregoing cases the Board and the General Counsel rejected the employers' contentions that the employees' appeals to the public for support of the employees' labor disputes and grievances constituted disloyalty or insubordination. The theme is again evident of an expansive rather than a niggardly reading of the fundamental rights of free speech and discussion in labor disputes contained in section 7. Concepts in labor relations such as disloyalty and insubordination border on the pernicious. In real life, as experienced management lawyers might concede, the concepts mean anything employees do or say that the employer does not like. The concepts are so vague that they almost defy definition. Moreover, they

96. 231 N.L.R.B. No. 99, 96 L.R.R.M. 1267 (1977). *Accord*, American Hosp. Ass'n, 230 N.L.R.B. No. 10, 95 L.R.R.M. 1266 (1977).

97. 96 L.R.R.M. at 1268.

98. The General Counsel had contended before the Board that the suspensions and discharges were violative of § 8(a)(1) for the additional reason that they were based in part upon the employees' protected concerted activity in filing the lawsuit. The Board found it unnecessary to reach the contention because it considered its broad order sufficient to remedy any additional violations. *Id.*

99. *Id.*

suggest a highly militaristic and paternalistic view of the industrial environment. Application of these concepts to disqualify employees from the protections of section 7 should be reserved for the most severe and egregious situations where the conduct truly precludes a further viable employment relationship.

B. *Criminal Prosecution for Protected Distribution of Literature*

Protection of employees' section 7 rights of free discussion of labor disputes, and the problems of providing prompt and effective remedies against infringement of such rights, were highlighted in the following case. The General Counsel had previously found that the employer violated section 8(a)(3) and (1) by discharging an employee and a complaint had issued concerning the discharge.¹⁰⁰ Subsequently the discharged employee began to distribute literature in the employer's parking lot protesting the employer's working conditions. The employer had the employee arrested. The arrest led to the institution of a state court criminal trespass proceeding which was awaiting trial when the case came back to the General Counsel. The General Counsel found that the employer had violated section 8(a)(1) by causing the arrest of the employee.¹⁰¹ The General Counsel then sought and obtained authorization from the Board for the institution of section 10(j) injunction proceedings.

Section 10(j) provides that after a complaint has issued alleging a violation of any section of the Act, the Board can seek temporary injunctive relief in the appropriate United States district court.¹⁰² The purpose of a section 10(j) injunction is to prevent a respondent from frustrating the purposes and policies of the Act and accomplishing an illegal objective prior to imposition of any legal restraint by the Board. The injunctive relief contemplated is interlocutory to the final disposition of the unfair labor practice matters pending before the Board and expires when the Board renders its final decision.¹⁰³

100. NLRB Gen. Counsel Q. Rep., [1977] 96 LAB. REL. REP. [BNA] 1, 9. Concerning the general rights of employees and non-employees to distribute literature on the employer's premises see cases cited note 80 *supra*.

101. *Accord*, Little Rock Crate & Basket Co., 227 N.L.R.B. No. 192, 94 L.R.R.M. 1385 (1977), in which the Board found that an employer violated § 8(a)(1) by threatening to cause the arrest of a discharged employee who brought union literature onto the employer's premises.

102. Section 10(j) states:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(j) (1970).

103. *Eisenburg v. Hartz Mountain Corp.*, 519 F.2d 138 (3d Cir. 1975); *Seeler v. Trading*

In the instant case the General Counsel and the Board considered injunctive relief necessary to prevent the trial from being tantamount to a penalty for the employee's exercise of section 7 rights, to avoid the chilling effect such a penalty would have upon employee rights generally, and to preclude state intrusion into federally protected rights in derogation of the Board's jurisdiction. The General Counsel sought section 10(j) relief that would require the employer to grant the employee permission to distribute literature in the parking lot, to make such grant of permission retroactive to the date of the arrest, and to inform the state's prosecuting attorney of the retroactive permission. The apparent theory of the injunction was that a district court order providing for retroactive permission would remove an essential basis for the trespass proceeding, *i.e.*, lack of consent, and thus end the prosecution. As a legal proposition the theory appears dubious, and, as discussed below, the approach seems ridiculously indirect. After the section 10(j) petition was filed the prosecutor agreed to defer prosecution until the Board issued its final order on the merits.¹⁰⁴ The Board then withdrew its petition, finding that the employee would not suffer the time or expense of a criminal trial prior to Board adjudication of the case.¹⁰⁵

Temporary albeit highly uncertain protection against prosecution was thus promptly given the employee. One cannot help but marvel, however, at the absolutely convoluted approach the Board took in the case. The employee had been arrested and was awaiting trial for conduct that not only was at the least "arguably subject"¹⁰⁶ to sections 7 and 8 of the Act but that was in fact the subject of a pending Board case. In this situation section 10(j) would appear to give the Board clear authority directly to seek in federal court to restrain the state court proceeding on grounds of both the general preemption doctrine¹⁰⁷ and the protection of federal court jurisdiction under sec-

Port, Inc., 517 F.2d 33 (2d Cir. 1975); *Minnesota Mining & Mfg. Co. v. Meter*, 385 F.2d 265 (8th Cir. 1967); *Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967). See *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185 (5th Cir. 1975).

104. NLRB Gen. Counsel Q. Rep., [1977] 96 LAB. REL. REP. [BNA] 1, 9.

105. *Id.*

106. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245. *Lodge 76, IAM v. WERC*, 427 U.S. 132 (1976); *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274 (1971). See generally *Cox, Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); *Come, Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 VA. L. REV. 1435 (1970).

107. *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *NLRB v. Comm. of Interns & Residents*, 566 F.2d 810 (2d Cir. 1977); *NLRB v. New York*, 436 F. Supp. 335 (E.D.N.Y. 1977); *Tyree v. Edwards*, 287 F. Supp. 589 (D.C. Ala. 1969). See *Sears, Roebuck & Co. v. Carpenters*, 46 U.S.L.W. 4446, 4453 & n.43 (U.S. May 15, 1978); *Thomas v. Collins*, 323 U.S. 516 (1944).

tion 10(j).¹⁰⁸ The Board's failure to take direct action when a fundamental section 7 right is made the subject of a state criminal prosecution is most unfortunate. The case cried out for a stronger and more decisive stand by the NLRB. Employees' exercise of their section 7 rights should not rest on the discretion or mood of state prosecutors or technicalities of the law of trespass. One is reminded of Mr. Justice Jackson's admonition that, "Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law."¹⁰⁹

The failure of the NLRB to take a stronger stand is rendered even more unfortunate in light of the apparent subsequent developments in the case. In what appears to be the Board decision on the merits in the foregoing case, the Board found that the employer had violated section 8(a)(1) by enforcing its nonaccess rule against the employee and by causing his arrest for distributing literature in the parking lot.¹¹⁰ The Board ordered the employer to notify the appropriate authorities of the Board decision but rejected the Administrative Law Judge's recommended order that would have required the employer to notify the authorities that the employer was withdrawing a criminal complaint against the employee. The Board stated: "Inasmuch as the record reveals that the local police, and not Respondent, signed the criminal complaint against [the employee], it is beyond our remedial power to effect the withdrawal of that complaint."¹¹¹ Accordingly, as matters now appear to stand, the employee remains subject to criminal prosecution, at the discretion of the local prosecutor, for what the Board has found to be a clearly protected activity. Further, even if the prosecutor elects to drop the case, the employee retains an arrest record based on protected activity, again subject to the discretion of the local authorities.¹¹² Something is very wrong.¹¹³

108. *Capital Service, Inc., v. NLRB*, 347 U.S. 501 (1954). See *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 516-17 (1955).

109. *NLRB v. Rockaway News Co.*, 345 U.S. 71, 75 (1953).

110. *Chrysler Corp.*, 232 N.L.R.B. No. 74, 96 L.R.R.M. 1382 (1977). Neither the names of the parties nor the case numbers appear in the reports of the earlier General Counsel and Board proceedings; one can only surmise from the similarity of the facts that the cases are identical.

111. *Id.* at 1382.

112. Concerning the serious adverse consequences of arrest records and the prevailing federal doctrine regarding expungement see *Menard v. Mitchell*, 430 F.2d 486 (D.C. Cir. 1970); *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977), and cases there cited.

113. *But see Baptist Memorial Hosp.*, 229 N.L.R.B. No. 1, 95 L.R.R.M. 1043 (1977) in which an employee who refused to stop distributing handbills on the employer's premises was arrested and convicted of disorderly conduct and fined \$25. The Board found that the employer maintained an unlawful no-access rule in violation of § 8(a)(1). The Board ordered the employer to make the employee whole for the \$25 fine, to pay the legal fees and expenses incurred by the employee in connection with his arrest and conviction, and to join with the employee in a joint petition to the local court and police department to expunge any record of arrest and conviction.

One significant aspect of the foregoing case is that it demonstrates the Board's use of section 10(j) injunctions as a speedy and effective remedy for the protection of section 7 rights. The increased use of the section 10(j) injunction by the General Counsel and Board should not go unnoted. In 1954, for example, only six section 10(j) proceedings were instituted.¹¹⁴ In 1976 twenty section 10(j) proceedings were instituted in district court.¹¹⁵ Between July 1, 1976 and July 1, 1977 the General Counsel's Division of Advice processed 219 requests for section 10(j) relief, and during this period the Board authorized the General Counsel to seek section 10(j) injunctions in 51 cases.¹¹⁶

Section 10(j) injunctive relief is an appropriate and highly effective remedy in a variety of unfair labor practice situations.¹¹⁷ Preservation and restoration of the status quo can be crucial for realistic protection of section 7 rights when there is reasonable fear that the efficacy of the Board's final order may otherwise be nullified, or that the Board's administrative procedures may be rendered meaningless.¹¹⁸ The outcry of the day, justifiably, is for increased use of section 10(j) injunctions against employers who flagrantly and repeatedly violate the Act.¹¹⁹ The pendulum swings, however, and tomorrow the cry may be against employee concerted activities which offend particular, dominant employer interests.

The fact that the section 10(j) proceeding is instituted and controlled by the Board, rather than by private parties,¹²⁰ goes a long way toward guarding against abuses which have historically marked the labor injunction.¹²¹ The labor injunction nevertheless remains a powerful weapon for resolving labor disputes prematurely and for curtailing the free exercise of fundamental rights; private parties can

114. 19 NLRB ANN. REP. 175 (1954).

115. 41 NLRB ANN. REP. 255 (1976).

116. NLRB, REPORT ON THE OPERATION OF THE OFFICE OF THE GENERAL COUNSEL, [1977] 96 LAB. REL. REP. [BNA] 333, 335.

117. For examples of the various situations in which § 10(j) relief was sought during 1977 see NLRB Gen. Counsel Q. Repts., [1977] 96 LAB. REL. REP. [BNA] 1, 9, 173, 175; 95 [1977] LAB. REL. REP. [BNA] 110, 115; [1977] 94 LAB. REL. REP. [BNA] 175, 177.

118. *E.g.*, *Hendrix v. Meat Cutters*, Local 340, 555 F.2d 175 (8th Cir. 1977); *Squillacote v. Local 248, Food Workers*, 534 F.2d 735, 744 (7th Cir. 1976).

119. See generally Siegel, *Section 10(j) of the National Labor Relations Act: Suggested Reform for an Expanded Use*, 13 B.C. IND & COMM. L. REV. 457 (1972); Note, 44 N.Y.U.L. REV. 181 (1969).

120. *Bakery Sales Drivers, Local 33 v. Wagshal*, 333 U.S. 437, 442 (1948).

121. F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930); C. GREGORY, *LABOR AND THE LAW I-VII* (2d rev. ed. 1958); C. SUMMERS & H. WELLINGTON, *CASES AND MATERIALS ON LABOR LAW* 163-68 (1968); Winter, *Labor Injunctions and Judge-made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70, 71-76 (1960). See *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976); *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974); *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970); *Marine Cooks v. Panama S.S. Co.*, 362 U.S. 365 (1960); *United States v. UMW*, 330 U.S. 258 (1947); *United States v. Hutcheson*, 312 U.S. 219 (1940); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

be expected to put substantial pressure on the Board to seek injunctions in various situations. To the extent that the injunction necessarily prejudices the ultimate legality of given activity it can be unfair or unjustified. Too much regulation too soon can improperly deny employee, union or employer of legitimate statutory rights. It should be remembered that "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining."¹²² The federal regulatory scheme leaves some activities and practices "to be controlled by the free play of economic forces."¹²³ Restraint and judgment are required to preclude government by injunction from becoming the next national labor policy.

C. *Shopping Mall Picketing*

Board protection for the section 7 rights of employees freely to communicate their positions in labor disputes to other employees and to the public at shopping mall locations was given substantial affirmation in the remand decision in *Scott Hudgens*.¹²⁴ In *Hudgens* warehouse employees of a retail shoe employer struck to protest the employer's failure to agree to their union's contract negotiation demands. The strikers picketed not only the employer's warehouse but also one of the employer's retail stores located within a large, enclosed shopping mall which houses sixty various retail stores. The employees picketed in an area of the mall immediately adjacent to the employer's retail shoe store. The owner of the mall told the pickets that they could not picket within the mall or in the parking lot and threatened to have them arrested for trespassing if they did not leave. The Board found that the owner's arrest threat violated section 8(a)(1). In the Supreme Court's view the Board's finding rested in part upon invalid first amendment notions, namely, a constitutional right of access to private property such as shopping centers that might be classified as quasi-public.¹²⁵ The Supreme Court remanded the case to the

122. *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 495 (1960).

123. *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). In *Nash-Finch*, the Court noted, but did not consider itself restricted by *Younger v. Harris*, 401 U.S. 37 (1971). See *Lodge 76, IAM v. WERC*, 427 U.S. 132, 140 (1976); *Garner v. Teamsters Local 776*, 346 U.S. 485, 500 (1953).

124. 230 N.L.R.B. No. 73, 95 L.R.R.M. 1351 (1977), supplementing 192 N.L.R.B. 671 (1971) and 205 N.L.R.B. 628 (1973). *Accord*, *Yurosek & Son*, 229 N.L.R.B. No. 21, 95 L.R.R.M. 1382 (1977).

125. *Hudgens v. NLRB*, 424 U.S. 507 (1976). The Court made clear its rejection of the principles of *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319-320 (1968), in which the Court per Mr. Justice Marshall had stated:

[b]ecause the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," *Marsh v. Alabama*, 326 U.S. at 508, the State may not delegate power, through the use of its trespass law, wholly to exclude those members of the public wishing to exercise their First Amend-

Board to evaluate the legitimacy of the picketing solely under the statutory criteria of section 7. The Court, relying upon its earlier section 7 analyses in *NLRB v. Babcock & Wilcox Co.*¹²⁶ and *Central Hardware Co. v. NLRB*¹²⁷ stated that the Board's task was to seek an accommodation between the employees' section 7 rights and the employer's property rights "with as little destruction of one as is consistent with the maintenance of the other."¹²⁸

On remand in *Scott Hudgens* the Board applied the *Babcock & Wilcox* balancing test and found that the shopping mall owner's property rights must yield to the employees' section 7 rights. The Board found that the fact that the case involved economic strike activity rather than organizational activity made little difference, and that the economic picketing was entitled to the same measure of protection as had been afforded the organizational activity in *Babcock & Wilcox*.¹²⁹ The Board also found irrelevant the fact that the picketers were employees of the retail shoe company whose store they were picketing rather than nonemployees as had been the union organizers in *Babcock & Wilcox*. The Board stated:

[I]t is basic that Section 7 of the Act was intended to protect the rights of employees rather than those of non-employees. With this principle in mind, the employee status of the pickets here entitled them to at least as much protection as would be afforded the non-employee organizers such as those in *Babcock & Wilcox*.¹³⁰

ment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

See *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

126. 351 U.S. 105 (1956). The Court there held that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. See generally Hanley, *Union Organization on Company Property—A Discussion of Property Rights*, 47 GEO. L.J. 266 (1958); Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964).

127. 407 U.S. 539 (1972).

128. 424 U.S. at 507, quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). The Court said in *Hudgens*:

[t]he locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance.

424 U.S. at 522. See *Beth Israel Hosp. v. NLRB*, 46 U.S.L.W. 4765 (U.S. June 22, 1978).

129. The Board's concern for protection of § 7 rights of speech is also highlighted by the Board's continued refusal to permit broad restrictions on those rights even in a hospital environment. *E.g.*, *Florida Medical Center, Inc.*, 227 N.L.R.B. No. 198, 94 L.R.R.M. 1419 (1977), *Presbyterian Medical Center*, 227 N.L.R.B. No. 135, 94 L.R.R.M. 1695 (1977); *Beth Israel Hosp.*, 223 N.L.R.B. 1193 (1976), *aff'd*, 46 U.S.L.W. 4764 (U.S. June 22, 1978); *St. John's Hosp. & Sch. of Nursing, Inc.*, 222 N.L.R.B. 1150, 91 L.R.R.M. 1333 (1976), *enforcement denied*, 557 F.2d 1368 (10th Cir. 1977). See *Times Publishing Co.*, 231 N.L.R.B. No. 44, 96 L.R.R.M. 1059 (1977) (lobby of business office); *McBride's of Naylor Road*, 229 N.L.R.B. No. 120, 95 L.R.R.M. 1196 (1977) (retail stores). See also *Baptist Memorial Hosp.*, 229 N.L.R.B. No. 1, 95 L.R.R.M. 1043 (1977), and cases there cited.

130. 95 L.R.R.M. at 1353.

The Board found further that the shopping mall owner's property right to exclude certain types of activity on his mall must yield to the section 7 rights of the employees to engage in economic activity directed against their own employer who did business at the mall.¹³¹ In the Board's view, it was thereby merely subjecting shopping mall enterprises to the same risks already endured by similar enterprises which front on public sidewalks. The Board stated:

It is clear, then, that by our holding here we do no more than assure that employees of employers doing business in such malls will be afforded the full protection of the Act. In our view, the national labor policy requires the such employees be afforded that protection. A contrary holding would enable employers to insulate themselves from Section 7 activities by simply moving their operations to leased locations on private malls, and would thereby render Section 7 meaningless as to their employees.¹³²

The Board rejects any notion that primary, economic strikers have less rights under section 7 than do nonemployee union organizers.¹³³ A contrary result would indeed be anomalous. The threshold interest of employees in learning of the merits of unionization hardly outweighs their interest in promoting their bargaining demands.¹³⁴ Nor is the fact that the primary employer is located upon the property of another person sufficient reason to prohibit the picketing. The concept of legal title should not be determinative of the breadth to be accorded section 7 rights nor should it be allowed to shelter the primary employer from the legitimate pressures of the employees.¹³⁵ Nor should the fact that the employer shares common

131. The General Counsel recently took the position that employer threats or coercive statements are not requisites to finding a violation, and that an employer violated § 8(a)(1) merely by refusing employees the right to picket near the primary employer's store in a shopping center. NLRB Gen. Counsel Q. Rep., [1977] 96 LAB. REL. REP. [BNA] 141, 141-42. In the General Counsel's view, "an employer violates the Act by withholding his consent to the entry on his property, thereby failing and refusing to accommodate his property rights to the Section 7 rights of his employees. *Id.* at 142.

132. 95 L.R.R.M. at 1355.

133. See *Curtis v. Rosso & Mastracco, Inc.*, 413 F. Supp. 804, 94 L.R.R.M. 2178 (E.D. Va. 1976) where the court relied upon *Hudgens* in holding that a supermarket's instigation of the arrest and prosecution of a non-employee union organizer for trespass was not unconstitutional government action within the meaning of the fourteenth amendment and 42 U.S.C. § 1981 (1970).

134. Section 13 of the Act reflects Congress' general solicitude for economic strike activity. Section 13 provides: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163 (1970). *NLRB v. Drivers Local 639*, 362 U.S. 274, 282 (1960); *NLRB v. Int'l Rice Milling Co.*, 341 U.S. 665, 672-73 (1951); *UAW v. O'Brien*, 339 U.S. 454, 456-57 (1950). "This repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-34 (1963).

135. In *Steelworkers v. NLRB*, 376 U.S. 492, 499 (1964) the Court noted that "the picketed gate in the present case was located on property owned by New York Central Railroad and not upon property owned by the primary employer. The location of the picketing is an important but not decisive factor, and in this case . . . has little, if any, significance." See *Linbeck Constr. Corp. v. NLRB*, 550 F.2d 311 (5th Cir. 1977).

premises with other retail employers in a shopping mall restrict picketing that is limited to the area immediately adjacent to the primary employer.¹³⁶ Adequate safeguards exist under section 8(b)(4)¹³⁷ to limit the scope of the picketing to preclude any unwarranted enmeshing of the neutral employers in the primary dispute.¹³⁸

D. *Right to Confer with Union Representative*

The expansive reading given by the Board in *Scott Hudgens* to section 7's protection of concerted activities was further reflected in several other cases briefly noted here. These cases involved questions concerning the rights of employees to confer with their chosen union representative and the treatment of individual employee action as concerted activity for the benefit of other employees.

In *Climax Molybdenum Co.*,¹³⁹ the Board found that the employer had violated section 8(a)(1) of the Act by refusing to allow a union representative to consult with two employees prior to an investigatory interview which the employees reasonably believed could result in disciplinary action. Two miners involved in an altercation were advised by their supervisor that the matter would be dealt with the following morning. In the morning one miner was advised by the union shop steward that there would be an investigation and that both of the miners could be fired. The same morning the union's grievance representative was summoned by a foreman to the employer's office at 7:30 a.m. for the investigation.¹⁴⁰ Before the investigation began, the grievance representative asked the foreman if he and the shop steward could speak with the two miners. The foreman denied the request and stated that the union representatives could speak with the miners during the course of the investigation. The meeting resulted in oral warnings to the two miners.

136. Local 222, Newspaper Guild (Miami Herald Publishing Co.), 218 N.L.R.B. 1234 (1975); Local 25, NABET (Taft Broadcasting Co.), 194 N.L.R.B. 162 (1971); Steelworkers Local 6991 (Auburndale Freezer Corp.), 177 N.L.R.B. 791 (1969), *vacated*, 434 F.2d 1219 (5th Cir. 1970), *cert. denied*, 402 U.S. 1013 (1971). The fact that the primary employer had another location where the employees could picket, *i.e.*, the warehouse, did not render unlawful the picketing at the employer's shopping mall store. IBEW Local 861 (Plauche Elec., Inc.), 135 N.L.R.B. 250 (1962).

137. 29 U.S.C. § 158(b)(4) (1970).

138. Local 761, IUE v. NLRB, 366 U.S. 667 (1961); Building & Constr. Trades Council (Markwell & Hartz, Inc.), 155 N.L.R.B. 319 (1965), *enforced*, 387 F.2d 79 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968). See SEIU Local 105, (Indus. Janitorial Serv. Inc.), 151 N.L.R.B. 1424 (1965); Local 254, SEIU (Univ. Cleaning Co.), 151 N.L.R.B. 341 (1965). See generally Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962); Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 KAN. L. REV. 561 (1971).

139. 227 N.L.R.B. No. 154, 94 L.R.R.M. 1177 (1977) (Chairman Murphy and Member Jenkins for the majority, with Member Fanning concurring and Members Penell and Walther dissenting).

140. The collective bargaining agreement provided for the presence of union representation whenever an employee was subject to action which might affect his permanent record or result in disciplinary action or discharge.

The Board found the denial of prior consultation violative of section 8(a)(1). In the Board's view, an employee's right to representation at an investigatory-disciplinary interview includes the right of the employee to confer with the union representative prior to the interview. To effectively represent the employee in an investigation, said the Board, the union representative must be knowledgeable concerning the matter under investigation, and these objectives can best be achieved where the union representative has a prior opportunity to learn the facts of the matter from the employee involved. The Board stated:

Nothing in the rationale of *Weingarten*^[141] suggests that, in its endorsement of the role of a "knowledgeable union representative," the Supreme Court meant to put blinders on the union representative by denying him the opportunity of learning the facts by consultation with the employee prior to the investigatory-disciplinary interview. Knowledgeability implies the very opposite. The right to representation clearly embraces the right to prior consultation.¹⁴²

In *Weingarten*¹⁴³ and in *ILGWU v. Quality Mfg. Co.*¹⁴⁴ the Supreme Court upheld the Board's position that an employee has a section 7 right to have a union representative present at an investigatory interview which the employee reasonably believes will result in disciplinary action.¹⁴⁵ The Court found that the employee's representational right constituted "concerted" activity for "mutual aid or protection" because the union representative safeguards not only the particular employee but also the interests of the entire bargaining unit against unjust discipline.¹⁴⁶

The Board's expansive reading in *Climax* of the statutory phrase "concerted activities" appears reasonable.¹⁴⁷ The essential predicate for the representational right recognized in *Weingarten* is that a "knowledgeable" union representative can assist both employee and employer by helping to ascertain the significant facts. Prior consultation clearly furthers that goal. The presence of a prepared and

141. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

142. 94 L.R.R.M. at 1178.

143. 420 U.S. 251 (1975).

144. 420 U.S. 276 (1975).

145. The development of the Board's doctrine can be traced in such cases as *Chevron Oil Co.*, 168 N.L.R.B. 574 (1967); *Texaco, Inc.*, 168 N.L.R.B. 361 (1967), *enforcement denied*, 408 F.2d 142 (5th Cir. 1969); *Jacobe-Pearson Ford*, 172 N.L.R.B. 594 (1968); *Quality Mfg. Co.*, 195 N.L.R.B. 195 (1972), *aff'd*, 420 U.S. 276 (1975); *Mobile Oil Co.*, 196 N.L.R.B. 1052 (1972); *Mt. Vernon Tanker Co.*, 218 N.L.R.B. 1423 (1975), *enforcement denied*, 549 F.2d 571 (9th Cir. 1977). See generally Comment, *Union Presence in Disciplinary Meetings*, 41 U. CHI. L. REV. 329 (1974).

146. The Court held that an employer violates § 8(a)(1) if it denies a representational request, if it discharges or disciplines an employee for refusing to participate in an interview without a representative, or if it discharges or disciplines either employee or union representative for requesting representation.

147. *Accord*, *Southwestern Bell Tel. Co.*, 227 N.L.R.B. No. 175, 94 L.R.R.M. 1305 (1977); *Certified Grocers*, 227 N.L.R.B. No. 52, 94 L.R.R.M. 1279 (1977).

informed union representative need not transform the interview into an adversary proceeding. The union's role is confined to advisor and assistant in the fact-finding process, and the employer has no mandatory duty to bargain with the union at the interview. The employee's representational right is grounded in section 7, not section 8(a)(5). Nor does the presence of a prepared union representative constitute further intrusion upon the employer's legitimate prerogatives concerning the interview.¹⁴⁸ The employer remains free to deny the representational request without need for justification and to proceed without the employee interview.¹⁴⁹ The presence of a knowledgeable union representative at the interview eliminates to a significant degree the inequality of bargaining power between employee and employer. National labor policy favors that emerging equality.¹⁵⁰

E. *Individual Action For The Common Good*

The Board's broadening grant of hospitable scope to the section 7 concept of concerted activity is further reflected in a number of cases in which ostensibly single employee complaints or protests are treated as concerted.

In *Jim Causley Pontiac*,¹⁵¹ for example, the employee had complained to the employer about paint fumes and a telephone buzzer in his work area but received no response. Other employees had complained about the paint fumes, but not the buzzer. The employee then contacted the Michigan Occupational Safety and Health Administration about the problems. The day the state inspector arrived at the employer's facility the employer laid off the employee. The Board found that the layoff violated section 8(a)(1). The basic rationale for the Board's conclusion is that the filing of such a complaint by an individual employee is protected concerted activity because the matter relates to the enforcement of health and safety laws which benefit

148. The Board's decision in *Coca-Cola Bottling Co.*, 227 N.L.R.B. No. 173, 94 L.R.R.M. 1200 (1977), reflects the Board's concern with legitimate employer rights. The Board there held that the employer did not violate § 8(a)(1) and (5) of the Act (29 U.S.C. §§ 158 (a)(1), (5) (1970)) by refusing to postpone an investigatory-disciplinary interview when the particular union representative requested by the employee was not available. The employee did not ask for an alternate union representative, and the Board found that the employer had no obligation either to suggest or to secure an alternate representative. The Board stated, "[T]he Supreme Court [in *Weingarten*] was careful to point out that the exercise by employees of the right to representation at an interview may not interfere with legitimate employer prerogatives. Certainly the right to hold interviews of this type without delay is a legitimate employer prerogative." 94 L.R.R.M. at 1201.

149. *New England Tel. & Tel. Co.*, Case No. 1-CA-12879, 95 L.R.R.M. 1530 (1977) (General Counsel Advise Case).

150. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260-61 (1975). "[A] primary purpose of the National Labor Relations Act was to redress the perceived imbalance of economic power between labor and management . . ." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965).

151. 232 N.L.R.B. No. 37 (1977). *Accord*, *B & P Motor Express, Inc.*, 230 N.L.R.B. No. 96, 95 L.R.R.M. 1438 (1977).

all employees. The rationale, as recently articulated in *Alleluia Cushion Co.*,¹⁵² rests upon a doctrine of implied consent. The legislature has enacted minimum health and safety laws for the protection and benefit of all employees, and consent and concert of action arise from the mere assertion of such statutory rights. No outward manifestation of support by fellow employees is required. Therefore when an employee seeks to enforce statutory provisions related to occupational health and safety the activity will be deemed concerted absent evidence that fellow employees have disavowed such representation.¹⁵³

In *Dawson Cabinet Co., Inc.*,¹⁵⁴ the Board reached the same conclusion when the employee's protest that the employer did not pay males and females equally was regarded as concerted activity in attempted vindication of the female employees' rights under Title VII of the Civil Rights Act of 1964. In contrast, however, in its earlier decision in *Hunt Tool Co.*,¹⁵⁵ the Board held that the filing of an individual claim under the Jones Act and/or the Longshoremen's and Harbor Workers' Compensation Act was not protected concerted activity. The Board apparently regarded the employee's claim as too personalized or individualized to be deemed concerted. The viability of *Hunt Tool* in light of the developing line of Board cases in this area seems dubious.¹⁵⁶ The rationale of *Alleluia Cushion* would seem properly to apply whenever an employee seeks to enforce social or protective labor legislation. There is little of substance to commend attempts to make any kind of meaningful distinction between degrees of employees' common interests and concern on the basis of the particular type of protective law being enforced—that is, between workmens' compensation laws and safety laws. The concept of "uniquely personal rights" in the context of the employment relation-

152. 221 N.L.R.B. 999 (1975). The Board there held that the filing by an individual employee of a complaint with OSHA was protected concerted activity. See generally *Eastex, Inc. v. NLRB*, 46 U.S.L.W. 4783, 4786 nd (U.S. June 22, 1978).

153. Individual action designed to present common grievances or to invoke or support group action is also deemed protected concerted activity. E.g., *NLRB v. Empire Gas, Inc.*, 566 F.2d 681 (10th Cir. 1977); *NLRB v. Brown*, 546 F.2d 690 (6th Cir. 1976); *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347-1350 (3d Cir. 1969), cert. denied, 397 U.S. 935 (1970), and cases there cited; *Garfield Park Health Center*, 232 N.L.R.B. No. 163, 96 L.R.R.M. 1481 (1977); *Fairmont Hotel Co.*, 230 N.L.R.B. No. 126, 96 L.R.R.M. 1031 (1977); *Ambulance Services*, 229 N.L.R.B. No. 3, 95 L.R.R.M. 1239 (1977) (filing criminal complaint against employer for bounced paycheck). See also *NLRB v. Waco Insulation, Inc.*, 567 F.2d 596 (4th Cir. 1977).

154. 228 N.L.R.B. No. 47, 96 L.R.R.M. 1373 (1977), enforcement denied, 566 F.2d 1079 (8th Cir. 1977).

155. 192 N.L.R.B. 145 (1971).

156. E.g., *Triangle Tool & Eng'r, Inc.*, 226 N.L.R.B. No. 205, 94 L.R.R.M. 1108 (1976), in which an employee's complaint to the Wage and Hour Division of the U.S. Department of Labor was deemed concerted activity. See *King Soopers, Inc.* 222 N.L.R.B. 1011 (1976), holding protected the individual filing of charges with the Equal Employment Opportunity Commission and a state Fair Employment Practices agency.

ship has been rejected by the Supreme Court under section 301 of the Act and should be rejected under section 7 as well.¹⁵⁷

A broad reading of section 7 analogous to the foregoing concept of statutory enforcement is also reflected in cases such as *Firch Baking Co.*,¹⁵⁸ holding that individual action to enforce contract terms is protected concerted activity. In *Firch*, for example, an employee complained to the employer concerning overtime, shift changes and safety conditions. The contract contained provisions covering overtime and safety conditions. The employer suspended the employee. The Board found the suspension violative of section 8(a)(1) because the employee's criticisms were protected concerted activity, namely, an effort to implement the terms of the collective bargaining agreement.¹⁵⁹ The Board regards the individual's enforcement of the contract not only as redounding to the benefit of all the employees but also as merely extending the concerted activity which led to and culminated in the contract.¹⁶⁰

CONCLUSION

Section 7 is the heart of the NLRA. The rights that it guarantees to employees to engage in organization, unionization, collective bargaining and other concerted activities are of supreme importance under our national scheme of labor-management relations. These rights embody vital and fundamental concepts of freedom of choice and

157. Section 301 of the Act provides that suits for violation of contracts between employers and unions may be brought in federal court. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). In *Ass'n of Westinghouse Salaried Employees v. Westinghouse Corp.*, 348 U.S. 437 (1955), the Court held that federal courts lacked jurisdiction under § 301 over union actions to recover employees' accrued wage claims. The Court regarded such claims as uniquely personal to the individual employee. The *Westinghouse* doctrine was later squarely rejected in *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962), where the Court stated:

The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus on the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.

See *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

158. 232 N.L.R.B. No. 120 (1977). *Accord*, *Meade Constr. Co., Inc.*, 220 N.L.R.B. 691 (1976), *enforcement denied*, 555 F.2d 1348 (6th Cir. 1977).

159. *Accord*, *Aro Inc.*, 227 N.L.R.B. No. 43, 94 L.R.R.M. 1010 (1976); *Roadway Express, Inc.*, 209 N.L.R.B. 278 (1975), *enforced* 532 F.2d 751 (4th Cir. 1976); *NLRB v. Century Broadcasting Corp.*, 419 F.2d 771, 780 (8th Cir. 1969); *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967); *Bunney Bros. Constr. Co.*, 139 N.L.R.B. 1516, 1519 (1962). *Contra* *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971).

160. See generally Comment, *Constructive Concerted Activity and Individual Rights: The Northern Metal-Interboro Split*, 121 U. PA. L. REV. 152 (1972).

speech. The recent cases and related developments discussed in this article indicate that the NLRB, both Board and General Counsel, are becoming increasingly sensitive to the significance of these fundamental section 7 rights. The direction of the NLRB clearly seems to be toward a permissive rather than a restrictive interpretation of the concepts of free choice and speech. Equally apparent is the NLRB focus upon meaningful remedies to make the free exercise of section 7 rights reality and not futility.