Cornell Law Review

Volume 68
Issue 3 *March 1983*

Article 3

Protection of Individual Action as Concerted Activity Under the National Labor Relations Act

Rita Gail Smith

Richard A. Parr II

NOTE

PROTECTION OF INDIVIDUAL ACTION AS "CONCERTED ACTIVITY" UNDER THE NATIONAL LABOR RELATIONS ACT

Section 7 of the National Labor Relations Act (NLRA)[1] guarantees employees[2] the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[3] Such concerted activity is "protected activity."[4] Action of an employer that interferes with or restrains this protected activity constitutes an "unfair labor practice"[5] and empowers the National Labor Relations Board

---

1 29 U.S.C. §§ 151-169 (1976). Section 7 contains the Act's statement of the right of employees to act in concert:

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

29 U.S.C. § 157 (1976) (emphasis added).

2 "Employee," as defined by the Act, includes:

> any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, . . . any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

29 U.S.C. § 152(3) (1976). Individuals subject to exclusions are those employed as agricultural laborers, domestic servants, independent contractors, supervisors, persons employed by a spouse or parent, or persons employed by an employer subject to the Railway Labor Act. *Id.*

Furthermore, when two workers, only one of whom is an "employee" under the Act, engage in an activity, their activity is not concerted and, therefore, not protected. *See* Capital Times Co., 234 N.L.R.B. 309, 309-10 (1978) (no concerted activity when individual employee refused to cross picket line set up by union members who were not employees within NLRA's meaning).

3 29 U.S.C. § 157 (1976). Under § 7, "mutual aid or protection" includes, but is not limited to, "collective bargaining." *See* Morrison-Knudsen Co. v. NLRB, 358 F.2d 411, 413 (9th Cir. 1966) (when employee had complained of working conditions, court rejects employer's argument that activities for "mutual aid or protection" must be related to "collective bargaining" activity). *See generally infra* notes 45-46 and accompanying text.

4 The significance of finding an activity to be protected by § 7 is twofold. *See infra* notes 9-21 and accompanying text. If an employee's activity is protected, employer interference with it constitutes an unfair labor practice. *See infra* notes 5-6, 17-20 and accompanying text. If the activity is unprotected, however, the employee is subject to the common law rule that his employer may discharge him for any reason. *See infra* note 14 and accompanying text.

5 Section 8(a)(1) of the NLRA provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." 29 U.S.C. § 158(a)(1) (1976).

(NLRB) to act against the employer.[6] Although Congress's use of the term "concerted activities" seemingly requires that activities involve at least two employees to gain NLRA protection,[7] the NLRB and the courts have extended section 7 protection to actions of individual employees in certain circumstances.

This Note examines the fiction of individual concerted activity[8] to determine the extent to which protection of individual action is a judicial distortion, rather than a necessary extension of section 7. Examina-

---

6 Section 10(a) of the NLRA provides in part: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce." 29 U.S.C. § 160(a) (1976). Section 10(c) empowers the Board, if it finds an unfair labor practice, to require: (1) cessation of the practice, (2) "affirmative action including reinstatement of employees with or without back pay," and (3) posting of appropriate notices in the work place that disavow the previous unfair labor practice. *See* 29 U.S.C. § 160(c) (1976); *see also* NLRB v. Washington Aluminum Co., 370 U.S. 9, 13 (1962) (reinstatement of seven employees who had staged a walkout because of working conditions). For an excellent examination of how violations of § 7 rights are "prevented, redressed, or compensated," see D. MCDOWELL & K. HUHN, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 3 (1976).

Section 10(e) gives the Board the right to petition the circuit court, within whose jurisdiction the alleged unfair labor practice occurred, for the enforcement of a Board order. 29 U.S.C. § 160(e) (1976). Section 10(f) gives any person aggrieved by a Board order a similar right to petition a circuit court for review of that order. 29 U.S.C. § 160(f) (1976).

7 "Concert" requires the involvement of at least two people. *See* City Disposal Sys. v. NLRB, 683 F.2d 1005 (6th Cir. 1982) (per curiam) ("An individual does not act in concert with himself."); Ontario Knife Co. v. NLRB, 637 F.2d 840, 844 (2d Cir. 1980) ("[B]y definition, an individual acting alone cannot act in concert."); Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 306 (4th Cir. 1980) (" 'Concerted activity,' under the statute, read literally, would appear to require more than a single participant.") (citing with approval the *Northern Metal* court's use of dictionary definition of "concert"); NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971) ("Webster's New International Dictionary . . . defines 'concert' as 'agreement in a design or plan; union formed by mutual communication of opinions and views; accordance in a scheme; harmony; simultaneous action' and 'concerted' as 'mutually contrived or planned; agreed on.' "); *cf. infra* note 75 and accompanying text (individual action aimed at inducing group action is protected concerted activity).

8 The term "individual concerted activity" most precisely describes the issue in question. "[P]resumed 'concerted activity' " relates specifically to the NLRB standard for finding a presumption of concerted activity in an individual employee's actions. *Krispy Kreme Doughnut Corp.,* 635 F.2d at 309; *see infra* notes 84-89 and accompanying text. "Constructive concerted activity" refers only to one formulation of individual concerted action—the *Interboro* doctrine. Note, *Constructive Concerted Activity and Individual Rights: The* Northern Metal-Interboro *Split,* 121 U. PA. L. REV. 152, 158 (1972) [hereinafter cited as Note, *Constructive Concerted Activity*]; *see infra* notes 67-76 and accompanying text.

The fiction of individual concerted activity, *see infra* note 94, has gained such acceptance as to render "concerted activities" only "a term of art rather than a factual description." Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1160 (5th Cir. 1980) ("[T]he determination whether a single employee's action is protected by section 7 turns on the 'interpretation of the purpose and effect of such action and not upon the simple and more limited question of whether there was, in fact, action "in concert" '.") (quoting Note, *Constructive Concerted Activity, supra* at 154 (footnote omitted)); *cf.* Note, *The Requirement of "Concerted" Action Under the NLRA,* 53 COLUM. L. REV. 514, 517, 520 (1953) (Prior discussion, agreement, or subjective accord are not necessary to find "concerted activity"; rather, "any activity by an employee . . . which [objectively] has the tendency of furthering the interests . . . of . . . employees, will be found to be 'concerted.' ") [hereinafter cited as Note, *"Concerted" Action*].

tion of the standards and rationales that courts and the NLRB have used and of the policies underlying the NLRA reveals, in fact, that individual concerted activity is an unwarranted expansion of section 7 protection.

I
PROTECTED STATUS UNDER SECTION 7

Section 7 protects employees engaged in concerted activity in a wide variety of circumstances. It protects, for instance, nonunionized employees engaged in such activity[9] and, in some instances, protects unionized employees acting outside established grievance procedures.[10] Section 7 even protects concerted conduct by employees who contemplate neither union activity nor collective bargaining.[11] A protected grievance or complaint also retains its protected status even when wholly or partly inaccurate, if the employees present it in good faith.[12] Fur-

---

9 *See* Ontario Knife Co. v. NLRB, 637 F.2d 840, 843 (2d Cir. 1980) ("long settled principle that § 7 covers concerted activities by nonunionized employees for the purpose of mutual aid or protection") (citing NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962)); NLRB v. Columbia Univ., 541 F.2d 922, 931 (2d Cir. 1976) ("[T]he protection afforded to concerted activities under the NLRA applies equally to workers in unionized or in non-unionized firms."); Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 752 (4th Cir. 1949) (" '[C]oncerted activities' . . . are not limited to cases where the employees are acting through unions or are otherwise formally organized."); NLRB v. Schwartz, 146 F.2d 773, 774 (5th Cir. 1945) ("[T]he right of employees lawfully to engage in concerted activities for the purpose of mutual aid, outside of a union, is specified by the Act.").

10 *See* Salt River Valley Water Users' Ass'n v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953) (quoting 29 U.S.C. § 159(a) (1976): "[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative. . . ."). *But see* Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320, 326 (7th Cir. 1976) ("The Act does not tender protection to activity by employees, albeit concerted, which abandons the principles of exclusive representation by circumventing established grievance procedures, and attempts instead to bargain with the employer regarding working conditions on separate terms."); *infra* note 129.

11 *See, e.g.,* NLRB v. Modern Carpet Indus., 611 F.2d 811, 813 (10th Cir. 1979) (employees' refusal to work with hazardous material until given assurance of safety held concerted activity for mutual aid or protection); NLRB v. Okla-Inn, 488 F.2d 498, 502 (10th Cir. 1973) (Section 7 of the NLRA "protects concerted activity . . . to alleviate oppressive working conditions, regardless of whether [the] activity is channeled through a union, through collective bargaining, or through some other means."); Morrison-Knudsen Co. v. NLRB, 358 F.2d 411, 413 (9th Cir. 1966) (rejecting company's argument that "activities for 'other mutual aid or protection' must be related to 'the purpose of collective bargaining' ").

12 *See* NLRB v. Modern Carpet Indus., 611 F.2d 811, 814 (10th Cir. 1979) (question was "whether or not the employees in good faith believed that working with the radioactive lead was dangerous"); Walls Mfg. Co. v. NLRB, 321 F.2d 753, 754 (D.C. Cir.) ("[N]otwithstanding the inaccuracy of any allegation, the [employees'] activity was protected conduct within the meaning of section 7. . . ."), *cert. denied,* 375 U.S. 923 (1963); *cf.* Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) ("[P]romulgation of deliberately or maliciously false information is not protected."); Socony Mobil Oil Co. v. NLRB, 357 F.2d 662 (2d Cir. 1966) (union's complaint, although partially erroneous, not made maliciously).

thermore, section 7 protects concerted activity even if the employees fail to present their grievance to their employer before they act.[13]

An employer may discharge or otherwise penalize an employee for any reason or for no reason at all if the employer is not motivated by the employee's participation in a protected activity.[14] Thus, it is necessary to determine an employer's subjective motivation for any interference with protected activity.[15] The mere existence of an objective cause for discharge will not legitimate an employer's conduct[16] when the actual motivation underlying employer interference with protected activity is opposition to the activity;[17] thus violation of the NLRA occurs whether protected activity motivates the interference wholly, or only partially.[18] Even an employer's good faith belief that an employee is engaged in unprotected conduct does not validate employer action if the conduct is

---

13 *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) (employees do not necessarily lose § 7 protection "merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable"); NLRB v. Empire Gas, Inc., 566 F.2d 681, 684 (10th Cir. 1977) (no loss of § 7 protection when employee does not present grievance to employer before attempting to organize a work stoppage).

14 We must not forget that the National Labor Relations Act "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them"; that the employer "may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interfering with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 753 (4th Cir. 1949) (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937)); *see also* Cloke, *Concerted Activity and the National Labor Policy,* 5 SAN FERN. V.L. REV. 289, 299 (1976).

15 Existence of objective cause will not suffice because *subjective* motivation is the criterion. Therefore, courts must determine whether an employer's action might have been less harsh had there been no protected employee activity. *See* Keokuk Gas Serv. Co. v. NLRB, 580 F.2d 328, 335 (8th Cir. 1978) (unfair labor practice where employee "would have received milder punishment but for his threat to file a grievance"); Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 570 (4th Cir. 1977) (discharged employee would have received "milder form of punishment" but for union activity).

16 *See* Southwest Latex Corp. v. NLRB, 426 F.2d 50, 56 (5th Cir. 1970) (evidence must show "causal connections between [the employee's] activity and the discharge"); NLRB v. Century Broadcasting Corp., 419 F.2d 771, 777 (8th Cir. 1969) (discharge may be discriminatory only when employer had knowledge of employee's union activity and this knowledge motivated discharge); *infra* note 39. The NLRB general counsel has the burden of proving that an employer's motivation for discharge was improper. *See* Jim Causley Pontiac v. NLRB, 620 F.2d 122, 126 (6th Cir. 1980).

17 "It is well established that [§ 7] is violated when the subjective motivation underlying a discharge is that of opposition to an employee's union activity." Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 707 (1st Cir. 1975) (citing Radio Officers' Union v. NLRB, 347 U.S. 17, 42-44 (1954); NLRB v. Barberton Plastics Prods., Inc., 354 F.2d 66, 68 (6th Cir. 1965); NLRB v. Whitin Mach. Works, 204 F.2d 883, 885 (1st Cir. 1953)).

18 A discharge only partially motivated by protected activity violates § 8(a)(1). NLRB v. Elias Bros. Restaurants, Inc., 496 F.2d 1165, 1167 (6th Cir. 1974); *accord* Jim Causley Pontiac v. NLRB, 620 F.2d 122, 126 (6th Cir. 1980) (discharge motivated, in part, by employee's "low productivity," and in part by employee's protected activity; court finds unfair labor practice because employer knew the activity was concerted).

in fact protected.[19] Moreover, a close proximity in time between protected activity and employer action creates an inference that the protected activity motivated such action.[20]

In short, a court will extend significant protection to concerted activities within the ambit of section 7. The courts, however, have encountered difficulty in interpreting and applying the requirements for protection as stated in section 7.[21] Although the NLRB and courts often construe the "concerted activity" and "mutual aid" requirements as synonymous,[22] in fact, they are distinct and independent.[23]

A. Mutual Aid or Protection

Section 7 does not protect all concerted activities,[24] but only that

---

19 *See* NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964); NLRB v. Knuth Bros., 537 F.2d 950, 954 (7th Cir. 1976) (employer's good faith belief that employee was disloyal because employee failed to use care in using information acquired in the course of employment did not absolve employer from § 7 violation). If the activity is not protected, however, the activity constitutes "cause" for discharge under § 10(c) and employer action does not violate § 7. *See* 29 U.S.C. § 160(c) (1976); *infra* note 24.

20 *See* Jim Causley Pontiac v. NLRB, 620 F.2d 122, 126 (6th Cir. 1980) (immediacy of employee's discharge after employer learned of filing of safety complaint supports inference of unfair labor practice); NLRB v. Tennessee Packers, Inc., 390 F.2d 782, 784 (6th Cir. 1968) ("[P]roximity between . . . activity protected . . . and measures taken against employees . . . can lend support to [an] inference of unfair labor practice.").

21 *See, e.g.,* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 262 (1975).

22 *See infra* notes 79-81, 134-36 and accompanying text.

23 *See infra* note 25 and accompanying text. In Ontario Knife Co. v. NLRB, 637 F.2d 840, 844-45 (2d Cir. 1980), the Second Circuit observed that "the issue . . . was not the requirement of concertedness, but the requirement that the activities be for 'mutual aid or proteetion.' . . . Not only must the ultimate objective be 'mutual' but the activity must be 'concerted'. . . ." For example, an individual employee's activity might be concerted but unprotected if it is not engaged in for "mutual aid and protection." *See, e.g.,* NLRB v. Superior Tool & Die Co., 309 F.2d 692, 695 (6th Cir. 1962) (concerted activity held unprotected because verbal abuse and threats directed against nonstriking employees could not be deemed for "mutual aid and protection"). The "concerted" requirement must be distinguished from the "mutual aid" requirement. For an examination of the danger inherent in treating the two requirements as one, see *infra* notes 134-36, 144-47 and accompanying text.

24 The NLRA affords no protection to some activities, whether or not they are concerted. *See generally* Note, *Constructive Concerted Activity, supra* note 8, at 154 n.7; Note, *The Sixth Circuit Spurns* Interboro *and the Doctrine of Constructive Concerted Activity*—Aro, Inc. v. NLRB *Leaves Non-Union Employees At the Mercy of Their Bosses,* 11 U. TOL. L. REV. 1045, 1052 (1979) [hereinafter cited as *Sixth Circuit Spurns* Interboro]; Note, *Concerted Activity Under Section 7 of the National Labor Relations Act,* 1955 U. ILL. L.F. 129, 132-36 [hereinafter cited as *Concerted Activity*]. Activities in breach of a collective bargaining agreement or contract are unprotected, *see, e.g.,* NLRB v. Sands Mfg. Co., 306 U.S. 332, 345 (1939), as are unlawful, violent, or insubordinate activities, *see, e.g.,* NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962); Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942) (unlawful "mutiny"); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255-56 (1939) (violent "sit-down strike"); NLRB v. Barberton Plastics Prods., 354 F.2d 66 (6th Cir. 1965) (insubordination). Nor does the Act protect disloyalty unnecessary to carry on a worker's legitimate concerted activities, NLRB v. Local Union No. 1229, 346 U.S. 464, 472 (1953), nor conduct in "reckless disregard of [an] employer's business interests," NLRB v. Knuth Bros., Inc., 537 F.2d 950, 956 (7th Cir. 1976) (employee discharged for revealing employer's confidential information). Section 10(c) of the

concerted activity which is for the "mutual aid or protection" of employees.[25] Courts have construed "mutual aid or protection" so broadly that employee action invariably satisfies this requirement. Activity considered to be "for mutual aid" includes "almost any activity that somehow affects the well-being of the employees as a group."[26] For example, activities directed at a dispute over terms or conditions of employment that are pursued on behalf of all employees satisfy the "mutual aid" requirement.[27] The Supreme Court set out the most sensible interpretation of "mutual aid" in *NLRB v. J. Weingarten, Inc.*:[28] the "solidarity"[29] established when an employee's activity gives "assurance to other employees in the bargaining unit that they, too, can obtain . . . aid and protection"[30] in like circumstances is " 'mutual aid' in the most literal sense."[31]

NLRA recognizes an employer's right to protect its business interests and to discharge employees "for cause." 29 U.S.C. § 160(c) (1976). The "condonation" doctrine, however, protects employees' activities when their employer voluntarily forgives them. *See, e.g.,* Richardson Paint Co. v. NLRB, 574 F.2d 1195, 1202-03 (5th Cir. 1978) (unprotected walkout in violation of no-strike clause, subsequently condoned by employer, held protected).

25 "The words 'concerted activities' are limited in meaning by the words with which they are associated . . . 'for the purpose of collective bargaining or other mutual aid or protection.' " Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 752 (4th Cir. 1949). The "mutual aid" requirement is important because certain concerted activities have unprotected objectives and, therefore, are denied protection. *See supra* note 24.

26 Note, *Constructive Concerted Activities, supra* note 8, at 161; *see, e.g.,* Frank Briscoe, Inc. v. NLRB, 637 F.2d 946, 950 (3d Cir. 1981) (filing of EEOC complaint, seeking to end employer's alleged discriminatory practices, was activity for mutual aid or protection); Eastex, Inc., 215 N.L.R.B. 271, 274 (1974) (distribution of union newsletter urging employees to support union held "mutual aid or protection"), *enforced,* 550 F.2d 198 (5th Cir. 1977), *aff'd,* 437 U.S. 556 (1978).

The term was not construed so broadly early in NLRA history. *See* Note, *Concerted Activity, supra* note 24, at 132-35. Courts in some circumstances will give the requirement greater scrutiny. *See, e.g.,* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260 (1975); *see infra* notes 28-31 and accompanying text.

27 *See, e.g.,* NLRB v. Okla-Inn, 488 F.2d 498, 502 (10th Cir. 1973) (maid's complaints that work requirements were too harsh held protected); Hagopian & Sons, Inc. v. NLRB, 395 F.2d 947, 952 (6th Cir. 1968) (employees' complaints concerning work scheduling held protected). One commentator argues for the extension of § 7 "protection of concerted activity for mutual aid or protection to the acts of individual employees, organized or unorganized, when those acts are directed at terms or conditions of employment." Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act,* 58 TEX. L. REV. 991, 1014 (1980). Under this argument, "a complaint relating to terms or conditions of employment deserves protection even when no other employees have knowledge of the activity or actually encourage it, and even when the actor's motivation was self-interest." *Id.* The author seemingly adopts the NLRB "benefit" standard, which conditions protection of individual activity upon a finding of "mutual aid or protection" and effectively excises from § 7 its "concert" requirement. *See infra* notes 84-89, 93-139 and accompanying text.

28 420 U.S. 251 (1975).

29 *Id.* at 261 (quoting NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 506 (2d Cir. 1942)); *cf.* Salt River Valley Water Users' Ass'n v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953) (individual employee's activity to obtain "solidarity" among the employees was for purpose of mutual aid or protection).

30 420 U.S. at 261.

31 *Id.* (quoting *Peter Cailler Kohler,* 130 F.2d at 506). The *Weingarten* Court also stated:

"Individual griping and complaining"[32] to redress a personal grievance is the most notable type of behavior that fails to satisfy the "mutual aid" requirement.[33] An employee's complaints made solely on his own behalf, such as demands for special treatment,[34] attempts to gain more favorable contract terms for himself,[35] or complaints about his personal share of overtime work,[36] are not made to achieve mutual aid and therefore do not merit section 7 protection. Significantly, such behavior is individual, not concerted, activity, and therefore also fails to satisfy the "concerted activity" requirement.[37] Courts in "individual griping and complaining" cases have denied section 7 protection because of both a lack of mutual aid and a lack of concert, or solely because of a lack of concert.[38] This duality and confusion of rationales may arise because a lack of concert strongly suggests that the activity in question is not pursued for employees' mutual aid. The presence or absence of concerted

---

> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7. . . . This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The union representative whose participation he seeks is, however, *safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit* by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.

420 U.S. at 260-61 (citations and footnote omitted) (emphasis added); *see* Ontario Knife Co. v. NLRB, 637 F.2d 840, 844 (2d Cir. 1980).

32 NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 718-19 (5th Cir. 1973) (no protection where individual employee griped and complained, sought more favorable commission rate for himself, had never been designated as spokesman for other employees, and did not speak with employer on other employees' behalf). The *Buddies Supermarkets* court placed "primary reliance" on the *Mushroom* case, *see infra* notes 56-66 and accompanying text, "line of authority." *Id.* at 718 (footnote omitted); *see* Scooba Mfg. Co. v. NLRB, 694 F.2d 82, 84 (5th Cir. 1982) (per curiam) ("Purely personal disputes are not within the protection of the Act."); Southwest Latex Corp. v. NLRB, 426 F.2d 50, 56 n.3 (5th Cir. 1970) (holding individual griping and complaining not protected concerted activity); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1348 (3d Cir. 1969), *cert. denied,* 397 U.S. 935 (1970); Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967).

33 *See infra* notes 34-36 and accompanying text.

34 *See, e.g.,* Bay-Wood Indus. v. NLRB, 666 F.2d 1011 (6th Cir. 1981) (no concerted activity when employee acted alone and on his own behalf in refusing to work unless special equipment installed); NLRB v. Gibbs Corp., 284 F.2d 403, 405-06 (5th Cir. 1960) (shop steward discharged because of continued demands for special treatment).

35 *See, e.g.,* NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 717 (5th Cir. 1973); Inked Ribbon Corp., 241 N.L.R.B. 7 (1979) (no concerted activity where individual employee claimed wage increase and other benefits for herself only).

36 *See, e.g.,* Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 28 (7th Cir. 1980) (employee's complaints about job rates and overtime constituted unprotected personal griping, not "concerted activity").

37 *See supra* note 7; *infra* notes 40-46 and accompanying text.

38 *See, e.g.,* Indiana Gear Works v. NLRB, 371 F.2d 273, 276-77 (7th Cir. 1967) (both lack of concert and lack of mutual aid); NLRB v. Office Towel Supply Co., 201 F.2d 838, 841 (2d Cir. 1952) (lack of concert; individual "employee's complaint, if addressed to other employees, is not, without more, 'the sort of activity which Congress intended [the NLRB] to protect' ").

activity, therefore, serves as a cogent indication of the existence of a purpose to achieve mutual aid.[39]

B. Concerted Activities

When viewed against its statutory background,[40] section 7's "concerted activities" appears to be a shorthand expression for employee group action.[41] Congress found that the great disparity in bargaining power between employer and employee necessitated that employees have rights of organization and collective bargaining, and that the denial of these rights caused unsettled labor relations and industrial strife

---

39 For example, an individual's purpose of motivating a group of employees to action indicates that the individual's action is more than mere griping. *See infra* notes 55-58 and accompanying text.

Some courts require proof that an employer knew of the concerted activity. For example, the Fifth Circuit, in Southwest Latex Corp. v. NLRB, 426 F.2d 50 (5th Cir. 1970), found a discharged employee's conduct unprotected: "assuming that [the employee's] self appointment as letter-writer amounts to concerted activity, there is no evidence in the record to show that management or supervisory personnel knew he had so constituted himself, and therefore no evidence to show the requisite causal connection between such activity and the discharge." *Id.* at 56; *see also* McLean Trucking Co. v. NLRB, 689 F.2d 605 (6th Cir. 1982) ("[I]t is the employer's knowledge of an employee's concerted activity and subsequent discipline which constitutes a violation of the Act.") (citing Jim Causley Pontiac v. NLRB, 675 F.2d 125 (6th Cir. 1982)); Tri-State Truck Serv. v. NLRB, 616 F.2d 65, 71 (3d Cir. 1980) (employer "must have knowledge, or reason to know, that the employee activities have coalesced into group action for mutual aid or protection"); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 717 (5th Cir. 1973) (record must show employer's knowledge of concerted activity); Texas Aluminum Co. v. NLRB, 435 F.2d 917, 919 (5th Cir. 1970) (employer's knowledge of concerted activity required, but may be inferred from the circumstances); Indiana Gear Works v. NLRB, 371 F.2d 273, 276-77 (7th Cir. 1967) (although employee's activity was potentially concerted activity, employer had no knowledge, and therefore no protection accorded to the activity); *see supra* notes 15-16 and accompanying text.

40 Virtually no legislative history exists to clarify Congress's intent in including "concerted activities" in § 7. *See* Note, *"Concerted" Action, supra* note 8, at 515-16; Note, *Constructive Concerted Activity, supra* note 8, at 174; Note, *Sixth Circuit Spurns* Interboro, *supra* note 24, at 1051. However, the phrase does have a statutory history predating the NLRA. *Id.; see also* Lynd, *Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History,* 50 IND. L.J. 720, 726-34 (1975). The Clayton Act of 1914 protected employees, acting "singly or in concert," from injunctions prohibiting strikes. Ch. 323, § 20, 38 Stat. 738 (1914) (codified at 29 U.S.C. § 52 (1976)). The Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (codified at 29 U.S.C. §§ 101-115 (1976)), extended the protection by declaring that the public policy of the United States dictated that employees "be free from the interference, restraint, or coercion of employers . . . in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 102 (1976). Section 7(a) of the National Industrial Recovery Act, ch. 90, 48 Stat. 198 (1938), as well as § 7 of the NLRA, transformed this public policy into a positive protection of concerted employee action from employer retaliation.

41 Two commentators suggest that § 7's "concerted activities" provision may be the result of either Congress's determination that individual conduct is too insignificant to merit governmental protection or Congress's attempt to induce workers to combine in expressing their grievances. *See* Note, *"Concerted" Action, supra* note 8, at 522, 530; Note, *Constructive Concerted Activity, supra* note 8, at 174. These reasons seem plausible, given the necessity of screening out "individual griping and complaining," *see supra* notes 33-37 and accompanying text, and the overall purpose of the NLRA, *see infra* notes 42-44 and accompanying text.

affecting commerce.[42] The NLRA is Congress's attempt to guarantee these necessary rights.[43] Section 7 envisions concerted activity as the means of achieving equality in bargaining power between employer and employee and of obtaining collective benefit for employees.[44]

Section 7 protects the rights of individuals to engage in specific organizational and collective bargaining activities.[45] By their very nature, these activities involve more than one employee: they are group activities benefiting all employees. The statutory language reveals a critical connection between these activities and the "concerted activities" requirement: "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. . . ."[46] Congress's use of "other" strongly implies that "other concerted activities" were to possess the same group-oriented characteristics as the specified organizational and collective bargaining activities.

II

THE STANDARDS OF INDIVIDUAL CONCERTED ACTIVITY

Each of the twelve federal circuits has accepted the concept of individual concerted activity: in certain circumstances, individual conduct shall be protected as concerted activity.[47] The courts and the NLRB

---

42 *See* 29 U.S.C. § 151 (1976) (NLRA's statement of findings and declaration of policy).

43 As the Court noted in *Emporium Capwell Co. v. Western Addition Community Organization,* § 7 guarantees employees' basic rights of industrial self-organization, rights which are for the most part 'collective rights . . . to act in concert with one's fellow employees.' . . . Section 7 protects those rights that are essential to employee self-organization. . . .

NLRB v. J. Weingarten, Inc., 420 U.S. 251, 273 (1975) (Powell, J., dissenting) (citation omitted) (quoting Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62 (1975)); *see also* Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 752 (4th Cir. 1949) (" 'The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace.' ") (quoting NLRB v. Draper Corp., 145 F.2d 199, 203 (4th Cir. 1944)).

44 *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1961); Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 343 (9th Cir. 1968) ("The Act was designed primarily to guarantee employees the right to organize and to engage in joint action ealculated to further their mutual interests. . . ."); NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 506 (2d Cir. 1942) ("by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased"); *see also* Lynd, *supra* note 40, at 725-27.

45 29 U.S.C. § 157 (1976); *see supra* note 1.

46 29 U.S.C. § 157 (1976) (emphasis added).

47 *See* Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 306 (4th Cir. 1980) ("action by a single employee may be treated as 'concerted activity,' even though participated in by a single employee"); Kohls v. NLRB, 629 F.2d 173, 177 (D.C. Cir. 1980) (recognizing but expressing "serious doubts about the validity of" the individual concerted activity doctrine), *cert. denied,* 450 U.S. 931 (1981); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 28 (7th Cir. 1980) ("[A]ctions of an individual employee who acts on his own to enlist the support of other employees for the purpose of mutual aid or protection are as 'concerted' as group activities to the same end."); Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1160 (5th Cir. 1980) ("The mere fact that an employee has acted alone does not preclude treatment of his action as concerted

have developed four standards of varying permissiveness to identify the circumstances necessary to support a finding of individual concerted activity.

A. The "Representation" Standard

When an individual's conduct is "on behalf of, or as a representative of,"[48] other employees, all courts will protect it as concerted activity.[49] Although the individual need not be formally elected or appointed,[50] he must represent the expressed interests of a discrete group of employees that has formulated complaints or grievances.[51] A

---

activity for mutual aid or protection under section 7."); Wheeling-Pittsburgh Steel Corp. v. NLRB, 618 F.2d 1009, 1017 (3d Cir. 1980) (two employees' refusals to operate crane deemed concerted where employees act as "spokesmen for the safety of all the employees"), *cert. denied,* 449 U.S. 1078 (1981); NLRB v. Empire Gas, Inc., 566 F.2d 681, 684-85 (10th Cir. 1977) (individual employee's solicitation of collective refusal to work held concerted); NLRB v. Sencore, Inc., 558 F.2d 433, 434 (8th Cir. 1977) (per curiam) (individual employee's activity in enlisting other employees' support for individual views regarding wage increase was for mutual welfare and was therefore concerted); Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708 (1st Cir. 1975) (individual's pro-union statements to management deemed concerted because employee had welfare of other workers in mind); NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 978 (9th Cir. 1973) (recognizing *Interboro* principle, *see infra* notes 67-76 and accompanying text, but refusing to apply it where individuals complained of safety on jobsite); NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 499-500 (2d Cir. 1967) (individual employee's attempt to enforce collective bargaining agreement found concerted despite absence of other employees' interest therein); NLRB v. Guernsey-Muskingum Elec. Co-op., Inc., 285 F.2d 8, 12 (6th Cir. 1960) (individual action may be concerted action where individual is acting on behalf of, or as a representative of, other employees).

48 Aro, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979).

49 *See, e.g.,* Blaw-Knox Foundry & Mill Mach., Inc. v. NLRB, 646 F.2d 113, 116 (4th Cir. 1981) (no protected concerted activity where individual employee did not act on behalf of a group); Wheeling-Pittsburgh Steel v. NLRB, 618 F.2d 1009, 1017 (3d Cir. 1980) (where employees act as "spokesmen for the safety of all the employees," activity is protected); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 31 n.16 (7th Cir. 1980); Aro, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1355 (3d Cir. 1969) (individual employee presenting grievances on behalf of others is protected), *cert. denied,* 397 U.S. 935 (1970); Morrison-Knudsen Co. v. NLRB, 358 F.2d 411, 413 (9th Cir. 1966) (where employee complained about working conditions, but was not actually exposed to them himself, individual was nevertheless "sympathetic" to the other workers and acted on their behalf). Because it is closely tied to group activity, some courts may not even consider such activity individual. *See infra* note 55 and accompanying text.

50 Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 31 n.16 (7th Cir. 1980); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1355 (3d Cir. 1969) ("[A] spokesman may be a voluntary one or a chosen representative"), *cert. denied,* 397 U.S. 935 (1970); NLRB v. Guernsey-Muskingum Elec. Co-op., Inc. 285 F.2d 8, 12 (6th Cir. 1960) ("The mere fact that the men did not formally choose a spokesman or that they did not go together to see [their employer] does not negative concert of action.").

51 *See* Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1349 (3d Cir. 1969) ("The cohesiveness of the concerted activity need not be more than the suggestion of group action."), *cert. denied,* 397 U.S. 935 (1970); Morrison-Knudsen Co. v. NLRB, 358 F.2d 411, 413-14 (9th Cir. 1966); NLRB v. Guernsey-Muskingum Elec. Co-op., Inc., 285 F.2d 8, 12 (6th Cir. 1960). One employee speaking on behalf of himself and only one other is sufficient to meet this standard. *See* Jim Causley Pontiac v. NLRB, 620 F.2d 122 (6th Cir. 1980). The Eighth Circuit has held that when one employee constitutes an entire bargaining unit, the employee's actions in reli-

lone employee acting unilaterally for an unwitting and complacent group of coworkers fails to meet this standard; individual action for the possible or "theoretical" benefit of others is insufficient.[52]

Thus, under the "representation" standard, an individual engages in concerted activity when he files a safety complaint with the cooperation and consent of another employee,[53] or when he presents a grievance that a group of employees has discussed and shares.[54] Although labeled "individual," such activity necessarily involves more than one employee and a matter of common concern; protecting it as concerted merely recognizes that a group spokesman is an arm of the group.[55]

B. The *Mushroom* Standard

In *Mushroom Transportation Co. v. NLRB,*[56] the Third Circuit held that individual activity is concerted when the activity induces or prepares for group action to correct a grievance or complaint.[57] When inducement of group action is only a chance consequence or mere possibility, however, the activity fails to meet this standard; the individual activity must be "intended" or calculated to induce group activity.[58]

---

ance on a collective bargaining agreement are protected concerted activity. *See* NLRB v. Century Broadcasting Corp., 419 F.2d 771, 780 (8th Cir. 1969).

52 Aro, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979). An individual must, in fact, be acting on behalf of a group. *Id.* "[A]n employee must show either explicit concert of action or activity on the part of other similarly situated employees which demonstrates tacit approval of the individual complainant's actions." Note, *Sixth Circuit Spurns* Interboro, *supra* note 24, at 1055.

53 *See, e.g.,* Jim Causley Pontiac v. NLRB, 620 F.2d 122, 123 (6th Cir. 1980) (before sending letter of complaint to state health department, individual employee obtained coworker's permission to use coworker's name in the letter).

54 *See, e.g.,* Morrison-Knudsen Co. v. NLRB, 358 F.2d 411, 413-14 (9th Cir. 1966).

55 Activity that meets the "representation standard" satisfies the "mutual aid" requirement of § 7. By acting as a representative of or acting on behalf of fellow employees, an individual employee clearly "safeguard[s] not only [his] interest, but also the interests of the entire bargaining unit. . . ." NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260 (1975); *see supra* notes 27-28 and accompanying text.

56 330 F.2d 683 (3d Cir. 1964). In *Mushroom,* the Third Circuit faced the issue of whether conversations between employees could constitute concerted activity. *See id.* at 684-85.

57 *Id.* at 685. The court stated:

> [A] conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the *object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.*

Id. (emphasis added); *see* Salt River Valley Water Users' Ass'n v. NLRB, 207 F.2d 325, 328 (9th Cir. 1953) ("Concerted activity may take place where one person is seeking to induce action from a group.") (citing NLRB v. Schwartz, 146 F.2d 773 (5th Cir. 1945)). Cases like Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967) have held that *Mushroom* protects individual activity, although not necessarily conversation, aimed at group action. This standard clearly goes beyond the strict definition of "concert," *see supra* note 7; the activity precedes subjective accord between employees. Individual activity protected under the *Mushroom* standard, however, is intended to *cause* such accord.

58 "[G]roup action" should be "intended, contemplated, or . . . referred to." 330 F.2d

Under the *Mushroom* standard, courts will protect as concerted activity an individual's solicitation of a collective refusal to work on certain days,[59] or an individual's circulation of a petition or leaflet to enlist the support of other employees in correcting a problem with working conditions or terms of employment.[60] Conversely, an employee who presses individual demands for holiday pay to which he deems himself entitled,[61] or an employee who walks off the job to protest an individual work assignment,[62] is not protected, even though his activity affects other employees.

The rationale of the *Mushroom* standard is straightforward. Denying protection to the individual activity meeting this standard would hamper section 7's protection of concerted activities:[63] individual activity inducing group action is an indispensable step preliminary to actual group activity.[64] Furthermore, as the *Mushroom* court stressed, a conscious purpose to move a group to action is a reliable indication that the

---

at 685. Even if intended to induce group activity, individual activity may not be protected if it occurs during working hours and disrupts the work force. *See* Midland Frame Div., Midland Ross Corp., 216 N.L.R.B. 302 (1975); *supra* note 24.

59 *See, e.g.,* NLRB v. Empire Gas, Inc., 566 F.2d 681, 684 (10th Cir. 1977) (employee's writing and sending letter to fellow employees urging them to refrain from pumping gas on certan day was protected).

60 *See, e.g.,* Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320, 327 (7th Cir. 1976) (distributing of leaflet publicizing allegations of unsatisfactory supervisory instruction and urging employees to act was protected); Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) (petition); Salt River Valley Water Users' Ass'n v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953) (employee's circulation of petition authorizing him to act on behalf of fellow employees with regard to back pay and overtime wages was protected).

61 *See* NLRB v. Northern Metal Co., 440 F.2d 881, 884-85 (3d Cir. 1971) (although benefit to other employees possible, and individual's actions could have caused group action, individual intended to benefit only himself).

62 *See* Ontario Knife Co. v. NLRB, 637 F.2d 840, 841-42 (2d Cir. 1980) (although protesting her whole shift's work assignment, employee's walking off the job was an individual response to a perceived inequity and she encouraged no other employees to join her).

63 "[C]ollective activities would surely be hampered if . . . individual efforts looking to group action were not protected." NLRB v. Empire Gas, Inc., 566 F.2d 681, 684 (10th Cir. 1977). For this reason, the *Mushroom* standard does not require that individual actions achieve "fruition" as group activity:

> [I]nasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition.

330 F.2d at 685.

64 "The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity. The one seldom exists without the other." Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969); *see also* NLRB v. Sencore, Inc., 558 F.2d 433, 434 (8th Cir. 1977) (per curiam) ("Higher wages are a frequent objective of organizational activity and discussions about wages are necessary to further that goal.") (citation omitted); *cf.* Steere Dairy, Inc., 237 N.L.R.B. 1350, 1351 (1978) (individual employee's walkout in protest of working conditions protected despite fellow employees' refusal to join him; his attempt to convince fellow employees was a "threshold action to induce group action").

individual action is more than "mere 'griping.' "[65] The *Mushroom* standard enjoys virtually complete judicial acceptance; ten of twelve circuits have relied on or followed the standard.[66]

C. The *Interboro* Doctrine

The controversial *Interboro* doctrine[67] protects individual activity aimed at enforcing an existing collective bargaining agreement. This protection extends to situations in which other employees do not know of or are not interested in the activity, as well as to situations in which

---

65 330 F.2d at 685. Thus, individual activity "inducing or preparing for group action" satisfies § 7's "mutual aid" requirement: a conscious purpose to move a group to action is a strong indicium of a purpose to benefit employees other than the individual employee involved. *See supra* note 39 and accompanying text. One commentator suggests that the distinction between individual griping and individual action designed to induce group action is a "fine line" to draw. *See* Note, *Protected Employee Activity Under Section 7 of the National Labor Relations Act,* 1973 WASH. U. L.Q. 931, 938.

66 *See* Scooba Mfg. Co. v. NLRB, 694 F.2d 82, 84 (5th Cir. 1982) (per curiam) (individual employee "must be engaging in the activity with the object of initiating, inducing or preparing for group action); Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980) ("Individual activity can be protected . . . if it is 'looking toward group action.' ") (quoting *Mushroom*); Wheeling-Pittsburgh Steel Corp. v. NLRB, 618 F.2d 1009, 1017 (3d Cir. 1980), *cert. denied,* 449 U.S. 1078 (1981); Aro, Inc. v. NLRB, 596 F.2d 713, 718 (6th Cir. 1979); NLRB v. Empire Gas, Inc., 566 F.2d 681, 684 (10th Cir. 1977) (solicitation of collective refusal to work held protected); NLRB v. Sencore, Inc., 558 F.2d 433, 434 (8th Cir. 1977) (per curiam) (employee's activity in enlisting fellow employees' support regarding wage increase was for employees' "mutual welfare"); Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708 (1st Cir. 1975) (employee's conversations conveying pro-union sentiments found to be preparation for group action); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 720 (5th Cir. 1973) (*Mushroom* standard not met because "no substantial evidence that the purpose of [the employee's] conversations was to arouse concerted action"); Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) (petition regarding working conditions "was plainly intended to enlist the support and assistance of other employees"); Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967) ("[T]o prove a concerted activity under Section 7 . . . , it is necessary to demonstrate that the activity was for the purpose of inducing or preparing for group action to correct a grievance or a complaint."); Salt River Valley Water Users' Ass'n v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953) (precedent for *Mushroom* standard; concerted activity occurs where individual seeks "to induce action from a group").

67 The standard arose from broad dictum in NLRB v. Interboro Contractors, Inc., 388 F.2d 495, (2d Cir. 1967):

> Even if it were true that [the employee] was acting for his personal benefit, it is doubtful that a selfish motive negates the protection that the Act normally gives to Section 7 rights. . . .
>
> Furthermore, while interest on the part of fellow employees would indicate a concerted *purpose,* activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for *concerted purposes* even in the absence of such interest by fellow employees.

Id. at 499-500 (emphasis added). *Interboro* involved an employee's complaints on behalf of other employees about contract violations. The testimony of fellow employees disclosed that "on several occasions" the discharged employee "was speaking for [the fellow employees] as well as for himself." *See id.* Because other employees knew about and had indicated "interest" in the individual's complaints, the individual's activity was protected concerted activity. *Id.* at 500.

the individual employee does not intend to cause group action.[68] Although the individual must base his activity on a reasonable interpretation of the agreement,[69] his motives may be purely selfish.[70] Thus, the *Interboro* doctrine has protected, as concerted activity, individual complaints about jobsite violations of agreement safety standards[71] and individual protests of denial of seniority rights guaranteed by agreement.[72]

The *Interboro* doctrine's rationale is that "individual action seeking to implement the terms of a collective bargaining agreement is merely an extension of the concerted activity which gave rise to the agreement in the first place."[73] Rights secured by agreement are collective rights, even though personal to each employee.[74] Therefore, an employee who

---

68 388 F.2d at 500. *Interboro* protects individual complaints made directly to management and which, therefore, could not be intended to induce group action. *See infra* notes 71-72 and accompanying text. This protection must be distinguished from protection of such complaints under the "representation" standard. *See supra* notes 48-55 and accompanying text. Under the "representation" standard, such complaints result from group action; an individual employee complains directly to management because he is the chosen representative of the employees. *See* Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1355 (3d Cir. 1969) (right of individual employee to present grievances to management on behalf of other employees is protected), *cert. denied,* 397 U.S. 935 (1970).

69 The Second Circuit recoguized this limitation in NLRB v. John Langenbacher Co., 398 F.2d 459, 463 (2d Cir. 1968), *cert. denied,* 393 U.S. 1049 (1969) ("[A]n attempt by employees to enforce their understanding of the terms of a collective bargaining agreement is a protected activity . . . if the employees have a *reasonable basis* for believing that their understanding of the terms was the understanding that had been agreed upon. . . .") (citations omitted) (emphasis added). The NLRB has used *Interboro* to justify extending protection to an employee's complaint when it has only a "colorable" basis in the collective bargaining agreement. *See* Aro, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979) (citing Snap-On Tools Corp., 207 N.L.R.B. 238 (1973)). The collective bargaining agreement need not be written; it may be an oral agreement or merely a "relationship." *See* NLRB v. Ben Pekin Corp., 452 F.2d 205, 206 (7th Cir. 1971) (per curiam) (although written collective bargaining agreement was lacking, because employee "thought that he and his fellow employees were entitled to [a wage] increase" because of "rclationship" and "oral agreement," his actions were protected).

70 One commentator suggests that the "reasonable interpretation" requirement ensures that *Interboro* does not protect individual gripes or complaints. *See* Note, *Constructive Concerted Activity, supra* note 8, at 159. This assertion is a *non sequitur. Interboro* protects an individual gripe or complaint when the individual reasonably bases it on the collective bargaining agreement. *See infra* notes 127-28 and accompanying text.

71 *See, e.g.,* City Disposal Systems, 256 N.L.R.B. 73 (1981) (relying on *Interboro,* NLRB finds unlawful discharge where individual employee refused to operate allegedly unsafe equipment); NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 497-500 (2d Cir. 1967); *see also* Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 285 (8th Cir. 1968) (Lay, J., dissenting) (majority finds unauthorized use of employer's equipment in violation of contract not protected activity; dissent argues that discharged employee acted "in implementation of the collective-bargaining agreement, which amounted to an extension of the concerted activity that gave rise to that agreement") (citing *Interboro*).

72 *See* NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217, 219-21 (8th Cir. 1970).

73 Aro, Inc. v. NLRB, 596 F.2d 713, 716 (6th Cir. 1979). In Keokuk Gas Serv. Co. v. NLRB, 580 F.2d 328, 333 (8th Cir. 1978), the court protected an individual's threat to use a grievance procedure pursuant to the collective bargaining agreement " 'because the collective bargaining agreement is the result of concerted activities by the employees for their mutual aid and protection' " (quoting *Selwyn Shoe,* 428 F.2d at 221).

74 Rights under the collective bargaining agreement are personal because individual

enforces such rights acts on behalf of the group as an extension of the original concert: he effectuates the expressed will of the group. Furthermore, vindication of a collective bargaining agreement's terms presumably ensures that the individual activity satisfies section 7's "mutual aid" requirement.[75] Of course, individual activity outside the context of a collective bargaining agreement is outside of the doctrine's protection.[76]

The *Interboro* doctrine has been controversial. Although the NLRB has applied the *Interboro* doctrine for many years,[77] only a few circuits have embraced it, and no others appear willing to follow their lead.[78]

---

employees initiate the contract grievance mechanisms and, therefore, the agreement theoretically constitutes a personal contract between the employer and each employee. *See Selwyn Shoe,* 428 F.2d at 221.

75 "[R]ights secured by such an agreement, though personal to each employee, are protected rights under § 7 of the Act because the collective bargaining agreement is the result of concerted activities by the employees for their mutual aid and protection." *Id.; see infra* notes 79-83 and accompanying text.

76 *See* Krispy Kreme Doughnut Corp. v NLRB, 635 F.2d 304, 309 (4th Cir. 1980) (*Interboro* inapplicable "since there is no collective bargaining agreement and, therefore, no foundation for a finding of 'constructive concerted activity' under the rationale adopted in *Interboro*"); NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1083 (8th Cir. 1977) (individual employee's refusal to work unprotected where "the employees are not unionized and no collective bargaining agreement is in effect"; *Interboro* inapplicable); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719 (5th Cir. 1973) (*Interboro* inapplicable because individual employee's activity "did not arise in the framework of an attempt to enforce an existing collective bargaining agreement"). Outside the context of collective bargaining agreements, the Second Circuit, the originator of the *Interboro* doctrine, interprets individual concerted activity restrictively. In Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980), the Second Circuit concluded:

> We think that, except in the context of agreements between an employer and his employees which are themselves the product of concerted activities, as in *Interboro* § 7, . . . should be read according to its terms. Not only must the ultimate objective be "mutual" but the activity must be "concerted" or, if taken by an individual as in *Weingarten,* must be looking toward group action.

Cf. supra note 23 (distinguishing the "mutual aid" and "concerted activity" requirements).

77 *See, e.g.,* Searle Auto Glass, Inc., 264 N.L.R.B. 169 (1982); Key City Mechanical Contractors, Inc., 227 N.L.R.B. 1884 (1977); Bunney Bros. Constr. Co., 139 N.L.R.B. 1516, 1519 (1962). *See generally* Note, *Constructive Concerted Activity, supra* note 8, at 156; Note, *Sixth Circuit Spurns* Interboro, *supra* note 24, at 1059 n.52.

78 The Second Circuit originated the *Interboro* doctrine and adheres to it, although in Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980), it recognized the doctrine's "mixed reception" and rejected the Board's reliance on *Interboro.* The court limited *Interboro*'s applicability to situations in which a collective bargaining agreement exists. *See supra* notes 68-76.

The Seventh Circuit applied the doctrine in NLRB v. Ben Pekin Corp., 452 F.2d 205, 206 (7th Cir. 1971), but may have since changed its position. *See* NLRB v. Slotkowski Sausage Co., 620 F.2d 642, 647 (7th Cir. 1980) (noting NLRB's reliance on *Ben Pekin,* but denying enforcement of NLRB order and finding individual engaged in "chronic complaining," not protected concerted activity). The First Circuit has relied on *Interboro* only for the proposition that "[t]he requirement of concertedness relates to the end, not the means." Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708 (1st Cir. 1975); *see infra* notes 79-83 and accompanying text.

The Third, Fifth, Sixth, and Ninth Circuits have rejected the *Interboro* doctrine as an unwarranted expansion of § 7. *See* Royal Dev. Co. v. NLRB, No. 81-7638 (9th Cir. Feb. 22, 1983); Aro, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979); NLRB v. Buddies Supermarkets,

Furthermore, *Interboro*'s broad dictum[79] has resulted in courts misinterpreting the doctrine. Some courts interpret *Interboro* to support the proposition that "[t]he requirement of concertedness relates to the end, not the means"[80] or that "an effect on the group suffices to render an action 'concerted' for purpose[s] of section 7."[81] These interpretations are in-

---

Inc., 481 F.2d 714, 719 (5th Cir. 1973); NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971).

The Court of Appeals for the District of Columbia has not yet had to resolve the *Interboro* issue. However, it expressed "serious doubts" as to *Interboro*'s validity in Kohls v. NLRB, 629 F.2d 173, 177 (D.C. Cir. 1980) ("[T]he rationale supporting the doctrine is suspect; *Interboro* creates a legal fiction of *constructive* concerted activity in the face of statutory language that plainly protects workers who 'engage in concerted activity' for the mutual aid and protection of other workers.") (emphasis in original). Similarly, the Fourth Circuit refused to pass on the doctrine's validity, but questioned its rationale. *See* Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 308-09 (4th Cir. 1980). *But see* Roadway Express, Inc., 217 N.L.R.B. 278, 279, *enforced mem.* 532 F.2d 751 (4th Cir. 1976) (employee who acted alone in refusing to work engaged in protected concerted activity because "the nature of his complaint [had] significance and relevance under the contract to the interests of all of [the other] employees"). The Eighth Circuit found it unnecessary "to pass on the validity of the *Interboro* rule" in NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1083 (8th Cir. 1977); the court, however, quoted extensively from the *Northern Metal* decision, which rejected the rule. *See id.*

79 *See supra* note 67. *Interboro*'s dictum providing protection of "concerted *purposes*" is especially troublesome. *See* NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971) ("The [NLRA] surely does not mention 'concerted *purposes*.' ") (emphasis in original). This formulation confuses the "concerted activity" requirement with the "mutual aid" requirement. *See supra* notes 22-46 and accompanying text; *infra* notes 80-82 and accompanying text.

80 Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708 (1st Cir. 1975); *see* NLRB v. Sencore, Inc., 558 F.2d 433, 434 (8th Cir. 1977) (per curiam) (Individual employee's "complaint was not solely aimed at resolving a personal problem. The welfare of other workers was also in mind. The requirement of concertedness relates to the end, not the means.") (citing *Randolph Division*). The assertion that "concerted" is a requirement regarding the gains to be derived from conduct, rather than the manner of achieving those gains, distorts the language of § 7. *See supra* notes 41-44 and accompanying text.

81 Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1160 (5th Cir. 1980); *see id.* at 1161 n.10 ("[T]he effects of the employee's action on the group [is] the focus of the *Interboro* approach."). The *Anchortank* court formulated the issue as "whether the action of a single employee must involve both a *concerted purpose* and a *concerted effect* to deserve section 7 protection or whether a concerted effect alone will suffice." *Id.* at 1160 (emphasis added). The court apparently decided that § 7 requires only "concerted effect": because the object of the employee's action did "not have the *effect* on other employees essential to satisfaction of the *Interboro* standard for concerted activity," the individual's actions were not concerted activity. *Id.* at 1161 (emphasis added).

This misinterpretation of the *Interboro* doctrine, as looking to "effect," led the *Anchortank* court to opine that the Supreme Court has adopted the doctrine. The court focused on the Supreme Court's decision in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975): "In concluding that an employee engages in concerted activity when he seeks union representation at an interview which he reasonably fears may lead to discipline, the [*Weingarten*] Court focused entirely on the *effects* of such representation on the bargaining unit." 618 F.2d at 1161 (citations omitted) (emphasis added). This analysis of *Weingarten* is inaccurate. The employee's request in *Weingarten,* for union representation "at a confrontation with his employer," 420 U.S. at 260, clearly satisfied § 7's "concerted activity" requirement: the request was an attempt to act in actual concert—to combine for mutual advantage. Indeed, the *Anchortank* court admitted that "the employee's activity in *Weingarten* satisfied the *Mushroom* standard for concerted activity . . . by asking for union representation by her collective-bargaining agent, . . . [thereby] inducing group action." 618 F.2d at 1161 n.10. *But cf. id.* (*Weingarten* "did not

consistent with *Interboro*'s rationale because they extend the doctrine beyond the context of a collective bargaining agreement.[82] The agreement is "essential because it is the source of the employee's claimed rights,"[83] and constitutes the employee's identifiable tie with the expressed will of all employees.

D. The NLRB "Benefit" Standard

The NLRB's broad standard protects an employee's individual activity if it potentially benefits his fellow employees.[84] His fellow employees need not know of or show an interest in this activity;[85] nor does the standard require either an intention to induce group action or an existing collective bargaining agreement.[86] Thus, the standard protects an individual employee's complaints concerning alleged jobsite safety hazards or violations.[87] Indeed, it protects any individual action regard-

---

analyze the issue on those terms, but instead based its conclusions on the effects of the employee's action on the group, the focus of the *Interboro* approach"). Thus, the issue in *Weingarten* concerned the "mutual aid," and not the "concerted activity," requirement of § 7. The protection of employees "against unwarranted punishment," the purpose of the union representative's presence at the disciplinary interview, was "of concern to the entire bargaining unit." 420 U.S. at 261 n.6 (quoting Comment, *Union Presence in Disciplinary Meetings,* 41 U. CHI. L. REV. 329, 338 (1974)). This constituted "mutual aid or protection" according to the *Weingarten* Court—the "safeguarding [of] not only the particular employee's interest, but also the interests of the entire bargaining unit." 420 U.S. at 260. Thus, the employee's activity in *Weingarten* clearly satisfied both requirements of § 7.

82 *See supra* notes 73, 76.

83 NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980) (refusing to extend the *Interboro* doctrine to "situations where there [is] no collective bargaining agreement involved") (citation omitted).

84 This standard originated in Alleluia Cushion Co., 221 N.L.R.B. 999 (1975), in which an employee complained to the California Occupational Safety and Health Administration about working conditions in a plant manufacturing carpet cushions. The NLRB protected the individual's action as concerted because its effect would "benefit" all employees: "[W]here an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted." *Id.* at 1000; *see infra* note 91.

Until the early 1950's, the NLRB and the courts used very similar standards to determine "concerted activity." *See* Note, *"Concerted" Action, supra* note 8, at 520. Today, the NLRB applies and the courts reject the very permissive "benefit" standard. *See infra* note 93. One commentator suggests that a change in the standard of judicial review of NLRB decisions facilitated this divergence. *See* Note, *"Concerted" Action, supra* note 8, at 520-21. Today, "[t]he Board's findngs must be sustained if they are supported by substantial evidence on the record considered as a whole." Keokuk Gas Serv. Co. v. NLRB, 580 F.2d 328, 334 (8th Cir. 1978) (citing 29 U.S.C. § 160(e), (f) (1970) and Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)). The earlier standard of review required only that NLRB findings be "supported by evidence." 49 Stat. 453, 454 (1935) (previously codified at 29 U.S.C. § 160 (1946)).

85 *See* Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975).

86 *See* Bighorn Beverage, 236 N.L.R.B. 736, 752-53 (1978), *enforced as modified,* 614 F.2d 1238 (9th Cir. 1980). Thus, the "benefit" standard is more permissive than the *Interboro* doctrine, which requires the existence of a collective bargaining agreement. *See supra* notes 68-75, 76 and accompanying text.

87 *See, e.g.,* Bighorn Beverage, 236 N.L.R.B. 736, 752-53 (1978), *enforced as modified,* 614

ing the terms or conditions of employment.[88] Nevertheless, the standard does not protect individual complaining, for such action benefits only the individual.[89]

The rationale of this standard rests on the group benefit that allegedly accrues when one employee acts with regard to matters of common concern.[90] The standard also rests on a presumption that when other employees fail to disavow an individual's activity, they "implied[ly] consent"[91] to the activity; this failure to disavow triggers a "presumption of group conduct and participation."[92] The courts, however, have roundly rejected the NLRB's "benefit" standard.[93]

F.2d 1238 (9th Cir. 1980); Phyllis Whitehead, 224 N.L.R.B. 244 (1976) (employee's presentation of a list of alleged safety violations to employer protected); Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975) (complaint to state occupational safety and health administration protected).

88 *See* Diagnostic Center Hosp. Corp., 228 N.L.R.B. 1215, 1217 (1977) (individual activity is "concerted in nature if it relates to a matter of common concern"); *infra* note 139 and accompanying text; *cf.* Steere Dairy, Inc., 237 N.L.R.B. 1350, 1351 (1978) (although other employees refused to join him, individual protest by an employee who was then discharged was protected, because the protest "involved a group concern—the pay and working conditions of all employees").

89 *See, e.g.,* Hunt Tool Co., 192 N.L.R.B. 145 (1971) (purely personal suit against employer for on-the-job injury not protected); *see supra* notes 33-38 and accompanying text. The Board seems to have overruled *Hunt Tool* in Krispy Kreme Doughnut Corp., 245 N.L.R.B. 1053 (1979), *enforcement denied,* 635 F.2d 304 (4th Cir. 1980), when the Board held that the filing of a workmen's compensation claim is of common interest to other employees who might want to file such claims in the future. *See id.* at 1053. Thus, the NLRB "benefit" standard seems to protect mere individual griping and complaining when the Board believes that the activity might help "employees who might be similarly situated in the future." Johnson, *Protected Concerted Activity in the Non-Union Context: Limitations on the Employer's Rights to Discipline or Discharge Employees,* 49 MISS. L.J. 839, 848 (1978).

90 *See, e.g.,* Bighorn Beverage, 236 N.L.R.B. 736, 752-53 (1978) (even though employee individually complained about carbon monoxide fumes, his activity was protected as concerted because safe working conditions are matters of great and continuing concern for the entire work force), *enforced as modified,* 614 F.2d 1238 (9th Cir. 1980).

91 Alleluia Cushion Co., 221 N.L.R.B. 999, 1000 (1975). The Board in *Alleluia Cushion* held that "[t]he absence of any outward manifestation of support for [the discharged individual employee's] efforts is not . . . sufficient to establish that [other] employees did not share [the individual employee's] interest in safety . . . . Safe working conditions are matters of great and continuing concern for all within the work force." *Id.; see supra* note 84. *But see* Comet Fast Freight, Inc., 262 N.L.R.B. 40 (1982) wherein the Board refused to uphold an administrative law judge's finding of unlawful discharge where an employee's complaint involved a safety problem of concern to all employees and none of the employees had disavowed the discharged employee's complaint. The Board distinguished *Alleluia Cushion,* construing the admission of the individual employee in *Comet*—that his fellow workers did not mind driving the truck in question—as evidence that the other employees "did not share his concerns, and that the condition of the truck was of moment to [the discharged employee] alone." Id. at 42.

92 Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 309 (4th Cir. 1980).

93 The only courts which have considered [the NLRB "benefit" standard] have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws and there is no proof of a purpose enlisting group action in support of the complaint, there is "constructive concerted action" . . . .

Id.; see Ontario Knife Co. v. NLRB, 637 F.2d 840, 844-45 (2d Cir. 1980) (rejecting NLRB's

III

FROM "REPRESENTATION" TO "BENEFIT": LIMITING THE FICTION OF INDIVIDUAL CONCERTED ACTIVITY

Each of the four standards of individual concerted activity fictionalizes section 7's "concerted activity" requirement.[94] Thus, each protects activity that the NLRA apparently leaves unprotected.[95] The legitimacy of each standard depends upon whether it effectuates the policies of the NLRA or merely distorts the language of section 7.

The "representation" standard,[96] which protects individual employees who act "on behalf of, or as a representative of"[97] other employees, is legitimate. It protects activities that are individual in only a very literal sense: a group spokesman is indeed an arm of the group.[98] The standard, therefore, only minimally fictionalizes the concert requirement so central to the foundation of collective bargaining.[99] Furthermore, an individual employee acting as a spokesman for his fellow workers acts on matters of common concern and, therefore, establishes a "solidarity" that is " 'mutual aid' in the most literal sense."[100]

The *Mushroom* standard,[101] which protects individual activity "engaged in with the object of initiating or inducing or preparing for group action,"[102] is also legitimate. Protection of actual group action is a fundamental policy of the NLRA.[103] The *Mushroom* standard effectuates

---

reliance on *Interboro* and *Weingarten);* Kohls v. NLRB, 629 F.2d 173, 177 (D.C. Cir. 1980) (rejecting NLRB's reliance on *Interboro*), *cert. denied,* 450 U.S. 931 (1981); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 30 (7th Cir. 1980) ("proof that other employees shared the concerns voiced by the discharged employee" insufficient to support finding of concerted activity); NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980) (rejecting NLRB's reliance on *Alleluia Cushion);* Aro, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979) ("We think [the NLRB's] expansive reading of the concerted activity clause of § 7 goes too far."); NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1083 (8th Cir. 1977) ("We have not been cited to or found any cases where the Board's extension of the *Interboro* rule to non-union and non-collective bargaining situations has been approved."); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 720 (5th Cir. 1973) (even if the individual employee's activity "might have inured to the benefit of the other [employees], it is an exceedingly tenuous basis upon which to rest a finding of concerted activity"); NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971) (rejecting NLRB's reliance on *Interboro*).

94 Because "concerted activities," read literally, appears to require more than a single participant, *see supra* notes 7, 41 and accompanying text, any standard granting protection to *individual* concerted activity fictionalizes the "concert" requirement. *See supra* note 8.

95 *See supra* notes 41-46 and accompanying text.

96 *See supra* notes 48-55 and accompanying text.

97 Aro, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979); *see supra* notes 48-49 and accompanying text.

98 *See supra* text accompanying note 55.

99 *See supra* notes 41-46 and accompanying text.

100 United States v. J. Weingarten, Inc., 420 U.S. 251, 261 (1974) (quoting NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 506 (2d Cir. 1942)).

101 *See supra* notes 56-66 and accompanying text.

102 Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964).

103 *See supra* notes 41-45 and accompanying text; *infra* notes 116-19.

this policy by protecting the indispensable preliminary step to group action: individual action intended to induce group action.[104] Both the "representation" and *Mushroom* standards, therefore, effectuate legitimate policies, and virtually all courts accept one[105] or both of them.[106]

In contrast, most courts have refused to adopt the *Interboro* doctrine[107] and virtually all courts have rejected the NLRB "benefit" standard.[108] Commentators have criticized the courts for their failure to provide greater protection for individual or "constructive concerted activity."[109] Professors Gorman and Finkin argue "that *all* work-related claims of individual employees should be treated as within the scope of the term 'concerted activities' in section 7 of the NLRA."[110] Although they admit that the doctrine of "constructive concerted activity" rests "upon an accumulation of fictions and fabricated presumptions"[111] and that the doctrine "may run into difficulty with the language of section 7. . . ,"[112] they champion the idea that "industrial democracy"[113]—concern for the "liberty and dignity of the individual working per-

---

104 *See supra* notes 63-64 and accompanying text.

105 *See supra* notes 49, 66.

106 The Sixth Circuit recently declared that if an individual employee "actually proceeds on behalf of other employees, or at least with the intent to induce group action, in the presentation of work-related grievances arguably based within the collective bargaining agreement, then the activity is protected by the Act." McLean Trucking Co. v. NLRB, 689 F.2d 605, 608 (6th Cir. 1982). The *McLean* court, in evaluating the nature of the individual employee's action, found the following factors relevant to the issue of concertedness:

> (1) the substance of the employee's activity—did he act alone, without union advice or did he seek to involve and inform other employees; (2) the degree of union involvement in and concern with the dispute—was a grievance filed, were union officials notified; (3) the subject of the complaint—did it have at least an arguable basis in the collective bargaining agreement or was it merely a personal dispute.

Id. at 609; *see also* Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 306-07 (4th Cir. 1980) (individual's activity protected when "the action looks to group rather than mere individual action, and includes 'some element of collective activity or contemplation thereof,' or it is shown 'that the individual in fact was acting on behalf of, or as a representative of, other employees.' ") (footnote omitted); Aro, Inc. v. NLRB, 596 F.2d 713, 718 (6th Cir. 1979) (to be protected, complaint "must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action").

107 *See supra* note 78 and accompanying text.

108 *See supra* note 93 and accompanying text.

109 Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act,* 130 U. PA. L. REV. 286, 309 (1981).

110 *Id.* (emphasis added).

111 *Id.*

112 *Id.* at 299.

> By defining concerted activity as conduct, even by an individual, which has some general improvement in working conditions as its purpose, the Board has in effect read out of section 7 the apparent requirement that the *means* be somehow concerted. It has substituted the independent requirement of concerted benefits for that of concerted activity, creating a redundancy in the Act.

Id. (emphasis in original)

113 *Id.* at 339. Gorman and Finkin admit that the idea of " 'industrial democracy' may

son"[114]—underlies the NLRA, particularly section 7.

Although the drafters of the NLRA[115] and its predecessors[116] recognized freedom of the individual worker as a dominant concern, Gorman and Finkin virtually ignore the most important aspect of federal policy underlying the NLRA—the preservation of "the institution of *collective* bargaining and the achievement of industrial stability."[117] The rights accorded employees under the NLRA were intended "to write equity into the law, to make the relationship between labor and management equitable, [and] to place them on an equal basis."[118] Granting limitless

---

sound like a shibboleth" but assert that the idea was of utmost importance to the drafters of the NLRA. *See id.*

114 *Id.* at 344.

115 The drafters of the NLRA adopted, in §§ 7 and 8(1), the language of § 2 of the Norris-LaGuardia Act. *See supra* notes 1-3 and accompanying text. Professors Gorman and Finkin admit that the NLRA "was focused principally upon the protection of group action for the purpose of improving wages and working conditions." Gorman & Finkin, *supra* note 109, at 338. They argue, however, that such focus upon group action does not mandate a "*less* favored status for *individual* activity having the same objective." *Id.* (emphasis in original). Therefore, because Congress did not contemplate such a "less favored status" for individual workers, individual activity *ipso facto* deserves more generous protection than courts currently grant.

116 Section 6 of the Clayton Act states that "[t]he labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17 (1976). Section 2 of the Norris-LaGuardia Act provides:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 102 (1976). Professors Gorman and Finkin emphasize the "helpless[ness]" of the "individual unorganized worker" and his various freedoms—"freedom of labor," "freedom of association," and freedom "from the interference, restraint, or coercion of employers." Gorman & Finkin, *supra* note 109, at 335. The granting of these freedoms must be viewed, however, in connection with what Congress was attempting to counterbalance—the great disparity in bargaining power between "corporate and other forms of ownership association" and employees due to "prevailing economic conditions." The NLRA drafters knew that true equality of bargaining power could be realized only by expanding statutory protection of group activity. As the Second Circuit stated shortly after the passage of the NLRA: "[B]y extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased." NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 506 (2d Cir. 1942); *cf. supra* note 44 and accompanying text.

117 Gorman & Finkin, *supra* note 109, at 338 (emphasis added); *see supra* notes 40-46, 106 and accompanying text; *infra* notes 118-19 and accompanying text.

118 93 CONG. REC. 3425 (1947) (remarks of Rep. Hartley), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 617 (1948). The Supreme Court, in Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964), affirms that the

protection to an individual employee's actions distorts the language of section 7, violates the policies of the NLRA, reestablishes inequity in the labor-management relationship, and thus facilitates industrial strife.[119] A closer examination of the *Interboro* doctrine and the NLRB "benefit" standard reveals this distortion and resulting inequity.

Lacking requirements of active concert[120] and subjective accord among fellow employees,[121] the *Interboro* doctrine completely ignores the "concerted activity" requirement. The doctrine lacks even the *Mushroom* standard's saving grace of validating an indispensable step prior to concert: the incitement of group action. The doctrine emasculates the concert requirement by allowing it to be satisfied by the existence of a collective bargaining agreement, the same condition that satisfies the "mutual aid" requirement.[122] In short, the doctrine protects activity meeting only a single indicium of merit—mutual aid[123]—and bases satisfaction of the mutual aid requirement on the kind of theoretical benefit rejected under other standards.[124]

By effectively eliminating a separate concert requirement, the *Interboro* doctrine allows section 7's catch-all provision—"concerted activities for mutual aid or protection"—to operate far beyond the parameters of the other section 7 activities.[125] Protection depends solely

---

NLRA was intended to promote industrial stability by encouraging the establishment of collective bargaining.

119 *See infra* notes 125-31 and accompanying text. Professors Gorman and Finkin acknowledge that "[e]mployers might be inclined to believe that [their] proposed interpretation will significantly undermine plant discipline and productivity . . . coddle the incurably insubordinate . . . [and] undermine the status of the union and the integrity of the grievance procedures of the contract . . . ." Gorman & Finkin, *supra* note 109, at 353.

120 *See supra* notes 73-74 and accompanying text.

121 *See* Note, *"Concerted" Action, supra* note 8, at 520. Conceivably, *Interboro* protects individual activity that the employees as a whole would disavow. Such protection is unwarranted and improper under a statutory scheme protecting "concerted activities." *See supra* notes 41-46 and accompanying text. Furthermore, the philosophy of the NLRA, especially § 7, is that employees have the right to be represented by a bargaining agent or other such representative of their choice. *See* 29 U.S.C. §§ 151, 157 (1976); *see also* Clark's Gamble Corp. v. NLRB, 422 F.2d 845 (6th Cir.), *cert. denied,* 400 U.S. 868 (1970); NLRB v. Red Arrow Freight Lines, Inc., 180 F.2d 585, 586 (5th Cir. 1950) (§ 7's "apparent purpose" is "to permit employees . . . to choose their own bargaining agent"). An individual employee may also choose to refrain from being represented by a labor union or other bargaining agent. 29 U.S.C. § 157 (1976). If courts protect individual conduct that other employees neither knew of nor consented to, the other employees' right of choice under the NLRA may be diluted.

122 *See supra* note 76 and accompanying text.

123 *See supra* note 75; *supra* notes 118-19 and accompanying text.

124 *See supra* notes 51-52 and accompanying text.

125 *See supra* notes 44-46 and accompanying text. *But see* Dolin, *The* Interboro *Doctrine and the Courts: A History of Judicial Pronouncements on the Protected Status of Individual Assertions of Collective Rights,* 31 AM. U.L. REV. 551 (1982). Dolin argues that *Interboro* is a "sound, reasonable doctrine that, as a product of the NLRB's exclusive expertise in labor relations matters, ought to be respected by the federal courts." *Id.* at 590. In support of her interpretation of § 7, Dolin relies on § 9(a) of the NLRA, 29 U.S.C. § 159(a) (1976). Section 9(a) provides, in pertinent part, that "[r]epresentatives designated or selected for the purposes of collective

on the easily satisfied mutual aid requirement.[126] The doctrine thus can foster after-the-fact rationalization of mere individual complaining whenever a collective bargaining agreement is extant.[127]

Besides ignoring section 7, the availability of such after-the-fact rationalization may derogate established grievance procedures: if an individual employee can base his actions on the collective bargaining agreement, he may bypass the grievance procedure without fear of employer retaliation. Derogation of established grievance procedures strains the entire collective bargaining system.[128] Furthermore, when individuals have complaints that they know the system will not redress because the complaints are either de minimis or without merit, the *Interboro* doctrine provides an effective means for disgruntled individuals to harass employers.[129]

Because the *Interboro* doctrine protects individual complaints based on a collective bargaining agreement,[130] it forces employers to take such complaints as seriously as collective bargaining and other organizational activities by employees. The *Interboro* doctrine thus equates individual bargaining with collective bargaining, which goes far beyond the

---

bargaining . . . shall be the exclusive representatives of all the employees in such unit. . . ." Specifically, Dolin interprets the proviso to § 9(a) as "protect[ing] the employee's limited right to present individual grievances directly to the employer . . . ." Dolin, *supra* at 561. Dolin is correct insofar as "Congress intended to '[assure] the individual grievant the right to confer with his employer without participation of the certified bargaining agent.' " *Id.* at 563. This intent does not support her conclusion, however, that "Congress sought to vest employees with an affirmative right at least as broad as that conferred by *Interboro*." *Id.*

126 *See supra* notes 26-27 and accompanying text.

127 *Interboro* protects an individual if he can, in any way, base his actions on a collective bargaining agreement. Activity engaged in solely by, and on behalf of, an individual can become protected if he argues convincingly that he sought to vindicate the agreement. *See supra* note 75 and accompanying text. Requiring an actual tie to real group activity screens out the more blatantly personal complaints. *See supra* notes 32-36, 39 and accompanying text.

128 *See* Note, *Constructive Concerted Activity, supra* note 8, at 173. When individuals circumvent the process too frequently, both employees and employers no longer accept the process as the most efficacious means of settling disputes. *See* McLean Trucking Co. v. NLRB, 689 F.2d 605, (6th Cir. 1982). In setting forth factors relevant to the issue of concertedness the *McLean* court was concerned about the "degree of union involvement in and concern with the dispute—was a grievance filed, were union officials notified. . . ." *Id.* at 609. Presumably, once the parties establish a grievance procedure, courts will be more willing to declare "concerted" the actions of individual employees who utilize that procedure. The efficacy of the collective bargaining process is, therefore, maintained. *But see* Note, *supra* note 27, at 993 (protecting individual activity when it relates to terms and conditions of employment "does not undermine unionism").

129 Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union.

Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179, 186 (2d Cir. 1962).

130 *See* Note, *supra* note 27, at 1014.

NLRA's purpose of reducing the "inequality of bargaining power"[131] between employer and employees.

The NLRB "benefit" standard,[132] which protects an employee's individual activity if it potentially benefits his fellow employees,[133] is clearly unacceptable; like the *Interboro* doctrine it ignores the language of section 7 and related sections of the NLRA. The standard bases its protection of individual activity on a finding of benefit akin to the "mutual aid" requirement.[134] It effectively excises "concerted actitivies" from section 7, for according to the NLRB, fulfillment of the "mutual aid" requirement fulfills the "concerted activity" requirement.[135] This attempted merging of section 7's two requirements is simply too "tenuous"[136] to accept. Furthermore, a finding of concerted activity is a "jurisdictional requirement"[137] for NLRB action. As the Fourth Circuit stated: "[i]t would be odd, indeed, if this essential quasi-jurisdiction predicate might be supplied by a presumption admittedly resting on no factual base but predicated on a purely theoretical assumption."[138] In short, the "benefit" standard extends protection of individual conduct beyond the principled limit of section 7.[139]

---

131 29 U.S.C. § 151 (1976); *see supra* notes 41-44 and accompanying text.

132 *See supra* notes 84-93 and accompanying text.

133 *See supra* notes 84-88 and accompanying text.

134 The NLRB reasons that when an individual acts on matters of concern common to fellow employees, he is *ipso facto* engaged in concerted activity that "benefits" them. *See supra* notes 88-92 and accompanying text. The "safeguarding [of] not only the particular employee's interest, but also the interests of the entire bargaining unit" fulfills the "mutual aid" requirement of § 7. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260 (1961); *see supra* notes 28-31 and accompanying text.

135 *See supra* notes 88-92, 134 and accompanying text.

136 "Even if [the employee's] success . . . might have inured to the benefit of the other [employees], it is an exceedingly tenuous basis upon which to rest a findng of concerted activity." NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 720 (5th Cir. 1973).

137 Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 310 (4th Cir. 1980).

138 *Id.* The "quasi-jurisdiction[al]" character of the "concerted activities" requirement is evident. Section 10(a) of the NLRA empowers the Board "to prevent any person from engaging in any unfair labor practice . . . listed in section [8]." 29 U.S.C. § 160(a) (1976). Section 8(a)(1) makes employer interference with employees' § 7 rights—the right to engage in "concerted activities"—unlawful. 29 U.S.C. § 158(a)(1) (1976). The NLRB thus has no jurisdiction until an employer violates § 8, which he does not violate until he interferes with protected "concerted activities."

The *Krispy Kreme* court also examined the effect of the Board's "presumption of group conduct and participation," 635 F.2d at 309, *see supra* notes 91-92 and accompanying text, on the burden of proof:

> [T]he Board confesses in its brief . . . that [in] no proceeding in which it has proposed this theory has the Board suggested "the precise manner whereby an employer might obtain evidence to rebut the presumption" that other employees identified with the complaint. It follows, therefore, that the Board would set up a presumption which in practical effect . . . would be impossible for an employer to rebut and thus would constitute an irrebutable presumption.

635 F.2d at 309.

139 The Fifth Circuit, in NLRB v. Datapoint Corp., 642 F.2d 123 (5th Cir. 1981) agreed:

CONCLUSION

Congress enacted section 7 of the NLRA to redress the inequality of employer-employee bargaining power. The courts and the NLRB should construct the fiction of individual concerted activity to effectuate this congressional purpose; they should not use it as a means of reversing employer-employee inequality in the employees' favor. Actual concert is a reliable indication that employees are, in fact, acting for mutual aid and not merely for personal benefit. The explicit requirement of "concerted activities" should not be interpreted so loosely as to destroy section 7's purpose.

Rita Gail Smith and Richard A. Parr II

> The Board asks us to set too far-reaching a precedent, one by which virtually any action taken by a single employee in any way related to wages, hours or the terms and conditions of employment would be considered protected concerted activity. If Congress had intended Section 7 to be read so broadly, it certainly could have done so with much more definite language, and courts would have discovered that intent long ago.

Id. at 129.