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Constructive Concerted Activity Under the NLRA: Conflicting Signals from the Court and the Board

TERRY A. BETHEL*

I. INTRODUCTION

In two recent decisions the Supreme Court and the National Labor Relations Board1 have confronted the controversial problem of whether the national Labor Relations Act2 protects individual employees who register complaints or take action intended to protest their own working conditions or those of their co-workers. The problem stems from the language of section 7 of the Act, which grants to employees the rights to form and support unions, to bargain collectively and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."3 The literal language of the NLRA protects those employees who act in concert; it says nothing about protecting those who act alone. The courts of appeals and, to a lesser degree, the NLRB have made much of this apparent distinction between concerted and individual activity.

In a recent law review article, Professors Gorman and Finkin argue forcefully that both the history and policy of the Act negate any congressional intention

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1. Hereinafter referred to as the Board or the NLRB. The Board is an administrative agency created by the Congress in sections 3-6 of the National Labor Relations Act, 29 U.S.C. §§ 153-156 (1982). The Board's principal functions are enforcement of the unfair labor practice provisions found in section 8 of the Act (29 U.S.C. § 158) and administration of the election procedure in section 9 (29 U.S.C. § 159).

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 U.S.C. § 158(a)(3)].

If an employee's conduct is protected by section 7, an employer who retaliates against the employee on account of that conduct (typically, although not always, by discharge or other discipline) commits an unfair labor practice under section 8(a)(1) of the Act: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in [§ 7]. . . ." 29 U.S.C. § 158(a)(1).
to protect only the actions of two or more employees, while leaving those who act alone at the whim of their employers. The authors argue that section 7 is silent as to individual activity, not because Congress wished to leave it unprotected, but because the rights of individuals had not been at issue during the years preceding the Wagner Act. Stated differently, Congress expressly protected concerted activity in order to expand the rights of workers, not to diminish them.

In terms of statutory construction, there are not two abstract and distinguishable categories of action . . . one which Congress chose not to protect and the other which Congress chose to protect, but rather a continuum of individual activity.

Despite the impressive historical, statutory and practical arguments marshalled by Gorman and Finkin, and despite decisions by the NLRB that critics claimed all but obliterated the distinction between concerted and individual activity, both the Board and the courts have adhered to the position that only concerted activity enjoys the protection of the statute. While maintaining that posture, however, Board decisions, at least until recently, had blurred the distinction, primarily through the fiction of "constructive concerted activity." Thus, action by an individual that seeks to enforce the provisions of a collective bargaining agreement or that claims the protection of occupational safety and health legislation, or even action that is merely "for the benefit of" and a "matter of mutual concern to" other employees, fell within the Board's definition of concerted activity.

In NLRB v. City Disposal Systems, the Supreme Court, by a narrow margin, endorsed the theory of constructive concerted activity so far as it relates to attempts by individuals to enforce or claim the protection of a collective bargaining agreement. Rejecting (though virtually ignoring) a claim by the dissenters that its decision would undermine labor arbitration agreements by authorizing the NLRB to determine contractual disputes, the majority, through Justice Brennan, upheld the Board's theory as a reasonable interpretation of the Act. Interestingly, at about the time the Supreme Court

5. Gorman & Finkin, supra note 4, at 329-46.
7. See infra note text accompanying notes 14, 20, 30, 52, 90-105.
9. Id. at 1516-19.
10. Id. at 1516. See infra text accompanying notes 90-108 for a detailed discussion of City Disposal.
accepted constructive concerted activity in *City Disposal*, the Board rejected it, albeit in a different context, in *Meyers Industries*.\(^{11}\) In their respective decisions, both the Board and the Court took pains to limit their action. The Board noted that *City Disposal* was pending before the Court, but asserted that the issues were distinguishable since no collective bargaining agreement existed in *Meyers*.\(^{12}\) In *City Disposal*, the majority noted the Board’s assertion that the cases were inapposite and concluded that *Meyers* was "of no relevance here."

While the theory of constructive concerted activity has been applied to disparate factual settings and while *City Disposal* and *Meyers* are distinguishable on the facts, neither case adequately addresses the crucial question of whether the Act protects any form of individual (as opposed to concerted) activity. Nor was either case decided correctly. The *Meyers* opinion is much too narrow; *City Disposal* unjustifiably injects the Board into the enforcement of collectively bargained rights.

A. Constructive Concerted Activity

1. The NLRB’s Opinion

Directly at issue in *Meyers* was a 1975 decision called *Alleluia Cushion Co.*\(^{14}\) in which the Board had held protected the complaint by a single employee (Henley) to the California Occupational Safety and Health Administration. Henley had not discussed his action with fellow employees; none of them joined in it; and the Board noted "the absence of any outward manifestation of support for his efforts."\(^{15}\) That fact, however, was not sufficient "to establish that Respondent’s employees did not share Henley’s interest in safety or that they did not support his complaints."\(^{16}\) The Board said that employees had a "vital interest" in safe working conditions (recognized by Congress in the Occupational Safety and Health Act),\(^{17}\) noted that most of Henley’s complaints would improve, not his own working conditions, but those of his colleagues,\(^{18}\) and concluded that

\[\text{[I]t would be incongruous with the public policy enunciated in such occupational safety legislation . . . to presume that, absent any outward manifestation of support, Henley’s fellow employees did not agree with}\]

\(^{12}\) Id., 115 L.R.R.M. at 1028.
\(^{13}\) 104 S. Ct. at 1510 n.7.
\(^{14}\) 221 N.L.R.B. 999 (1975).
\(^{15}\) Id. at 1000.
\(^{16}\) Id.
\(^{18}\) *Alleluia*, 221 N.L.R.B. at 999 n.3.
his efforts to secure compliance with the statutory obligations imposed
on Respondent for their benefit.\textsuperscript{19}

The Board said that concerted action was implicit in the assertion of statutory
rights by one employee, at least "in the absence of any evidence that fellow
employees disavow such representation."\textsuperscript{20}

Obviously, the \textit{Alleluia} rationale was a fiction created by the Board to protect
employees whose \textit{purpose} was the mutual aid and protection of fellow workers,
but whose means had fallen short of the concerted activity requirement set
forth in section 7. The \textit{Alleluia} reasoning was attacked, and its result over-
turned, in \textit{Meyers}. In the \textit{Meyers} case, a truck driver named Prill was involved
in an accident because of defective brakes.\textsuperscript{21} Prill refused to drive his truck
and requested an inspection by the Tennessee Public Service Commission,
resulting in a citation to the employer. Previously, Prill had voluntarily stopped
at an Ohio roadside inspection station, prompting another citation for defec-
tive equipment.\textsuperscript{22} The administrative law judge (ALJ) found that Prill was
discharged for his safety complaints in Tennessee and Ohio and for his refusal
to drive the truck after the accident in Tennessee.\textsuperscript{23} Although Prill had been
alone on both occasions, and although he had not discussed the matter with
other employees, the ALJ relied on \textit{Alleluia} and found Prill's actions pro-
tected by section 7.\textsuperscript{24}

The Board, with the three Reagan appointees in the majority, overruled
\textit{Alleluia} and returned to what it called the "'objective' standard of concerted
activity."\textsuperscript{25} The Board criticized \textit{Alleluia} for dispensing with any "manifesta-
tion of 'group will'" and looking merely to an individual's attempt to enforce
statutes:

The practical effect of this change was to transform concerted activity
into a mirror image of itself. Instead of looking at the observable evidence
of group action to see what men and women in the work place in fact
chose as an issue about which to take some action, it was the Board that
determined the existence of an issue about which employees \textit{ought} to have
a group concern . . . .\textsuperscript{26}

Stressing that concerted activity requires employee interaction, the Board said
that under its new objective standard (which it billed as a return to a
pre-\textit{Alleluia} analysis),\textsuperscript{27} in order to be concerted, activity must be "engaged
in with or on the authority of other employees, and not solely by and on
behalf of the employee himself."\textsuperscript{28}

\begin{itemize}
\item\textsuperscript{19} Id. at 1000.
\item\textsuperscript{20} Id.
\item\textsuperscript{21} Meyers Industries, 268 N.L.R.B. No. 73, (Jan. 6, 1984), 115 L.R.R.M. (BNA) 1025,
\item\textsuperscript{22} Id.
\item\textsuperscript{23} Id., 115 L.R.R.M. at 1030; JD slip op. (No. 730-80) at 8-9 (Jan. 14, 1981).
\item\textsuperscript{24} JD slip op. (No. 730-80) at 10-11.
\item\textsuperscript{25} Meyers, 115 L.R.R.M. at 1028-29.
\item\textsuperscript{26} Id. at 1027.
\item\textsuperscript{27} Id. at 1029.
\item\textsuperscript{28} Id.
\end{itemize}
A narrow reading of Meyers might lead one to conclude that the Board merely discarded its presumption that an employee seeking to enforce statutory rights acts with the support of other employees. In fact, member Zimmerman's dissent tried to so limit the issue.\textsuperscript{29} The Board's opinion, however, had a much broader effect. Under Alleluia, and even before, the Board had protected individual activity "for the benefit of" or "on behalf of" other employees without regard to an employee's attempt to enforce health and safety legislation. The Meyers decision overruled those cases as well and adopts a rigid and literal interpretation of section 7.

As the Board noted in Meyers, under Alleluia and its progeny, "the requirement of legislative action" was dropped, and the Board protected, as concerted activity, individual action that was a matter of "group concern."\textsuperscript{30} In Air Surrey Corp.,\textsuperscript{31} for example, following the issuance of dishonored paychecks, a single employee inquired of a bank about his employer's solvency.\textsuperscript{32} The Board found the inquiry was concerted activity and said, echoing Alleluia, there was a "likelihood that the other employees, in the absence of evidence to the contrary,"\textsuperscript{33} shared his concern. The Board did make a weak pass at Alleluia's statutory rationale by noting that a state law prohibited knowing issuance of bad checks.\textsuperscript{34} Air Surrey, however, indicated that Alleluia rested, not merely on the existence of rights under another statute, but on an individual's action on a matter of common concern.\textsuperscript{35} Any doubt about that rationale was removed in Steere Dairy, Inc.\textsuperscript{36} and Ontario Knife Co.,\textsuperscript{37} two cases with similar fact patterns.

In Steere Dairy, three milk deliverymen arrived for work one morning and discovered their employer had switched from paper to glass containers (thus making their work more difficult) and had reduced the price of milk. Since the employees were paid on a percentage basis, the price reduction had a significant impact on their compensation.\textsuperscript{38} The employees discussed the matter and decided that one of them, Watkins, should call management with their con-

\textsuperscript{29} The dissenting opinion says, The case before us involves only one of the principles embodied in Alleluia—that an employee's assertion of an employment-related statutory right can be presumed to be activity covered by the NLRA. As such it requires no consideration of general arguments concerning a presumption of concert in the assertion of a matter of common concern to the work force.

\textsuperscript{30} Id. at 1032.

\textsuperscript{31} 229 N.L.R.B. 1064 (1977), enforcement denied, 601 F.2d 256 (6th Cir. 1979).

\textsuperscript{32} The Board found that the employer's paychecks had been dishonored repeatedly, and that on one occasion, they had been delayed. Id. at 1064.

\textsuperscript{33} Id.

\textsuperscript{34} Id.

\textsuperscript{35} The Board expressly refused to consider whether the complaining employee had engaged in actual concerted activity (three other employees accompanied him to the bank, but remained outside), instead premising its decision entirely on the Alleluia rationale. Id.

\textsuperscript{36} 237 N.L.R.B. 1350 (1978).

\textsuperscript{37} 247 N.L.R.B. 1288, enforcement denied, 637 F.2d 840 (2d Cir. 1980).

\textsuperscript{38} Steere Dairy, 237 N.L.R.B. at 1350-51.
cerns. Watkins called the president and told him “[T]his is the Steere’s drivers in Oil City, and we are a little upset over the glass jugs.” Even under the Meyers test, the action to this point was concerted. The discussions were employee interaction, and the telephone call was “on the authority of” the other employees. The problem arose when Watkins, dissatisfied with the president’s response to the telephone call, walked off the job. Although he tried to persuade the other two employees to join him, alluding to an assurance from “labor board representatives” that “they could not be fired,” neither joined the walkout.

It was obviously the walkout that prompted Watkins’ discharge. Neither of the other two employees was disciplined for his part in the telephone complaint lodged by Watkins. Moreover, the ALJ found that it was Watkins’ walkout and his attempt to persuade the other two employees to join him that prompted the employer’s action. The ALJ might have held that the walkout fit the definition of concerted activity because it was merely the outgrowth of what had started as a group protest. Citing Alleluia, however, the administrative law judge said “even the individual protest of Watkins acting alone was protected because it involved a group concern—the pay and working conditions of all employees.” The ALJ, then, recognized Watkins’ protest as individual action, but protected it under the constructive concerted activity theory advanced in Alleluia.

In Ontario Knife, two employees complained to management about a work assignment. The supervisor rebuffed their complaint, in the process directing an abusive remark at one of the employees, who thereafter walked off the job in anger. The walkout resulted in her discharge.

As in Steere Dairy, the ALJ conceded that the complaint, having been made by both employees, was protected concerted activity. He found the walkout, however, to be unprotected individual conduct. The Board disagreed, saying that both employees were engaged in concerted conduct up to the point when one walked out alone. Citing Steere Dairy, the Board said that the walkout, too, was concerted (and protected) “because it involved a group concern.”

Although both Steere Dairy and Ontario Knife adopt a portion of the Alleluia analysis and, perhaps, expand it, the group concern theory was evident even before 1975. In Guernsey-Muskingum Electric Cooperative, the

39. Id. at 1351.
40. Id.
41. Id. at 1352.
42. Id. at 1351. The Board adopted the ALJ’s recommended order without comment.
43. Ontario Knife, 247 N.L.R.B. at 1288. The other employee, who did not walk out, was not discharged.
44. Id. at 1295.
45. Id. at 1298. The ALJ said that there was no case “directly on point.” Id. In a footnote he distinguished Alleluia as involving an attempt “to enforce a statutory right.” Id. at 1298 n.23.
46. Id. at 1289.
47. Steere Dairy, in fact, expressly cited Alleluia for support. 237 N.L.R.B. at 1351 n.4.
Board found unlawful the discharge of an individual who had complained about the appointment of a new foreman. As in Steere Dairy, the employees had complained to each other. Three of them individually complained to management, without any prior agreement or authorization from co-workers. The Board upheld an ALJ decision that said it was sufficient for concerted activity "if the matter at issue is of moment to the group" and if the spokesman, whether appointed by the group or acting "voluntarily" (i.e., presumably acting alone) is speaking "for the benefit of" the interested group.

Similarly, in Oklahoma Allied Telephone Co., the Board found the complaint of one employee to be concerted activity, affirming an ALJ finding that the employee's actions were not "solely by or on behalf of herself but were with or on behalf of other employees."

There were grumblings from other employees about the same matter, but there was no finding that the discharged employee acted with the authorization of the others. In fact, in adopting the ALJ's opinion, the Board majority noted: "We do not subscribe the Chairman's view that for Williams' activities to have been concerted, the protest about them must have been 'authorized' by her fellow employees, or 'inspired or directed toward inspiring a concerted plan of action' by fellow employees." The reference to the "Chairman's views" relates to then Chairman Miller's dissenting opinion. Miller's comments proved prophetic:

My colleagues seem to be saying that any time an individual, without authorization from his fellows, confronts management about a matter which could be the subject of concerted action, the individual is engaging in section 7 "concerted" activity.

The following year the Board decided Alleluia. Although that opinion did not go as far as Miller predicted, subsequent cases significantly expanded the scope of protection for individual activity. When it overruled Alleluia, the Board, echoing Miller, said that under that case "the Board questioned whether the purpose of the activity was one it wished to protect and, if so, it then deemed the activity 'concerted' without regard to its form."

The Board's return to its "pre-Aleluia" standard and its adoption of an objective test obviously does more than discard the presumption of concerted activity when an individual claims the protection of safety legislation; it also overrules those cases that had protected individual employees who, without

49. Id. at 621.
50. Id. at 624.
52. Id. at 920. The discharged employee, Williams, had complained about faulty air conditioning in an area where 16 or 18 employees worked. Id. at 918.
53. Id. at 916 n.l.
54. Id. at 917 (emphasis in the original).
55. Meyers, 115 L.R.R.M. at 1027. This was, in fact, the test proposed in an early student publication. See Note, The Requirement of "Concerted" Action Under the NLRA, 53 COLUM. L. REV. 514, 522 (1953).
authorization, voiced a group concern.\textsuperscript{56} Its requirement that employees act together or that a single employee act "on the authority of" others seems destined to require purposeful interaction or express, knowing authorization. In short, concert of action will not be established merely because individuals have lodged protests over similar matters, and authority to act for one's colleagues will no longer be presumed or implied from the circumstances. Support for this conclusion can be found not only in the Board's criticism of \textit{Air Surrey}, \textit{Steere Dairy}, and \textit{Ontario Knife},\textsuperscript{57} but also from other references used in the opinion and from the facts of \textit{Meyers} itself.

In the course of its opinion the Board voiced approval of its prior decision in \textit{Traylor-Pamco}.\textsuperscript{58} In that case, two employees refused to eat lunch in a sewer tunnel, opting instead for the more sanitary conditions of the "dry shack."\textsuperscript{59} The majority in \textit{Meyers} endorsed the ALJ's conclusion that the activity was not concerted because neither employee had consulted the other and neither had relied on the other in his action.\textsuperscript{60} The facts of \textit{Traylor-Pamco}, however, furnish evidence of the strictness of the \textit{Meyers} standard. It is true that only two of the employees of the first shift regularly ate in the dry shack. However, only one week before his discharge, one of the employees (Cordisco), as union steward, ordered all of the employees to eat in the dry shack because

\textsuperscript{56} In addition to the cases cited in the text, see, e.g., Dupont Puerto Rico, Inc., 262 N.L.R.B. 1003 (1982) (employee's inquiry to management concerning fellow employee's wages was protected concerted activity); Scooba Mfg. Co., 258 N.L.R.B. 147 (1981), enforcement denied, 694 F.2d 82 (5th Cir. 1982), cert. denied, 104 S. Ct. 1706 (1984) (employee's discussion with vice-president concerning discharge of son was protected concerted activity); Pioneer Natural Gas Co., 253 N.L.R.B. 17 (1980), enforcement denied, 662 F.2d 408 (5th Cir. 1981) (employee's activity in telling other employee about fellow employee's racial remarks was concerted because related to a matter of common concern); Koch Supplies, Inc., 249 N.L.R.B. 1144 (1980), enforcement denied, 646 F.2d 1257 (8th Cir. 1981) (employee's protest concerning promise of vacation benefits a matter of common concern). See also Diagnostic Center Hosp. Corp., 228 N.L.R.B. 1215 (1977); St. Joseph's High School, 236 N.L.R.B. 1623 (1978), vacated on other grounds, 248 N.L.R.B. 901 (1980).

\textsuperscript{57} The Board in \textit{Meyers} included each of these three cases in a footnote to text that said: Alleluia's progeny, however, dropped even the requirement of legislative action, and the Board ultimately decided what ought to be the subject matter of working persons' concern when the statutory manifestation of such "group concern" was slim or nonexistent.

\textsuperscript{58} 154 N.L.R.B. 380 (1965).

\textsuperscript{59} \textit{Id.} at 385.

\textsuperscript{60} In \textit{Meyers}, the Board quoted a portion of the administrative law judge's opinion from \textit{Traylor-Pamco}:

\begin{quote}
There is not even the proverbial iota of evidence that there was any consultation between the two in the matter, that either relied in any measure on the others in making his refusal, or that their association in refusing to eat in the tunnel was anything but accidental.
\end{quote}

\textsuperscript{115} L.R.R.M. at 1028.

\textsuperscript{154} 154 N.L.R.B. 380 (1965).

\textsuperscript{154} \textit{Id.} at 385.

\textsuperscript{154} In \textit{Meyers}, the Board quoted a portion of the administrative law judge's opinion from \textit{Traylor-Pamco}:

\begin{quote}
"As with the employees who ate their lunch together in \textit{Traylor-Pamco}, there is no evidence here that there was any concerted plan of action. . . ." 115 L.R.R.M. at 1030.
CONSTRUCTIVE CONCERTED ACTIVITY

he thought eating in the tunnel violated the collective bargaining agreement. The following day, all employees on first shift delayed the beginning of work because of the same dispute. Management officials assured Cordisco that the matter was being explored with the union. The employees then began work, although Cordisco would not eat in the sewer and, at lunch time, he and one other employee went to the dry shack. Thus, the ALJ, with Board con-currence, refused to find concert of action, even though two employees had taken exactly the same action at the same time, against a background of a union protest, a mass refusal to begin work, and concurrent union negotiations over the matter that prompted the employee action.

Similar facts existed in Meyers itself. Although Prill (the discharged employee) was ordinarily assigned to the defective truck, another employee, Gove, drove it for two weeks during Prill's absence. When Prill returned, he was present when Gove complained to management about the truck's condition and heard him say "I wasn't going to drive it no farther." Despite the fact that Prill's subsequent activity related to problems with the same truck, the Board characterized it as an individual protest. The Board said there was no evidence that Prill and Gove had "joined forces." Rather, each had acted on his own: "Taken by itself... individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action."

Both the Board's endorsement of Traylor-Pamco and its characterization of the facts in Meyers demonstrate the harshness of its new standard. With the exception of individual activity in support of a collective bargaining agreement, the theory of constructive concerted activity is dead. Meyers expressly rejected the presumption that an employee invoking statutory protection acted for the group and, likewise, repudiated the presumption that an individual's conduct is concerted when he acts "on behalf of" the group or with respect to a "matter of concern" to the group. But it did more than that—it created a more stringent standard to invoke the protection of the statute when the matter at issue is not merely presumed to be of group interest, but is, in fact, a group concern.

2. The Courts of Appeals

The rigid objective test promulgated in Meyers finds considerable support in the courts of appeals, thus making it probable that the Meyers rationale

62. Id. In fact, negotiations with the union were ongoing at the time of the discharge and subsequently produced an agreement. Id. at 388 and at 388 n.8.
63. Id. at 385-86.
64. Meyers, 115 L.R.R.M. at 1029.
65. Id. at 1030 (emphasis in the original). The Board's decision not only overrules Alleluia, but stands in contrast to Guernsey-Muskingum, discussed supra text accompanying notes 48-50,
will survive at least as long as the Reagan influence on the Board is dominant. Given the pattern of decisions among the various courts of appeals, it seems doubtful that any of them will prompt the Board to reevaluate its position. Moreover, while frustrated employees can certainly apply for Supreme Court review, the uniformity of views expressed by the courts of appeals makes Supreme Court action unlikely.

Although a few courts of appeals had given limited endorsement to the theory of constructive concerted activity when an individual sought to enforce a collective bargaining agreement (an interpretation now approved by the Supreme Court in City Disposal), most had not, and all had rejected Alleluia and its progeny. The only consistent exceptions for individual, as opposed to group, conduct involved activity that looked to or sought to incite group action and situations in which one employee had been authorized to act on behalf of others. Even though the courts of appeals unanimously agree that actual concerted action is essential to claim the protection of section 7, they

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66. As of this writing, three of the four members on the Board (Chairman Dotson and Members Hunter and Dennis) were appointed by President Reagan. They formed the majority in Meyers. Member Zimmerman, appointed by President Carter, dissented. One seat on the Board is vacant.

67. See, e.g., NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967) (protecting as concerted activity an individual's attempt to enforce a collective bargaining agreement, popularly known as the "Interboro doctrine"); NLRB v. Ben Pekin Corp., 452 F.2d 205 (7th Cir. 1971) (per curiam). See also Roadway Express, Inc. v. NLRB, 532 F.2d 751 (4th Cir. 1976), in which the court enforced, without opinion, an NLRB decision (217 N.L.R.B. 278 (1975)) premised on Interboro. But see Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980), where the Court said that the lack of a collective bargaining agreement in the case made it "unnecessary . . . to determine whether Interboro is to be applied in this circuit. . . ." Id. at 309.

68. See, e.g., NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977 (9th Cir. 1973); ARO, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979); NLRB v. Buddies Supermarkets, 481 F.2d 714 (5th Cir. 1973); Northern Metal Co., 440 F.2d 881 (3d Cir. 1971).

69. See, e.g., NLRB v. Bighorn Beverage, 614 F.2d 1238 (9th Cir. 1980); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980); Jim Causley Pontiac v. NLRB, 620 F.2d 122 (6th Cir. 1980); Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980); Ontario Knife Co. v. NLRB, 637 F.2d 840 (2d Cir. 1980); NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977). Even before Alleluia, courts of appeals had insisted on actual, as opposed to constructive, concerted activity. See, e.g., Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967); Mushroom Transp. Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964).

70. See, e.g., Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967), where the court stated that, "in order to prove a concerted activity under Section 7 of the Act, 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." Id. at 276. See also Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357 (4th Cir. 1969): "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." Id. at 1365.

71. See, e.g., ARO, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1348, 1355 (3d Cir. 1969); Pacific Electricord Co. v. NLRB, 361 F.2d 310 (9th Cir. 1966) (per curiam). The requirement that an employee act with "or on the authority of" other employees has been adopted as the objective test in Meyers. Meyers Industries, 268 N.L.R.B. No. 73 (Jan. 6, 1984), 115 L.R.R.M. (BNA) 1025, 1029 (1984).
have seldom addressed the policy implications of their decisions. Instead, they have been content with the obvious omission of individual conduct from the protected activities enumerated in section 7. Since the courts of appeals' views have been detailed elsewhere, a few examples are sufficient to illustrate the range of opinion.

In *Krispy Kreme Doughnut Corp. v. NLRB,* the Fourth Circuit refused to enforce a Board finding, under an *Alleluia* statutory enforcement theory, that an employer violated section 8(a)(1) when it discharged an employee for filing numerous spurious workmen's compensation claims. The court started its analysis by noting that "concerted activity," if interpreted literally "would appear to require more than a single participant." The court rejected the *Alleluia* rationale as imposing "an irrebuttable presumption" of concert. Instead, the court embraced the test promulgated by the Third Circuit in its opinion in *Mushroom Transportation Co. v. NLRB:*

> It is not questioned that a conversation may constitute a concerted activity although it involved 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.

In neither *Krispy Kreme* nor *Mushroom Transportation,* however, did the courts discuss the policy reasons for their literal construction of the statute. That is, both opinions start with the assumption that the statute, read literally, protects only activity undertaken by at least two employees. Neither examined whether protection of individual conduct could advance the policy of the National Labor Relations Act. In fact, *Krispy Kreme* characterized the existence of actual concert as a "jurisdictional requirement" for Board action.

In its review of the Board's decision in *Ontario Knife,* the Second Circuit made a cursory attempt at explaining its insistence that activity must be literally concerted in order to be protected, a requirement it found lacking in the case before it. The court briefly reviewed the origin of the concerted activity

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72. For an excellent, and detailed, discussion of judicial action in concerted activity cases, see Gorman & Finkin, supra note 4, at 310-28.
73. 635 F.2d 304 (4th Cir. 1980).
74. Id. at 306.
75. Id. at 309. The court noted the Board's argument that the *Alleluia* presumption (i.e., that employees are presumed to support action taken in the common interest, absent employer evidence to the contrary) "had the effect of merely shifting the burden of proof." *Id.* The court said that the Board had conceded in its brief that it had never "suggested 'the precise manner whereby an employer might obtain evidence to rebut the presumption.'" *Id.*
76. 330 F.2d 683 (3d Cir. 1964).
77. Id. at 685.
78. Both opinions concede that individuals acting as such enjoy some protection, but only when their conduct was for the purpose of inducing group action. *See Krispy Kreme, 635 F.2d* at 307; *Mushroom Transp., 330 F.2d* at 685.
79. *Krispy Kreme, 635 F.2d* at 310.
80. *Ontario Knife Co. v. NLRB, 637 F.2d* 840 (2d Cir. 1980).
language in section 7 and concluded that "courts should adhere rather closely to the statutory language." Apparent its conclusion is premised on its finding that, in drafting the concerted activity language, "Congress scarcely had ... in mind" the protection available to individual employees. This conclusion, of course, fails to address Gorman and Finkin's argument that Congress was only interested in expanding the rights of employees. Stated differently, Congress might not have had the interests of individuals "in mind" because there was no significant question concerning their rights.

The rigidity with which courts have insisted on actual concerted conduct is demonstrated not only by Ontario Knife, where the court might easily have found the single employee's walkout resulting from a group concern to be concerted, but also by the Seventh Circuit's decision in Indiana Gear Works v. NLRB. There, an employee (Packard), upset with the meagerness of a general wage increase, ridiculed the company's action (and its president) by posting cartoons found by the ALJ to be "insulting, sarcastic and malicious." There was evidence that at least two other employees had suggested captions for Packard's cartoons, that at least one other employee had posted a similar cartoon, and that such cartoon posting was a common form of communication among the employees. Although the court might have found the activity concerted but unprotected, it chose to characterize the protest as mere individual conduct. The court noted the lack of any evidence that "Packard had prepared and posted the cartoons for the purpose of inducing or preparing for any group action by the employees." Inexplicably, the court simply dismissed the "casual assistance" offered by the other employees by saying

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81. Id. at 843.
82. The court noted that the concerted activity language of section 7 came from section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102 (1982)—legislation intended "to curtail injunctions ... against what everyone would recognize as organized activity." Ontario Knife, 637 F.2d at 843.
83. 371 F.2d 273 (7th Cir. 1967).
84. Id. at 275.
85. In its opinion the NLRB stated:

While the evidence shows that Packard was perhaps the leading spirit in the preparation and posting of the cartoons, the evidence also establishes that the cartoons did not represent a single individual's effort, that Packard was not the only employee so engaged, that a number of the employees in the gear department suggested captions for the cartoons and offered Packard other newspaper pictures with captions, and that other employees hung similar cartoons on the lampshade.

Indiana Gear Works, 156 N.L.R.B. 397, 398 (1965). The Board also found that cartoon posting "was not an uncommon form of communication among the employees," id., and that the employer was aware of the practice. Id. at 398 n.2.

The court referred to the assistance and the practice only briefly. Indiana Gear Works, 371 F.2d at 276.

86. Although section 7 protects employees who engage in concerted activity, not all such conduct enjoys the protection of the law. See generally, R. Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining 302-25 (1976). See also infra text accompanying notes 161-65.
87. Indiana Gear Works, 371 F.2d at 276.
that "by no stretch of interpretation [can it] be held to be concerted activity under the Act." 8 One's imagination should not have to stretch far to conclude that the employees who offered assistance to Packard were acting in concert with him.

Gorman and Finkin correctly assert that on numerous occasions the courts of appeals have failed to articulate any policy arguments for protecting group as opposed to individual conduct, but have been satisfied with a dictionary definition of "concerted." As is discussed later, 9 however, the courts' failings do not mean that the history of the Act is devoid of policy supporting the focus on collective activity. Collective bargaining was the means adopted by Congress to loosen the employer's stranglehold on the lives of employees. Not only collective bargaining, but activity likely to lead to that end is also protected. There is no warrant for expanding the statutory language to embrace individual conduct unrelated to the welfare of the group as Gorman and Finkin have proposed. The Board and the courts, however, also subvert the Act's policy by focusing narrowly on the number of employees involved in a protest instead of on the movement it represents.

B. The Supreme Court Case

The part of the constructive concerted activity theory reserved by the Board in Meyers was resolved by the Supreme Court in City Disposal. Interestingly, the two cases are quite close factually, with only one significant, although determinative, difference. As in Meyers, the employee whose rights were at issue in City Disposal (Brown) was a truck driver. Also, as in Meyers, Brown's discharge resulted from his refusal to drive a truck that he believed had defective brakes. 90 Unlike the employee in Meyers, however, Brown and his co-workers were represented by a union that had negotiated a collective bargaining agreement with Brown's employer. One provision of that contract said that the employer was not to require employees to drive unsafe vehicles and that employees who refused to operate such equipment committed no contract violation "unless such refusal is unjustified." 91 The Court accepted

8. Id. at 277. In light of the Board findings reported supra note 85, the court's characterization of the concerted activity as "casual" appears indefensible. In addition, the Board referred to testimony of other employees detailing their action in either posting cartoons or lending assistance to Packard. Indiana Gear Works, 156 N.L.R.B. at 398 nn.3-4.
9. See infra notes 119-24 and accompanying text.
91. The clause in question was contained in a contract between the employer and Local 247 of the Teamsters Union:

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

Id. at 1507-08. Similar language has been at issue in other concerted activity cases. See, e.g., Kohls v. NLRB, 629 F.2d 173, 175 n.8 (D.C. Cir. 1980) (refusal to drive truck not concerted).
the NLRB's conclusion that Brown "honestly and reasonably believed" that the truck was unsafe.\textsuperscript{92} Despite that belief, the union declined to process Brown's contractual grievance, finding that it had "no objective merit."\textsuperscript{93} Brown then took his case to the NLRB, which adopted the ALJ's finding that Brown's conduct was protected concerted activity and that his discharge on account of his protest, therefore, violated section 8(a)(1).\textsuperscript{94}

The ALJ's conclusion was based on the so-called Interboro doctrine, named after the Second Circuit's decision in \textit{NLRB v. Interboro Contractors, Inc.}\textsuperscript{95} As the Court noted in \textit{City Disposal}, the Board has used two theories to justify its conclusion that an employee who invokes rights under a collective bargaining agreement is engaged in concerted activity: (1) that the employee's action is an extension of the concerted activity that gave rise to the labor contract; and (2) that the employee's action affects the rights of, and is in the interest of, all the employees in the bargaining unit.\textsuperscript{96}

Because of the Board's rules for the establishment of bargaining units, the similarity between the second justification for Interboro and the line of cases overruled in \textit{Meyers} is clear. Under those cases, the Board's theory had been that an employee's activity is concerted if it is in the interest of other, presumably similarly situated, employees. The employee's action in an Interboro case also redounds to the benefit of similarly situated employees since unit determination rules require a finding that employees within a bargaining unit share a community of interest.\textsuperscript{97} The distinction would appear to be that in the Alleluia line of cases, the employee acted on matters that could only be presumed to be of interest to the other employees, while in Interboro the agreement itself made the presumption irrebuttable. That is, the agreement furnished evidence that all employees in the unit shared the same concern.\textsuperscript{98}

\textsuperscript{92} \textit{City Disposal}, 104 S. Ct. at 1507.
\textsuperscript{93} \textit{Id.} at 1509.
\textsuperscript{94} \textit{City Disposal Systems}, 256 N.L.R.B. 451 (1981). The court of appeals denied enforcement of the NLRB's order, finding that Brown's refusal to drive the truck was an action taken solely on his own behalf and thus was not a concerted activity within the meaning of section 7. 683 F.2d 1005 (6th Cir. 1982), rev'd, 104 S. Ct. 1505 (1984).
\textsuperscript{95} 388 F.2d 495 (2d Cir. 1967), enforcing 157 N.L.R.B. 1295 (1966).
\textsuperscript{96} \textit{City Disposal}, 104 S. Ct. at 1510.
\textsuperscript{97} An analysis of NLRB unit determination procedures is beyond the scope of this article. Briefly, section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1982), provides that the representative selected by employees "in a unit appropriate for [collective bargaining]" is the exclusive representative. Section 9(b), 29 U.S.C. § 159(b), provides, in part:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . .

The Board has developed unit determination criteria to fulfill this statutory change, aimed principally at insuring a community of interest, or cohesiveness, among the unit. For a fuller discussion, see generally, R. Gorman, supra note 86, at 66-92.
\textsuperscript{98} The strength of this analysis is undermined somewhat, however, by NLRB decisions saying that even meritless contractual claims are concerted activity entitled to the protection of section 7. See, e.g., T & T Indus., Inc., 235 N.L.R.B. 517 (1978). The rationale would appear
Although the Supreme Court alluded to the Board’s dual justification for the Interboro doctrine, it based its affirmance of the doctrine primarily on the extension of concerted activity theory. The Court started by stating the obvious: concerted activity encompasses the “activities of employees who have joined together in order to achieve common goals.” It acknowledged, however, that the question before it was the “precise manner” in which individual employee action “must be linked to the actions of fellow employees” in order to satisfy the statutory requirement of concerted activity. The Court observed that even section 7 did not require a literal, or dictionary, definition of “concerted.” Thus, joining or assisting a labor organization is concerted activity within the statute, even though a single employee can engage in that conduct. Moreover, most courts of appeals have acknowledged that some type of individual conduct is protected by section 7. The problem, then, was simply one of “differing views regarding the nature of the relationship that must exist between the action of the individual employee and the action of the group.” In Interboro, the group action was the negotiation of the contract which the employee, through individual action, tried to implement.

Since an employee could not invoke a contractual right without the concerted activity of the contract negotiation, the Court viewed an individual’s claim based on the contract as “an integral part of the process that gave rise to the agreement.” An employee, then, who invokes a contractual right “does not stand alone,” but, through his assertion, reminds the employer that collective action “had extracted a promise” from the employer and, if need be, the individual could “reharness the power of the group” to ensure enforcement. Treating the individual complaint as a symbolic “reassembling” of the group, Justice Brennan said the employee’s action was concerted “in a very real sense.” Presumably, the “very real sense” distinguishes the Interboro doctrine from constructive concerted activity cases like Alleluia where a common employee interest was not “real” but was merely inferred.

Although the Court did no go as far as Gorman and Finkin had urged, it did rely on their view of the history of section 7, and of the Act generally, to conclude that protection of individual conduct in the Interboro situation was consistent with the policies of the Act. What Congress sought, said

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99. City Disposal, 104 S. Ct. at 1511.
100. Id.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id. at 1511-12.
106. Id. at 1513. The Court cited Gorman & Finkin, supra note 4, for the origin of the word “concert” in labor legislation. It traced the term from section 20 of the 1914 Clayton Act (29 U.S.C. § 52 (1982)), through section 4 of the 1932 Norris-LaGuardia Act (29 U.S.C. § 104),
the Court, was to equalize the bargaining power between employers and employees by expressly protecting concerted action of the employees. Since enforcement of the collective bargaining agreement is an integral part of the collective bargaining process, protecting individual employees who invoke contractual rights "mitigates that inequality . . . and is, therefore, fully consistent with congressional intent."107

In an apparent stab at the Board's other justification for Interboro—that individual enforcement benefits the other employees in the unit—the Court noted that protecting the individual "preserves the integrity of the entire collective bargaining process" since the individual employee makes a contractually based right a "reality" and thereby "breathes life" not only into the agreement, but into the entire collective bargaining process.108 Employee Brown's refusal to drive a garbage truck, then, not only protected his own well-being, but simultaneously resuscitated the entire system of collective bargaining.

II. AN ANALYSIS OF CONCERTED ACTIVITY

The article by Gorman and Finkin and the recent opinions of the NLRB and the Supreme Court are representative of the spectrum of opinion on concerted activity. At the one extreme is Meyers, which adopts a rigid group activity requirement in order to claim statutory protection; at the other extreme is Gorman and Finkin who would protect individual activity taken for individual goals. Somewhere in the middle is City Disposal which adopts at least part of the Board-created fiction of constructive concerted activity. None of these positions is a justifiable reading of the statute. The Meyers opinion is much too narrow, Gorman and Finkin's interpretation ignores the overriding purpose of the NLRA, and the City Disposal opinion is an unwarranted attempt to interpose the NLRB as an agency of contract enforcement. A better reading of the statute would liberally construe the "concerted activity" terminology of section 7, but would protect individual employee conduct only when related to the actual concerns of a group. Individual activity for individual purposes should not be protected. Nor should individual activity that seeks to enforce the terms of a collective bargaining agreement be protected unless the enforcement effort uses the contractual procedure. Although the Board's opinion in Meyers marks a radical departure from its previous cases, some of those cases (albeit not Alleluia) represented an interpretation more in line with the purposes and policies of the NLRA than the views espoused by Gorman and Finkin, Meyers, or City Disposal. A more detailed analysis of each interpretation will aptly demonstrate the point.


107. City Disposal, 104 S. Ct. at 1513.
108. Id.
A. Gorman and Finkin's Interpretation

1. Historical and Statutory Arguments

Gorman and Finkin’s thesis that section 7 protects individual activity for individual purposes as well as concerted activity for mutual purposes is premised on both an historical analysis of the origin of the phrase “concerted activity for mutual aid and protection” and a review of the social and political framework from which it came. The concerted activity language first appeared in the policy statement of the Norris-LaGuardia Act—legislation that did not affirmatively protect employee efforts to organize and bargain collectively, but that did prohibit the federal courts from enjoining those activities.\(^{109}\) Subsequently, the language was carried over into section 7(a) of the National Industrial Recovery Act\(^{110}\) and was ultimately adopted as a protected right in section 7 of the 1935 Wagner Act.\(^{111}\) In reviewing the gestation of the

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109. The article by Gorman & Finkin, supra note 4, contains an excellent discussion of the history of the Norris-LaGuardia Act, including the decision to limit its focus to procedural, not substantive, reform. \(\text{Id. at } 332-337.\) The Act limits the ability of the federal court to issue injunctions in labor disputes. Section 1 (29 U.S.C. § 101 (1982)) provides, in part:
   
   No court of the United States . . . shall have jurisdiction to issue any restraining order or . . . injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter.

   The legislation was necessary to stop federal courts from interfering with employee organizational efforts by enjoining strikes and other union activity. See, e.g., \(H. \text{Mills & R. Montgomery, Organized Labor 629-51 (1945)}\) and \(F. \text{Frankfurter & N. Greene, The Labor Injunction (1930)}.\)

   Although the focus of the Act is procedural, the policy statement in section 2 (U.S.C. 29 § 102) broadly endorses the right of employees to engage in collective activity:

   Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize 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; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. (emphasis added).

   In addition, section 4 (29 U.S.C. § 104) lists the specific acts that may not be enjoined whether engaged in “singly or in concert.” See also section 5 (29 U.S.C. § 105).

   110. Ch. 90, § 7, 48 Stat. 195, 196 (1933). The legislation required industries to adopt codes of fair competition and required, in section 7(a), that the codes immunize employees from employer coercion in self-organization “or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The quoted language was taken verbatim from section 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102. The National Industrial Recovery Act was found unconstitutional in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

   111. See supra note 2.
concerted activity language, Gorman and Finkin note that under Norris-LaGuardia, Congress simply extended to groups, rights of action already enjoyed by individuals. They then argue that the NLRA was intended to protect from private sanction the same activity that the Norris-LaGuardia Act protected against governmental sanction. Moreover, even though the NLRA focuses principally on collective bargaining, “there is not the slightest hint in the history of the NLRA that in attempting to expand the protection that the law would give to group activity to secure benefits or improvements, Congress contemplated a less favored status for individual activity having the same objective.”

In addition, Gorman and Finkin buttressed their conclusion by arguing that the NLRA was intended to foster “industrial democracy,” a key feature of which was securing to the individual employee the right to present grievances to his employer. The purpose of the Act, then, was not merely to foster collective bargaining, but “to ensure the liberty and dignity of the individual working person.”

Gorman and Finkin’s use of labor and political history is impressive and their policy arguments seem compelling. Congress might well have chosen to temper the disparity in bargaining power between employer and employee by securing rights for individuals to act in their own behalf. The question is whether that was, in fact, the path chosen in the NLRA. Granted, the mere words of a statute do not always reveal congressional intent. Nonetheless, the fact that a convincing argument can be advanced in favor of broadening statutory coverage does not compel the conclusion that that is what Congress has done. Congress might have legislated protection for the individual employee. But it might also have decided that equalization of bargaining power could better be effected by protecting only that group activity explicitly mentioned in the statute.

112. “The assumption of the Act was not that action which should be protected when engaged in by a group should be left unprotected when engaged in by the individual, but that lawful individual action should not become unlawful when engaged in collectively.” Gorman & Finkin, supra note 4, at 336 (emphasis in the original).

113. Id. at 338.

114. Id. at 344. After viewing the political and social history of the time, id. at 338-46, Gorman and Finkin conclude:

[T]he history of the language of section 7 and an examination of the policy it was designed to effect suggest a far more expansive reading [than the literal interpretation of the courts and the Board]—one that encompasses the individual’s right to complain and to act in his own self-interest.

Id. at 344.

115. Whether we search for actual legislative purpose or actual legislative intent, we can infer it only from external materials.

Because the reliable indicia of any purpose are more likely to be found beyond the mere words of the statute, the temptation to scavenge among the materials of legislative history is at least as great as it is for legislative intent.

R. Dickerson, The Interpretation and Application of Statutes 92 (1975). The same author includes a caution that seems appropriate in this area:
CONSTRUCTIVE CONCERTED ACTIVITY

The legislative history marshalled by Gorman and Finkin does indicate an intention to remove the disparity in bargaining power between the employer and the employee, but it does not necessarily justify the conclusion that individual conduct for individual purposes was to be protected. As noted, Gorman and Finkin argue that the Norris-LaGuardia Act was intended to legalize, for groups, activity that was already lawful for individuals. In short, they argue that the focus of the Norris-LaGuardia Act and, later, of the NLRA, was only on group activity because there was no serious question about the right of individual workers to act in their own behalf. That conclusion seems appropriate for the Norris-LaGuardia Act. Before 1932, individual protests were lawful in the sense of not being criminal or subject to court injunction. The legislation extended that immunity to group conduct. Clearly, it was not necessary for Norris-LaGuardia to address individual activity since the rights of individuals were not in question.

That argument, however, cannot simply be reapplied in conclusory fashion to the NLRA, where the focus was much different. It may have been unnecessary for the Norris-LaGuardia Act to expressly legalize individual conduct already recognized as "lawful," but the issue under the NLRA is whether an individual's conduct is protected, not whether it is "lawful." Confronted with a common law that allowed employers to retaliate freely against employees for virtually any reason (or for no reason at all), Congress

As with legislative intent, the danger in presuming an actual legislative purpose beyond what is expressly or impliedly revealed is that the interpreter will either attribute to the statute a purpose of his own contriving or search for actual purpose so relentlessly that he goes beyond the limits of the appropriate available evidence.

Id.

116. The focus in injunction cases was concerted activity that might lead to unionization. The injunctions were ordinarily issued under tort law theories. See, e.g., Vegelahn v. Guntern, 167 Mass. 92, 44 N.E. 1077 (1896). The same activities by individuals were, however, as one commentator has said, "perfectly lawful." R. Gorman, supra note 86, at 2.

117. Although section 7 protects concerted activity, some lawful activity that clearly meets any definition of "concerted" is, nonetheless, not protected. See, e.g., NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953). See also infra text accompanying notes 161-65.

118. Detailed discussion of the so-called "employment-at-will" doctrine is beyond the scope of this article. In brief, the doctrine allows employers to discharge employees "for a good reason, a poor reason or no reason at all" absent a contract or some statutory prohibition (like the NLRA's prohibition of discharge in retaliation for concerted activity). See, e.g., Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86, 90 (3d Cir. 1943). Traditionally, judicial interpretation of the doctrine has been harsh. For example, one court held that a contract guaranteeing "permanent employment" created only an "at-will" relationship. See Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967).

The employment-at-will doctrine has provided an enormous literature of late, and there is some reason to suspect some erosion of its traditional application. See, e.g., 16 U. Micr. J. L. REV. (Winter 1983) (entire issue); Note, Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816 (1980).

Any loosening of the at-will doctrine, however, has been accomplished under state law theories. The NLRA does not require that employers have proper cause for discharge or discipline. It merely protects employees from employer retaliation for union or other concerted activity. See Edward G. Budd Mfg. 138 F.2d at 91.
explicitly protected certain forms of group, as opposed to individual, conduct. Unlike the Norris-LaGuardia Act, where individual rights were not at issue and which dealt only with group rights, any protection against employer retaliation was at issue in 1935, and if protection for individuals exists, it must spring from the NLRA itself. Individual employees had the "right" to complain to their employers prior to the NLRA. No provision of the law made such action illegal. Nor was it illegal, however, for the employers to retaliate for the complaint. Individual action was immunized against governmental sanction, but not against private retribution. In passing the NLRA, Congress for the first time created rights against private employers by protecting concerted activity for "mutual aid or protection" from retaliation. The inference is strong that only the conduct expressly mentioned enjoyed that new protection. Neither the wording of the statute nor the legislative history discloses a congressional intention to protect individual conduct for individual gain.\footnote{The legislative history of the Act does not reveal an intention to protect individual as well as group activity. See NLRB, Legislative History of the National Labor Relations Act, 1935 (1949) [hereinafter cited as NLRA Legislative History]. Although Gorman and Finkin cite testimony supporting the principle of industrial democracy, see, e.g., Gorman & Finkin, supra note 4, at 343, neither the language used by Congress, nor the congressional reports support the argument that section 7 protects individual conduct for individual gain. To the contrary, the reports stress collective bargaining. See, e.g., S. Rep. No. 573, 74th Cong., 1st Sess. 2 (1935), reprinted in 2 NLRA Legislative History, supra, at 2301: "It is thus believed feasible to remove the provocation to a large proportion of the bitterest industrial outbreaks by giving definite legal status to the procedure of collective bargaining. . . ." See also id. at 8: "These sections [7 and 8] are designed to establish and protect the basic rights incidental to the practice of collective bargaining." See also H.R. Rep. No. 1147, 74th Cong., 1st Sess. 16 (1935), reprinted in NLRA Legislative History, supra at 3065: "[T]he bill seeks to redress an inequality of bargaining powers by forbidding employers to interfere with the development of employee organization, thereby removing one of the issues most provocative of industrial strife and bringing about a general acceptance of the orderly procedure of collective bargaining. . . ."}

The statute and the legislative history do disclose an intention to equalize bargaining power between employer and employee.\footnote{Section 1 of the NLRA, 29 U.S.C. § 151 (1982), provides in part: The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife. . . . Experience has proved that protection by the law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . . It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.}
the status and position of the individual worker was no doubt part of that goal. That does not mean, however, that Congress chose to accomplish the goal by protecting employees who strike out on their own, seeking to serve only their own ends. Despite Gorman and Finkin’s suggestion to the contrary, there is nothing anomalous about securing individual liberty through group action. The focus of the National Labor Relations Act is collective bargaining, although, as NLRB v. Washington Aluminum Co. teaches, other forms of group activity are protected as well. Congress might well have decided that given the great disparity between employer and employee power, the status of individuals could be enhanced only through the force of the group. Collective bargaining itself represents an instance when some individual interests and freedoms are sacrificed for group concerns. However, the group is made up of individuals. Concessions which group power extracts from the employer inure to individual employees. By protecting only concerted activity, Congress may well have decided that only by group action could the plight of working people be improved. Individual employees acting solely in their own interest were not likely to secure concessions from employers or otherwise nullify the employer’s significant bargaining advantage.

2. An Anomaly?

In addition to their historical and statutory arguments, much of Gorman and Finkin’s thesis is premised on the “extraordinary anomaly” of protecting two employees who refuse to work or otherwise protest employer action while leaving exposed a single employee who takes exactly the same action on his own behalf. Gorman and Finkin argue that the focus on the number of employees involved in a protest, or on the number who would be benefitted by it, creates an artificial distinction between protected and unprotected conduct and “trivializes the significant public policy underlying statutory protection.”

The word “some” modifying “employer” was added by the Taft-Hartley Amendments of 1947, ch. 120, 61 Stat. 136. Otherwise, all the quoted material was enacted in 1935. See sources quoted supra note 119 for the legislative material. 121. See sources cited supra notes 119-20.
123. In Washington Aluminum, the Supreme court held a walkout by nonunion employees to protest working conditions (cold temperatures in the workplace) to be protected concerted activity. Id. at 17.
124. Under the principle of exclusive representation created by section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1982), the union has the power to bind all employees in the bargaining unit to the collective agreement negotiated with the employer. Stated differently, employees are entitled to the benefits negotiated through the strength of the group, whether or not they belong to the union. See J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).
125. Gorman and Finkin, supra note 4, at 329. The authors also refer to the anomaly in other parts of the article. See, e.g., id. at 345 n.220, 347, 348, and 357.
126. Id. at 348.
On the surface, that argument seems convincing. Why, indeed, would Congress ignore an individual protest made in one's own self-interest, yet protect it if but one more employee will join in? Although this question may point out a significant gap in the statute's coverage, it does not compel the conclusion that individual, as opposed to group, conduct is protected by section 7.

As noted above, the focus of the NLRA is collective bargaining. While it also protects other group activity undertaken "for mutual aid or protection," it seems clear that Congress perceived collective bargaining as the principal means of achieving democracy within the workplace. The real anomaly, then, is not failing to protect individuals who act solely in their own interests, but is using legislation devoted almost entirely to the advancement of collective bargaining to protect selfish, individual conduct which could, in fact, lead to the destruction of the group. Gorman and Finkin's constant focus on the rights of two employees over those of an individual displays the obvious weakness of a statute that protects only group activity. Yet, that persistent focus distorts the concept of concerted activity. The hope held out by the NLRA is not that two or three employees will lodge feeble protests against their employers. While that conduct would be protected, it is unlikely to provide significant employee power or to hold out any realistic prospect of improvements in working conditions. Rather, the hope held forth by the NLRA is that the majority of employees will combine their forces to meet the employer on a more equal footing. Only that kind of group activity offers any real likelihood of change. Two or three employees acting together are protected, not only because such conduct is "concerted," but more importantly, because the protest of a handful—representing at least the concerns of that small group—might grow in numbers and strength. For the same reason, as is developed later, the protest of even a single employee over a matter of common employee concern deserves the protection of the Act. But the isolated grumblings of an individual employee, divorced from the concern of his co-workers, offer little opportunity for group action and fall outside the protection of the Act.

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127. See *infra* notes 131-155 and accompanying text.

128. Gorman and Finkin also argue that such anomalies distort the focus of the Act, which they say "is to ensure the liberty and dignity of the individual working person," and that "at the core of the freedom of the individual to protest in a group necessarily lies the freedom of the individual to protest at all." Gorman & Finkin, *supra* note 4, at 344. As noted, however, the "liberty and dignity" of individuals promised by the Act is to be achieved through the power of collective action. Moreover, while individuals should have the right to complain about matters of group concerns, selfish individual protests are themselves anomalous under legislation designed to enhance collective strength.
B. Meyers Industries

1. The Problem With the "Objective" Theory

Although Gorman and Finkin's charitable interpretation of section 7 seems unwarranted under the policy of the NLRA, it is far less troubling than the "objective" theory promulgated in Meyers. That is not to say that the rationale of Alleluia was supportable. However, Meyers is an overreaction to the problems created by that case.

Several responses to the fiction of constructive concerted activity were possible. The Board could have retained the theory or it could have discarded the concerted means test altogether, a path that Alleluia itself treaded perilously. As a practical matter, it seemed unlikely that the Board, and particularly the courts of appeals, would discard thirty-nine years of decisions that diligently (though not always righteously) maintained the distinction. Moreover, despite Gorman and Finkin's efforts, neither the statute nor its history supports such a move. The response actually adopted by the Board not only overrules Alleluia and discards the theory of constructive concerted activity (except as preserved in City Disposal), but also renders unlikely the protection of any individual conduct.

The problem with Meyers is, in some sense, the same as the problem with Gorman and Finkin's interpretation: each pushes too far. Thus, at one extreme, Gorman and Finkin would protect individual conduct even for selfish, individual purposes; at the other extreme, Meyers ignores individual protests, even if made concerning a matter of group concern. Certainly, Alleluia and its progeny had overstepped the bounds of the statute. The vice of Alleluia was not the Board's attempt to protect individual employees, but its position that an individual's claim based on a statute (and later a claim based on a matter of common concern) was presumptively concerted activity. There is a grain of truth in the Board's recent declaration that, under Alleluia, the Board protected activity that it thought ought to have been a group concern simply because "the purpose of the activity was one it wished to protect."

Although a concerted means test should not be applied so rigidly as to ignore all individual activity, individual action taken without any indication of support from other employees, or even interest among other employees, is simply not "concerted.” More important than the definition of concerted, however, is that such individual conduct taken solely for individual gain cannot lay claim to any protection under the policy of the Act.

As noted earlier, the Act fosters collective bargaining as the principal means of achieving industrial equality. Other group activity deserves protection prin-

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incipially because it might yield an employee effort of sufficient force to either compel collective bargaining or some other effective concerted employee action.\textsuperscript{130} Individual conduct solely for individual gain is unlikely to result in any significant threat to employer dominance of the workplace. Even though Alleluia's presumption of group support was flawed, however, that does not mean that its legacy should be rejected completely

2. The Better Interpretation

The concerted activity language in section 7 should not be read so rigidly as to impose an actual numbers requirement. Congress chose to protect concerted activity, not as a way of singling out individual employees for discrimination, but in order to nurture collective bargaining. Both group activity and individual conduct that either solidifies a group or is likely to lead to group activity should be eligible for protection. The crucial inquiry, then, ought not to be merely the number of employees who act; on that point, Gorman and Finkin are surely correct. Instead, the focus should be the likelihood that the action taken represents a group concern. It is one thing to hold that an individual's complaint on his own behalf falls outside the protection of the Act; it is quite another to reach the same conclusion when the individual's protest is lodged against a background of similar complaints by other employees. Yet the Board's single-minded emphasis on numbers rather than on labor policy would deny protection when one employee acts on a matter that is, in fact, of concern to the group.

In Meyers, for example, the discharged employee's protest represented not only his own concern, but also that of at least one other member of the bargaining unit. Similarly, in Traylor-Pamco, which the Board used as an example of mere individual activity in its Meyers opinion, two employees simultaneously protested a matter that had already been made known as a concern of an even larger group. In both cases, the concurrent concern of more than one employee should have been sufficient evidence of "concert" to fall within the policy of section 7. Nothing is gained by forcing employees to virtually hold hands and speak simultaneously in order to claim statutory protection. Rather, consistent with the Act's emphasis on fostering group activity as a way of countering employer power, individual protests should qualify for section 7 protection if they, in fact rather than in fiction, represent a matter of concern to the group.

Seen in that light, much of the criticism of prior Board decisions in Meyers is unwarranted. Granted, the fictitious group interest of Alleluia and its progeny was unconvincing. Moreover, the Board is certainly subject to criticism for

\textsuperscript{130} See, e.g., supra note 123.
inconsistency in some of its decisions. At least some of that criticism, however, misses the point. In Ontario Knife and Steere Dairy, for example, the individual protests deserved protection because they manifested and grew out of a group concern over employment decisions. Although Capitol Ornamental Concrete Specialties, Inc., where an employee's discharge for complaining about the condition of the parking lot access road was upheld, has been criticized as inconsistent with the fictitious group concern theory propounded in Alleluia, it is distinguishable from Steere Dairy and Ontario Knife. There was no evidence in Capitol that any other employee had ever given the matter any thought. In Ontario Knife and Steere Dairy, on the

131. See, e.g., Gorman & Finkin, supra note 4, at 297-99. One of the cases cited by the authors is inconsistent even as to its treatment of the same protest. In Auto-Truck Federal Credit Union, 232 N.L.R.B 1024 (1977), an employee complained to management about the discharge of a co-worker, and her own salary. The Board upheld the ALJ's conclusion that the complaint was not concerted as to the discharge (because she only complained about her salary) but was concerted as to the discharge (because "there is nothing of more moment" to employees than discharge). Id. at 1028. Presumably money, too, would be a matter of common concern, particularly since the discharged employee (who was the subject of the complaint) had complained about her salary as well. See id. at 1026.


133. See, e.g., Gorman & Finkin, supra note 4, at 299 n.39.

134. The Board said:
Thus, on the record before us, there is no evidence that Jimenez [the discharged employee] acted in concert with any other employee; nor is there evidence or reason to infer that his complaint touched a matter of common concern. Indeed, the record does not indicate that any other employee considered the condition of the road important enough to complain about, or even that employees had discussed the matter among themselves.

Capitol, 248 N.L.R.B. at 851.

Similarly, in Maietta Trucking Co., 194 N.L.R.B. 794 (1971), an employee's discharge resulted from his individual inquiry about a pay raise. The trial examiner found no credible evidence that the employee had been designated by his co-workers to speak, or that they otherwise shared his concern. Id. at 795.

Approval of the Board's action in Capitol should not be taken to mean, however, that criticism of its decisions for inconsistency is unwarranted. In Continental Mfg. Corp., 155 N.L.R.B. 255 (1965), two employees agreed to monitor restroom usage after a superior had rebuked the female employees for its unsanitary condition. The supervisor later warned the two employees against spying on the other workers. Id. at 256. Later, one of the employees, Ramirez, gave the owner a letter complaining about working conditions including the restroom reprimand. The letter asserted that the majority of the employees were "disgusted" with their treatment. Id. at 261. Ramirez was discharged for writing the letter. The Board, disagreeing with its trial examiner, found that the discharge did not violate section 8(a)(1). Id. at 258. It noted that Ramirez had acted alone, had not consulted either with other employees or the union, and said there was no evidence that the content of the letter reflected the views of other employees. Id. at 257.

The Board's decision is clearly contrary to the rationale reported ten years later in Alleluia, but which had already surfaced in 1959 in Guernsey-Muskingum Coop., Inc., 124 N.L.R.B. 618 (1959), enforced, 285 F.2d 8 (6th Cir. 1960) (individual complaints concerted because "of moment to the group"). Since the employees had been locked out of their restroom for a time, 155 N.L.R.B. at 256, one might assume that the supervisor's action was "of moment to the group" and that Ramirez' complaint was on behalf of the other employees, as well as herself. Moreover, the agreement between Ramirez and one other employee to monitor restroom usage, as well as their observation of the restroom, was clearly concerted activity. Curiously, the Board found that the letter was not simply an extension of the "spying" since the letter principally
other hand, as well as in *Meyers* and *Traylor-Pamco*, other employees had complained about the very same subjects that prompted the protests. Consistent with the policy of the Act, the Board should protect protests that reflect the actual interests of a group. It has no authority, however, to intervene in action taken by a single employee solely in his own interest, even if other employees conceivably could be interested in the same matter.

The interpretation recommended here should not be taken as an endorsement of the traditional Board test, retained by *Meyers*, that the employer have knowledge of the concerted nature of the protest.\(^1\) The only requirement should be that the protest involve a matter that is, in fact, a group concern. The genesis of the knowledge requirement in concerted activity cases is not entirely clear.\(^2\) What is clear is the result: employer ignorance of the concerted nature of a protest is a defense to a section 8(a)(1) charge.\(^3\)

Gorman and Finkin criticize the knowledge requirement, both because it is applied inconsistently by the Board and the courts and because it "frustrates
the objectives of the statute.” Their view that section 7 should protect individual as well as concerted conduct rests partly on the practical advantages of discarding a rule that protects employees engaged in concerted activity only if the employer has knowledge of that fact. However, they also point out the advantages of the knowledge requirement to the employer, who is protected against liability “unfairly imposed by surprise” if concerted activity is not discovered until after a discharge.

Writing on a much broader issue, Professor Paul Barron has, at least implicitly, endorsed the knowledge requirement in concerted activity cases by arguing that an employer cannot violate the Act if his action is not related to protected concerted activity. In brief, he argues that Congress did not intend to limit an employer’s freedom to deal with employees “if he acts without regard to organization and concerted activity of his employees.” Clearly, under this rationale, the employer must know that employee activity is concerted before any violation is possible.

Although Barron’s argument may seem plausible, it ignores the basic policy of the Act. The Board’s focus should be on the free exercise of employee rights, not on the purpose of the employer. Granted, there are some section 8(a)(3) discrimination cases in which employer motivation is an element of the offense and knowledge of employee involvement in union or concerted activity may be essential to proof of motive. But in many other cases, notably

knowledge that more than one employee was involved. Air Surrey Corp. v. NLRB, 601 F.2d 256, 257-58 (6th Cir. 1979). For a more detailed discussion of Air Surrey, see infra text accompanying notes 151-55.


139. The authors say:
If . . . the employer has imposed discipline not for some independent job-related “cause” but rather for a worker’s protest or inquiry regarding wages or working conditions, that should be sufficient to find a violation, even without proof that the employer knew that a second employee was implicated. What public policy demands that the employer . . . be permitted . . . to insulate itself against statutory liability merely by neglecting to ask whether . . . [one] employee . . . was in the company of other employees?

Id. at 352.

140. Id. at 353.


142. Barron says that, read literally, sections 7 and 8(a)(1) could prohibit “all employer activity that adversely affects employees’ protected rights in any way.” Id. at 425. He argues, however, that such a broad prohibition was not intended by Congress, which meant to sanction only employer conduct that responded to employee concerted activity. Id. at 427.

143. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), provides, in part: “It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .”

144. The question of employer motive has provoked considerable commentary. For example, in Christensen & Svanoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 Yale L.J. 1269 (1968), and in Getman, Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice, 32 U. Chi. L. Rev.
most section 8(a)(1) charges, a violation is made out simply by demonstrating an adverse effect on employee section 7 rights. Not every deleterious effect on employee organizational rights violates section 8(a)(1). Sometimes employer interests outweigh the section 7 rights of employees. In most of those cases, however, the employer has a legitimate business interest that is not directly related to employee organizational activity. In cases involving distribution of union literature and solicitation of union members, for example, the employer can limit some union activity on working time or on company premises because of legitimate property and managerial rights. As long as union solicitation is not singled out for special treatment, an employer can properly insist that working time is for work. However, employers who limit solicitation on non-working time, even in working areas, violate section 8(a)(1) whether the focus of the restraint was union solicitation or some other form of communication. In short, the Board considers whether an effect of the employer’s action was to interfere with employee rights, not whether the employer intended the interference. Moreover, the legitimacy of an employee’s conduct is determined by asking if it was protected, not if employer ignorance disqualified it as concerted. A similar analysis should control concerted activity cases. The emphasis should be the impact of employer action on activity protected by section 7, not the employer’s knowledge of concert.

Assessing liability against an employer who retaliates against an employee in ignorance of a concerted protest does not interfere with any significant

735 (1965) the authors discuss a confusing line of Supreme Court cases. Compare NLRB v. Erie Resistor Co., 373 U.S. 221 (1963) with American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965) and NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

Although a detailed review of section 8(a)(3) and the question of motive is beyond the scope of this article, it is generally acknowledged that in the most typical case, that of discriminatory discharge, the General Counsel must establish an anti-union motive in order to prove a violation. See, e.g., R. Gorman, supra note 86, at 137-38. See also NLRB v. Transportation Management Corp., 103 S. Ct. 2469 (1983). Knowledge that the discharged employee was involved in union activity is an essential element of the violation. See, e.g., THE DEVELOPING LABOR LAW (C. Morris 2d ed. 1983) [hereinafter cited as C. Morris].

145. See, e.g., R. Gorman, supra note 86, at 132-34. See also American Freightways Co., 124 N.L.R.B. 146, 147 (1959):

[1] Interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer’s motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

146. Detailed discussion of the law concerning distribution and solicitation is beyond the scope of this article. See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). See generally R. Gorman, supra note 86, at 179-94.

147. As recognized by Gorman & Finkin, supra note 4, at 352-53, the Supreme Court has not squarely addressed the issue of employer knowledge in concerted activity cases. Its opinion in NLRB v. Burnup & Sims, 379 U.S. 21 (1964), however, strongly suggests that knowledge is not essential. In that case the employer discharged two known union adherents because it had been informed, erroneously, that they had threatened to dynamite the plant. Id. at 21-22. Despite the employer’s good faith belief, the Supreme Court found the discharges to violate section 8(a)(1), focusing instead on the effect of the action on the section 7 rights of employees. Gorman and Finkin argue forcefully that the same principles should guide cases in which the employer had no knowledge of the nature of the employees’ concerted activity:
employer interest. Presumably, an employer who discharges an employee for refusing to work or for otherwise lodging a protest will claim the need to maintain discipline or production efficiency, legitimate enough concerns when applied to individual action for individual benefits. In fact, in the absence of concerted or union activity, the Act does not limit employer action against employees at all. If the individual's protest is part of a concerted effort, however, the discharge is the result of activity protected by the Act, thereby denying employees the express rights guaranteed them by section 7. While an employer's interest in controlling the workplace might be strong enough to regulate the time and place of some non-work activity (as in the solicitation cases), it is not so strong as to overcome all the protection section 7 grants to concerted activity. Nor is it possible to balance interests in the concerted activity cases in the same fashion the Board employs in other section 8(a)(1) cases. In solicitation and distribution cases, for example, the employer can protect the workplace, but only to a degree. Thus, employees are permitted to solicit for union membership in working areas, as long as they are on non-working time. Similarly, employees may distribute literature on company property, but not in working areas. In that way, the concerns of both employees and employer are accommodated.

No similar accommodation is possible, however, when an employer discharges an employee in ignorance of a concerted protest. Given that limitation, any employer interest that would abridge the section 7 right to engage in concerted activity must be compelling. About the most that can be said in defense of employer rights is the argument advanced by Gorman and Finkin: employers who act in good faith against what they believe is individual conduct might be unfairly surprised to learn subsequently that the employee's action

To treat such a discharge as a violation of 8(a)(1) is wholly consistent with the long-established doctrine (exemplified by Burnup & Sims itself) that the key to a violation of that section is not the employer's illicit motive but rather the coercive effect upon the exercise of section 7 rights.

Gorman & Finkin, supra note 4, at 352-53.

It must be pointed out, however, that the NLRB rule approved by the Board in Burnup & Sims included the element of employer knowledge:

[Section] 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

379 U.S. at 23 (emphasis added).

148. That is, section 7 guarantees to employees the right to organize, to join unions, to bargain collectively through freely chosen representatives and to engage in concerted activity "for the purpose of collective bargaining or other mutual aid or protection." The unfair labor practice provisions of section 8 secure those rights. Section 7, however, is not a general grant of employment security. See supra note 118.


150. The employer is not entirely at the mercy of the employee's concerted activity. In some cases, the purpose of the activity or the nature of the protest might render it unprotected. See infra text accompanying notes 161-65. Even though unprotected, however, it is concerted activity.
was part of a concerted protest. Whatever other employer interests the Act may recognize, freedom from surprise is not one of them. Little can be said for a rule that allows employers to retaliate against admittedly concerted activity only to save them the embarrassment of rescinding their previous action.

There are also practical reasons for dispensing with the knowledge requirement. As noted earlier, the Board's consistency of application is hardly praiseworthy. An even more serious problem is highlighted by the facts of *Air Surrey* where four employees decided to make inquiries at a bank about their employer's solvency. The ALJ found that all four intended to go into the bank, but, because they were unable to find a parking space, employee Patton went in alone while the other three remained in the car. When the employer confronted the employees, all but Patton denied involvement. The court of appeals found it "clear" that Patton was engaged in protected concerted activity, but refused to enforce the Board's unfair labor practice finding because the employer did not know "of the concerted nature of Patton's activity."  

Given the nature of the employer's investigation, his failure to discover the involvement of other employees is not surprising. The ALJ found that the employer was "mad" and, after a meeting with all but two of the employees (Patton was one of the absentees), left at least one with the impression that "someone was going to get fired." In view of that atmosphere and the considerable disparity of power between employer and employee, particularly in a nonunion workplace, one might expect the three employees who remained in the car to deny any involvement. Patton, who was easily identifiable as the employee who entered the bank, was then exposed alone to the employer's wrath. The nature of Patton's conduct, however, should not have been determined by after-the-fact declarations of other employees, who may have thought better of their earlier involvement or who may have been intimidated by an angry employer. Whether his activity was concerted should have been determined by the Board from evidence of other employee involvement at the time of the protest. The knowledge requirement, then, not only advances no legitimate employer interest, but also significantly impairs the

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152. 601 F.2d at 257. In reviewing the ALJ's recommended order, the Board ignored the issue of employer knowledge altogether, instead premising liability on the *Alleluia* rationale, alluding to "the likelihood that the other employees, in the absence of evidence to the contrary, shared his interest. . . ." 229 N.L.R.B. at 1064.
153. 229 N.L.R.B. at 1067.
154. The bank teller provided a physical description of the employee who entered the bank. In addition, when confronted by the employer, Patton admitted his involvement. *Id.*
155. Testimony from those employees would have been shielded from employer retaliation by section 8(a)(4): "It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act]. . . ." 29 U.S.C. § 158(a)(4) (1982).
free exercise of section 7 rights by exposing employees to the capriciousness of co-workers and the domination of employers.

In sum, the focus in concerted activity cases should be the existence of objective evidence that the employee action was prompted by a group concern. The Meyers requirement that an employee actually be authorized to act on behalf of co-workers places undue emphasis on formality and ignores the underlying policy of section 7 to foster employee activity that can spawn collective bargaining or other effective employee countermeasures to employer power. Nor should it matter if the employer has actual or imputed knowledge of concerted activity. The Board's primary concern should be protecting employee activity from employer retaliation, not safeguarding employers from embarrassment or protecting other nonexistent management interests.

C. The Problems with the Interboro Doctrine

Although the branch of constructive concerted activity identified as the Interboro doctrine met with only limited acceptance in the courts of appeals, the debate between the Board and those courts has now been resolved by the Supreme Court. Given the attitudes expressed by the Board in Meyers as well as the conservative tone of its other recent decisions,\(^\text{156}\) it is questionable that Interboro would have survived Board scrutiny at all, but for the Supreme Court's decision in City Disposal. While in theory the Board could still reject constructive concerted activity for individuals seeking to enforce labor contracts (since strictly speaking, the Supreme Court simply held that the Interboro doctrine was a "reasonable interpretation of the Act," thereby leaving open the possibility of other reasonable interpretations),\(^\text{157}\) it is unlikely that the Board will do so. Barring Supreme Court review of Meyers or a similar case, the only individual protests eligible for the Act's protection are those which seek enforcement of labor contracts. Ironically, those employees are less in need of Board assistance than are employees in nonunionized workplaces who do not enjoy contractual grievance-arbitration procedures, just-cause disciplinary provisions, or the support of unions. While unionized employees now enjoy the protection of both union advocacy and fictitious

\(^{156}\) As of this writing, three of the four Board members were appointed by President Reagan. Recently, the Board has decided numerous cases reversing prior doctrine, prompting allegations that the Board now has a conservative, or pro-management, bias. In addition to Meyers, see, e.g., Milwaukee Spring, 268 N.L.R.B. No. 87 (Jan. 23, 1984), 115 L.R.R.M. (BNA) 1065 (1984), and Rossmore House, 269 N.L.R.B. No. 198 (April 25, 1984), 116 L.R.R.M. 1025 (1984). For accounts of controversy generated by the Board in the popular press, see Greenhouse, Labor Board Stirs Up a Storm, N.Y. Times, Feb. 5, 1984, § 3, at 4, col. 3, and Middleton, NLRB: An Agency in Turmoil, Nat'l L.J. July 2, 1984, at 1.

\(^{157}\) In NLRB v. Weingarten, Inc., 420 U.S. 251, 265-66 (1975), the Supreme Court specifically addressed the Board's ability to change an interpretation of the Act, even though it had been accepted by the courts:
concerted activity, individuals in nonunion shops are protected only by adherence to the rigid guidelines of Meyers.

As constructive concerted activity, the Interboro doctrine is easier to sustain than the branch of the theory represented by Alleluia. In Alleluia, the Board merely presumed that other employees supported an individual's conduct invoking statutory rights or otherwise protecting matters thought to be of common concern. Although that presumption may have been mere fiction in Alleluia, it has more force in Interboro. It is not controversial to assert that employees have a common interest in the enforcement of rights won in collective bargaining. Clearly, a union steward who individually prosecutes grievances on behalf of other employees is engaged in exactly the kind of activity meant to be shielded by section 7. It is not much of an extension to hold that individuals should be able to enforce those same rights without the intervention of a bargaining agent. Indeed, the Act expressly so provides.

In addition to a more plausible assertion of the "matter of mutual concern" theory, Interboro also seems justified under the rationale the Supreme Court adopted in City Disposal: the individual action is but an extension of the concerted activity that produced the contract. Stated differently (and perhaps more accurately), contract enforcement is merely a part of the continuous process of collective bargaining. An individual's involvement in contract enforcement, then, would clearly seem to be involvement in the concerted activity of collective bargaining. Finally, even under the theory propounded in this article, individual efforts at contract enforcement appear to constitute concerted activity. That is, there would seem to be no clearer objective evidence of actual group interest in such conduct that the existence of a collectively bargained agreement. Despite the apparent ease of compliance with the dictates of the statute, however, the Interboro doctrine stirs larger issues than other

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We agree that its earlier precedents do not impair the validity of the Board's construction. . . . The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor laws would misconceive the nature of administrative decisionmaking. . . . The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.


159. The first and second provisos to section 9(a), 29 U.S.C. § 159(a) (1982), read: Provided, That any 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, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

For further discussion of the effect of section 9(a), see infra notes 178-79 and accompanying text.

160. "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).
forms of constructive concerted activity. The Court's failure to confront those problems adequately, and the potential scope of its opinion, is therefore even more bothersome than the Board's action in Meyers.

The Court had little trouble classifying an individual's refusal to drive a garbage truck as concerted activity. As the Court pointed out, however, finding concert is only half the battle. In order to enjoy the benefits of that statute, employee activity must be not only concerted, but protected as well. The precise range of protected activity is not entirely clear. Mere insubordination is not necessarily unprotected, since most concerted protests mounted by employees might be so viewed, at least by employers. In some cases the Board has classified as unprotected, conduct that is "disloyal" or "indefensible." In City Disposal, the Court seemed to say that while an individual's honest and reasonable invocation of a contractual right is concerted activity, it may be unprotected if the honest and reasonable belief turns out to be wrong. Noting that an employee's unjustified refusal to work in the face of a no-strike clause would be unprotected activity, the Court upheld the refusal to work at issue as concerted, but remanded the case to determine whether it was protected. That determination involves nothing more than a matter of contract interpretation.

The contract expressly provided that employees had the right to refuse to operate unsafe equipment "unless such refusal in unjustified." The employer contended that that language compelled the employee to work unless the truck was "objectively unsafe." Presumably, the language might also mean that an employee's action is unjustified only if it is not supported by reasonable evidence and by a good faith belief. The Court offered no view as to the proper interpretation, but noted that if the contract compelled an employee to drive a truck that was, in fact, safe, even though the employee might legitimately believe otherwise, the refusal was unprotected concerted activity. On remand, then, the Board will not use statutory standards, or otherwise

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162. In NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953), the Supreme Court held unprotected a concerted protest of employees that grew out of a contract negotiation. The employees' activity included handbills that impugned the employer's television programming. Characterizing the issue as whether the discharges were "for cause," id. at 471, the Supreme Court said: "There is no more elemental cause for discharge of any employee than disloyalty to his employer." Id. at 472. For a general discussion of those concerted activities that fall outside the protection of the Act, see R. Gorman, supra note 86, at 302-25, and C. Morris, supra note 144, at 159-64.
163. In this case, because Brown reasonably and honestly invoked his right to avoid driving unsafe trucks, his action was concerted. It may be that the collective-bargaining agreement prohibits an employee from refusing to drive a truck that he reasonably believes to be unsafe, but that is, in fact, perfectly safe. If so, Brown's action was concerted but unprotected.
164. Id. at 1514.
165. Id. at 1516.
apply its administrative expertise to the facts; it will simply interpret the contract.

Although the Board is not empowered to redress contract violations, there is no doubt that, in order to determine unfair labor practice charges, the Board can interpret collective bargaining agreements. In section 8(a)(5) unlawful refusal to bargain cases, for example, the Board often interprets the labor contract to assess the merit of an employer's claim that the union has waived its right to bargain over a certain subject. There is a difference, however, between cases like that and the issue presented in City Disposal. In section 8(a)(5) cases the statute expressly commands that employers bargain in good faith. Although either party can, by agreement, waive the right to bargain over certain issues, the statutory obligation to bargain is unrelated to the existence of a collective bargaining agreement. That is, if a union has been certified or recognized as the collective bargaining representative of employees, both the employer and the union must bargain in good faith, whether a collective bargaining agreement exists or not. Although the execution of a contract may suspend the bargaining obligation for certain subjects during the contract term, the statute, not the contract, is the source of the bargaining obligation. Contract interpretation plays a role only to the extent of determining whether or not one result of the statutorily mandated collective bargaining was to suspend negotiations temporarily.

166. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982), provides: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of [section 9(a), 29 U.S.C. § 159(a)]. . . ." For a discussion of the obligations section 8(a)(5) places on employers, see generally R. Gorman, supra note 86, at 399-495.

167. See, e.g., NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967), where the Board interpreted a provision of the collective bargaining agreement in order to resolve the employer's contention that the union had waived its right to bargain over a premium pay plan. The provision in question reserved to the employer the right to pay a premium rate to recognize "special fitness." Id. at 423. The Supreme Court upheld the Board's conclusion that the contract clause did not permit the employer to unilaterally increase wages for an entire crew, thereby enforcing the Board's decision that the union had not waived its right to bargain and the employer's action violated section 8(a)(5). Id. at 428.


170. In NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967), for example, the Supreme Court, after discussing Congress' decision not to vest the Board with jurisdiction to decide contract disputes, said:

But in this case the Board has not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer. It has not imposed its own view of what the terms and conditions of the labor agreement should be. It has done no more than merely enforce a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment—"to provide a means by which agreement may be reached." The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up these
In *City Disposal*, on the other hand, the Court's opinion makes the contract, not the statute, the source of employee rights. Under *Meyers* and consistent judicial, if not administrative, interpretation, unrepresented employees have no right to complain about or to protest working conditions individually unless expressly authorized by their co-workers. It is the existence of the contract, then, that creates an individual's rights under the *Interboro* doctrine. Having created the rights solely because the contract exists, *City Disposal* would then have the Board presume to determine the scope of the statutory right by reference to the contract's terms. This is not interpreting a contract for the purpose of determining a waiver or otherwise assisting in statutory analysis. It is elevating contract rights to the level of statutory rights. In short, *City Disposal* allows the Board to use its statutory unfair labor practice procedures as an instrument of contract enforcement, thereby not only frustrating whatever enforcement mechanism exists in the contract, but no doubt denigrating the status of the union as exclusive representative as well.

1. The Effect on Arbitration

Dispute settlement under collective bargaining agreements has commanded considerable attention from the Supreme Court. Although there are occasional signs that the NLRB is suspicious of labor arbitration, the Supreme Court's commitment has been fairly consistent. Starting with *Textile Workers Union v. Lincoln Mills* in 1957, which made agreements to arbitrate specifically enforceable, and the celebrated Steelworker's Trilogy in 1960, which...
considerably elevated the status of both labor arbitration and labor arbitrators, the Court's decisions have often encouraged resort to a peaceful system of dispute resolution as an alternative to industrial strife. Although there has been some accommodation to other significant employee rights, the Court, just ten months before City Disposal, appeared to reaffirm its commitment to labor arbitration. The depth of that commitment, however, is questioned by City Disposal.

Once recognized or certified, the union becomes the exclusive representative of all employees in the bargaining unit. Although section 9(a) allows employees to present grievances to their employers individually, resolution is controlled by the terms of the collective bargaining agreement, and, in any event, the Supreme Court has neutered most of the force of section 9(a). Like it or not, the union negotiates on behalf of all employees in the unit. Each employee is bound to the union's effort and by any collective bargaining agreement it negotiates.

The principle of exclusive representation is not as ominous as it sounds, though it has been criticized. In the first place, the union owes each employee in the unit, member or not, a duty of fair representation, enforceable either

363 U.S. 593 (1960), the Court limited the ability of courts to assess the merits of a case in reviewing an arbitrator's decision.


176. See W.R. Grace & Co. v. Local 759, Rubber Workers, 103 S. Ct. 2177 (1983), where the Court upheld an arbitrator's award that an employer who had laid off employees pursuant to a conciliation agreement with the EEOC had nevertheless violated the collective bargaining agreement.

177. See NLRA § 9(a), 29 U.S.C. § 159(a) (1982), which provides, in part:
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

178. See supra note 159.

179. See Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975). In that case, the employer lawfully discharged two employees who had picketed a department store in an attempt to force a meeting with management to discuss allegations of race discrimination. The Court said that section 9(a) was not intended to allow employees to force employers to hear individual grievances. Rather, it was intended to permit employers to deal with employee grievances individually without fear of violating section 8(a)(5). Id. at 61 n.12. It is, therefore, not unlawful for an employer to refuse to entertain a grievance asserted pursuant to the section 9(a) proviso. See infra text accompanying notes 216-21.


in court or before the NLRB. More importantly, a union that consistently ignored the wishes of its constituency would not long retain its representative status. Within the confines of those limitations, however, "[t]he union's power is the power to govern." Employees have only those benefits and employment perquisites negotiated by the union. They are unable to bargain for themselves. Moreover, the collective bargaining agreement ordinarily limits the employee to private contract enforcement procedures, typically a grievance arbitration process, ordinarily administered solely by the union. The Supreme Court has consistently upheld the enforceability of the exclusive resort to arbitration. Employees may look outside the contract only when the union has unjustifiably failed to make internal procedures available or has processed a grievance in an arbitrary, discriminatory, or perfunctory manner.

These restrictions are not intended to penalize individual employees. Rather, they serve to unify the group by centralizing its power in the union. In that fashion, employees are better able to combat employers' authority. The principle of exclusive representation, generally, and the union's control over the arbitration mechanism, specifically, enhance the power of the union as the bargaining representative, thereby making it a more potent force in its dealing with the employer.

There was a grievance-arbitration procedure in City Disposal. The day after his discharge, employee Brown filed a grievance. The union, finding no merit in Brown's contention, refused to process it. Neither the opinion of the Supreme Court nor that of the ALJ explains the reason for the union's inaction. There is no question, however, that as exclusive bargaining representative, the union can (and ordinarily does) retain control over the grievance arbitration process. The Supreme Court has said expressly that employees have no right to have grievances arbitrated. Instead, the union

182. See Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Syres v. Oil Workers Int'l Union Local 23, 350 U.S. 892 (1955); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). The Court defined the duty of fair representation in Steele as the obligation to represent each member of the bargaining unit (whether or not a union member) "without hostile discrimination, fairly, impartially, and in good faith." 323 U.S. at 204. For a more detailed discussion, see generally R. Gorman, supra note 86, at 695-728.
187. The opinion of the NLRB is reported at 256 N.L.R.B. 451 (1981).
188. The union's control is ordinarily exercised at the higher levels of the procedure, typically by retaining power to determine which cases are arbitrated. See, e.g., Vaca v. Sipes, 386 U.S. 171 (1967).
189. See, e.g., id. at 191.
has broad discretion, tempered by its duty of fair representation, to process, settle, or deny outright the complaints of individual employees.\textsuperscript{190} There is nothing in either the Board's or the Supreme Court's opinion indicating that Brown (or the Board) ever alleged that the union's action violated its duty of fair representation. In the ordinary course, then, Brown's case was finished. He had no right to arbitrate that grievance himself and the union had a right to determine in good faith (even erroneously) that the grievance was without merit.\textsuperscript{191}

\textit{City Disposal}, however, allows an employee to either circumvent the union's action or, worse, to ignore the grievance arbitration provisions of the contract altogether. Although both the Board and the Supreme Court treated the case as a question of employee rights arising under section 8(a)(1), the resolution of the unfair labor practice issue will require the Board to make exactly the same determination that the union has already made (i.e., whether or not the grievance has merit), or, in an appropriate case, to reconsider an arbitrator's decision denying relief to an employee. The Supreme Court observed correctly that, under \textit{NLRB v. C & C Plywood Corp.},\textsuperscript{192} the Board can interpret the contract. The issue, however, which the Supreme Court and the NLRB treated in only cursory fashion, is whether the Board should involve itself in contract interpretation in a \textit{City Disposal} type case.\textsuperscript{193}

In its opinion, the Court tried to neutralize criticism that its decision would undermine arbitration by advancing two arguments. First, the Court (reminiscent of Gorman and Finkin) said that it was clearly concerted activity when two employees invoked collectively bargained rights, regardless of any effect on arbitration. Thus, there was no reason to "single out" protests by one employee as more subversive of arbitration than similar protests by two employees.\textsuperscript{194} As discussed earlier, focusing on this so-called anomaly merely diverts attention away from the issue. If Congress chose to protect a group

\begin{itemize}
\item \textsuperscript{190} See id. at 190-93. See also Humphrey v. Moore, 375 U.S. 335 (1964); Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961).
\item \textsuperscript{191} In Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court rejected a claim that settlement of a meritorious grievance breached the duty of fair representation. The Court said:
\begin{quote}
For if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced.
\end{quote}
\textit{Id.} at 192-93.
\item \textsuperscript{192} 385 U.S. 421 (1967). See discussion supra note 167.
\item \textsuperscript{193} Although the majority virtually ignored the threat its decision poses to arbitration, Justice O'Connor, in dissent, did not. She asserted that the Court's argument "confuses the employees' substantive contract entitlements with the process by which those entitlements are to be vindicated." \textit{City Disposal}, 104 S. Ct. at 1518. She also criticized the broad role in contract interpretation assigned to the Board by the Court's opinion: "[T]he fact that the Board can resolve contractual matters incident to unfair labor practice disputes does not give it authority to make unfair labor practices out of the contractual disputes themselves." \textit{Id.} at 1517.
\item \textsuperscript{194} \textit{Id.} at 1514-15.
\end{itemize}
activity, a necessary consequence of that decision was that small groups as well as large ones are covered. The fact that small groups have little more power than individuals have may mean that Congress could or should have covered individuals as well; it does not mean that Congress did. More importantly, the Court’s argument proceeds on the premise that two employees should be able to have their contractual grievance heard by the Board, notwithstanding any effect on the arbitral process. Although that may now be the law, two employees should have no more right to such relief than an individual employee has. Instead, employees asserting rights under a collective bargaining agreement should be confined to their contractual remedies.

The Court also justified its conclusion that City Disposal would not undermine arbitration by citing the Board’s deferral practices. Under the Board’s Collyer Wire doctrine, unfair labor practice charges that involve claims of right under a collective bargaining agreement can be deferred to arbitration, with the NLRB retaining jurisdiction for only limited purposes. Recently, the Board has broadened the scope of deferrable cases to include section 8(a)(1) and section 8(a)(3) charges. In theory, then, individuals who seek to channel their contract claims into the unfair labor practice procedure as happened in City Disposal would find the Board unresponsive and would be relegated to their contractual rights.

Similarly, the Board could defer contractual cases under its Spielberg doctrine. Under Spielberg, the Board will decline to assert jurisdiction over an unfair labor practice charge if the same issue presented to the Board has already been heard by an arbitrator, if the arbitration proceedings were fair and regular, and if the result reached by the arbitrator is not repugnant to the purposes and policies of the Act. The Board has recently reaffirmed

195. Id. at 1515.
196. The Collyer Wire doctrine is named for the Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), in which the Board decided that it would defer its processes to arbitration in a section 8(a)(5) case in which the union charged that the employer had unlawfully implemented certain contract modification. Noting that the employer’s right to take the protested action was an arbitrable dispute, the Board said: “Because this dispute in its entirety arises from the contract between the parties, and from the parties’ relationship under the contract, it ought to be resolved in the manner which that contract prescribes.” Id. at 839. The Board retained jurisdiction to ensure that the arbitration, in fact, took place, that the procedure was fair, and that the results were not repugnant to the Act. Id. at 843.
198. The Spielberg doctrine is named for Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). Basically, the doctrine involves deferral of Board processes when the issue raised by an unfair labor practice charge has already been determined by an arbitrator.
199. In International Harvester Co., 138 N.L.R.B. 923, enforced sub nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964), the Board said:
its commitment to the policies of Spielberg deferral. If Spielberg is applied, then, employees would not be able to use unfair labor practice proceedings to reverse unfavorable arbitration rulings.

The primary issue is whether the Board should exercise jurisdiction over complaints by employees that their rights under a collective bargaining agreement have been violated. The fact that voluntary procedures exist limiting the exercise of jurisdiction is not dispositive of the central question of NLRB power. Even if it was, the history of Collyer Wire and Spielberg teaches that the limitations they impose may not be as significant as the Court implies. The policy of deferring section 8(a)(1) and section 8(a)(3) charges under the Collyer Wire doctrine has been a matter of considerable controversy within the Board. Under its decision in National Radio Co., the Board deferred section 8(a)(3) as well as section 8(a)(5) cases. In 1977, however, a three-way split in General American Transportation Corp. resulted in a policy of deferring section 8(a)(5) charges (in which the issue ordinarily was one of contractual waiver of the right to bargain) but refusing deferral in section 8(a)(1) and section 8(a)(3) charges (which involved matters of individual, rather than collective rights). General American Transportation remained the law until January, 1984, when the Board decided, in United Technologies, that it would once again defer section 8(a)(1) and section 8(a)(3) charges to arbitration. United Technologies resulted entirely from a change in membership on the Board and appears to be no more stable than the makeup of the panel itself. If the Board again returns to the rule of General American Transportation, the Court's observation in City Disposal is wrong: section 8(a)(1) charges filed by individual employees would not be deferrable. Certainly, a major

[T]he Board... should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself," and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.

138 N.L.R.B. at 927.
201. 198 N.L.R.B. 527 (1972).
203. Interestingly, General American Transportation remained the law for nearly seven years despite the fact that its entire holding was embraced by only one member of the Board. Thus, two members of the Board (Fanning and Jenkins) indicated their belief that the Board had no authority to "cede its jurisdiction to private tribunals" in any unfair labor practice case. Id. at 808. Two other members (Penello and Walther) disagreed and embraced a broad application of Collyer Wire that would have deferred interference cases (§ 8(a)(1) and 8(b)(1)(a)), discrimination cases (§ 8(a)(3) and 8(b)(2)), and refusal to bargain cases (§ 8(a)(5) and 8(b)(3)). Id. at 813-19. In the middle was then Chairman Betty Murphy who agreed that deferral was proper in refusal to bargain cases, but not in cases involving individual rights. Id. at 810-13. She therefore formed a three-person majority with Penello and Walther in agreeing to defer section 8(a)(5) and 8(b)(3) cases, and a three-person majority with Fanning and Jenkins in refusing to defer section 8(a)(3), 8(a)(1), 8(b)(1)(A) and 8(b)(2) cases. See also Roy Robinson, Inc., 228 N.L.R.B. 828 (1977).
policy question such as that decided in City Disposal should not be premised on the availability of a doctrine applied as erratically as Collyer Wire.

The same is true of Spielberg deferral. Although the Board's recent Olin Corp. decision purports to revitalize the doctrine, the Board admits that application of Spielberg has been inconsistent. Members have charged that it has often deferred to arbitrators' opinions simply because it agrees with them and has not hesitated to overrule opinions with which it disagreed, under the guise that they are "repugnant to the Act." The history of Spielberg, then, would appear to contradict the Court's assertion that deferral will minimize the effect on arbitration. Instead, it may undermine the finality of arbitration decisions, perhaps the single most important factor in the success of labor arbitration.

Given the Court's failure to confront the uncertainties of the Board's deferral doctrines, one must question whether the Court was oblivious to the threat its decision poses to arbitration, or whether it simply did not care. Most telling, perhaps, is the fact that neither Collyer Wire nor Spielberg would necessarily have applied to the facts at issue in City Disposal. Clearly, Spielberg deferral was not appropriate since there had been no arbitration. Since the case arose while the Board was adhering to its decision in General American Transportation, one can only speculate whether, after United Technologies, the Board would have deferred under Collyer Wire. Since the union refused to arbitrate the case, it seems unlikely that the Board would defer a charging party to a procedure that is not, in fact, available. Moreover, the Board should have no discretion to force an unwilling union to arbitrate a case it has already determined to be without merit. In cases like City Disposal, then, it appears that the Board will retain jurisdiction and, in effect, substitute its own processes for the procedure provided by contract. As the Supreme Court itself has noted,
the right to control contract enforcement procedures contributes greatly to the union’s effectiveness as bargaining representative. *City Disposal* would seem to both undermine the union’s authority and endanger the parties’ reliance on contractual procedures as the exclusive source of rights and remedies.

2. The Role of the Board

The procedure adopted in *City Disposal*—allowing the Board to determine whether activity is protected by interpreting rights granted under the contract—may pose significant danger to arbitration, by substituting the Board for the enforcement procedure adopted by the parties. The Court’s opinion seems to treat that result as inevitable. That is, since an individual employee who invokes contractual rights is involved in concerted activity, the validity of the complaint affects its status as protected or unprotected. Given the potential consequences of assigning to the Board such a broad role of contract interpretation, the Court’s analysis bears greater scrutiny. Even though the conclusion that individual invocation of contract rights is concerted activity appears plausible, one must question whether the protected nature of the conduct should hinge on the validity of a contractual claim. Also, one must consider whether the policy of the Act is really advanced by giving individuals represented by a union statutory rights superior to those who have no representation.

When employees choose a collective bargaining representative, they decide to substitute the force of the group for whatever power (usually minimal at best) they could have asserted as individuals. Although the exercise of group power is intended to enhance the employment status and to improve the working conditions of individuals within the group, most individual liberty to act is sacrificed for the good of the group. After designating a collective bargaining representative, individuals lose whatever power they may have had as individuals. They may no longer bargain on their own behalf. They may present grievances individually under the section 9(a) proviso, but cannot force their employer to entertain them. Even if the employer does consider a section 9(a) grievance, its resolution is controlled by the terms of the contract negotiated for the group.\(^\text{209}\) Although the contract may be a source of rights for individual employees, its enforcement is ordinarily reserved to the representative of the group, which retains power to sacrifice some individual rights in the interest of the group.

Viewed in this light, the Supreme Court’s conception of the collective bargaining agreement revealed in *City Disposal* is simply wrong. Implicit in *City Disposal* is that rights granted to individual employees in the collective

\(^{209}\) The first proviso to NLRA § 9(a), 29 U.S.C. § 159(a) (1982), provides that individuals have the right to present grievances and have them adjusted “as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect.”
bargaining agreement somehow transcend the enforcement mechanisms provided by contract. In its opinion, the Court noted that employee Brown's refusal to drive was an invocation of the right granted him by contract to refuse to operate unsafe equipment:

   Moreover, there can be no question but that Brown's refusal to drive the truck was reasonably well directed toward the enforcement of that right. Indeed, it would appear that there were no other means available by which Brown could have enforced that right. If he had gone ahead and driven . . . the issue may have been moot.\textsuperscript{210}

This passage, as well as other parts of the opinion, focuses on the right of individual employees to invoke contractual rights.\textsuperscript{211} Despite the contrary suggestion by the Court, however, it is not true that the ordinary contract enforcement mechanisms were unavailable to Brown. Brown might have driven the truck, at the same time filing a grievance protesting the frustration of his rights under the contract, an alternative the Court describes as "moot." That characterization overstates the effect, since an arbitrator's decision not only might have chastised the employer for ignoring Brown's rights, but also might have clarified the situation in which employees could refuse to drive unsafe vehicles—the same question the Board will now consider on remand. More realistically, Brown's refusal to drive (which appeared to be the procedure sanctioned by contract) could have been sustained by an arbitrator, resulting in his reinstatement.

In \textit{City Disposal}, however, the union refused to prosecute Brown's claim, thereby leaving him without a contractual remedy. Implicit in the Court's decision and in its statement that there were "no other means" of contract enforcement, is its assumption that employees have a right—now statutorily grounded—to enforcement of contract terms. Since the union refused to invoke the grievance-arbitration provision of the contract, the employee can now enforce the contract by claiming contractual rights (either by refusing to work or otherwise) and litigating the legality of the employer's reaction before the NLRB. In theory, under \textit{City Disposal}, an employee's invocation of contractual rights will not even have to result in discipline in order to qualify for relief. An employer who simply denies an individual's contractual claim to a benefit may have "retaliated" against an employee engaged in concerted activity (by denying a contractual right as punishment for having made the claim), thereby invoking Board processes to determine whether or not the contract allows the benefit.

Rather than involve itself in the merits of an individual's contractual claim, the Board should limit its inquiry to whether an employee's attempts to invoke a contractual grievance procedure have been frustrated. There should be no


\textsuperscript{211} See, e.g., \textit{id.} at 1511: "Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer." \textit{See also discussion, id.} at 1513-14.
independent right of contract enforcement. If the contract establishes a grievance-arbitration procedure as the exclusive method of implementing contract rights, employees should be relegated to that procedure and protected in its use, regardless of the merit of their claim. Attempts to enforce contract terms outside the grievance-arbitration procedures provided by contract may be concerted activity, but they should not enjoy the protection of section 7.

Contract rights have no metaphysical existence. They can be evaluated only in the context of the contractual procedure created for their enforcement. In City Disposal, for example, the right to refuse to drive unsafe trucks unless the refusal was "unjustified" was agreed to in the context of arbitration as the implementing procedure. The employer and the union no doubt understood that the clause was vague and that, if problems arose, they would first attempt a voluntary resolution and, if unsuccessful, assign the case to a mutually agreed neutral party. This opportunity to resolve disputes through private, informal (but binding) procedures may well have influenced the substance of the bargain. Had the parties contemplated contract enforcement through the more formal procedures of the courts or the Board, they might have chosen more precise language, resulting in more demanding negotiation. The process of negotiation is eased considerably when the parties believe that their disputes will be resolved by arbitrators who, one hopes, understand the contractual relationship and the bargaining process better than the Board does and, at least, are more versed in the language and customs of labor contracts.212

The parties also understood that the right created in individual employees was subject to union administration. In its discretion, the union might refuse to process even a valid claim as long as its decision did not violate its duty of fair representation. In elevating contractual rights above the context of the contract's enforcement mechanism, the Court ignored the bargain of the parties and the nature of individual rights under a collective bargaining agreement. Such rights are not inviolate. They are not independent entitlements subject to judicial sanction or administrative enforcement. They are no more

212. One commentator has summarized the attractions of arbitration as follows:
Generally speaking, arbitration is speedier than the full Board's processes; furthermore, the parties themselves control their cases, while before the Board one of the parties loses control to the General Counsel. The arbitrator, who may be expert in the industry or in the labor relations of the particular plant, is almost invariably closer to the context of the dispute than the Board or the trial examiner. The parties have selected the arbitrator and the arbitration process; this is the manner in which they indicated, prior to the particular disagreement, they preferred to resolve their disputes. My own observation tells me that arbitration is far less formal, less tense, and less exacerbating to the relationship of the parties, than a Board proceeding.
. . . In addition, the arbitrator has access to more flexible remedies: he can "split the baby." Finally, if the arbitrator makes a bad decision, the parties can renegotiate immediately, or at their next bargaining sessions, for a new contract; often, little harm results from the arbitrator's bad award.

Schatzki, NLRB Resolution, supra note 196, at 251-52 (footnote omitted).
valuable than the contractual procedures for enforcing them. They are to be implemented as part of the collective agreement, through the procedures selected by the parties. That process not only protects the employees, but fosters collective bargaining by insulating the relationship against governmental intrusion. *City Disposal*, however, impugns the integrity of the contract and diminishes the union's status as exclusive representative, thereby impairing its ability to provide effective representation. *City Disposal* did much more than protect the right of individuals to protest; it authorized unwarranted governmental intervention into a private contractual relationship.

The Board's only function in contract enforcement is to insure that employees have recourse to contractually provided enforcement mechanisms. Section 7 should protect employees who file grievances, or otherwise comply with contractual processes, from discharge or other employer retaliation. As the Court has recognized, grievance administration is part of the process of collective bargaining. Employees who use the procedures provided by contract are surely engaged in concerted activity, even if their grievance turns out to be meritless. Even though their action may manifest a group concern, however, employees who invoke contractual rights outside the grievance-arbitration procedures—typically by refusing to work—should not be the subject of NLRB concern, whether the action is taken by individuals or by groups. That is not to say that their protests might not enjoy *contractual* protection. Those contractual rights, however, should be effectuated through the procedure mandated by contract, not through unfair labor practice procedures.

In theory, this interpretation leaves unionized employees with less statutory protection than nonunion employees. That is, nonunion employees who act together, or who are authorized to act by co-workers, or, under the theory advanced here, who act over matters that are in fact of common concern are protected by section 7. Unionized employees covered by a collective bargaining agreement, however, would look to the contract as the source of their rights and protection, subject to the statutorily enforced right to use internal enforcement procedures. Although the treatment is different, it is not anomalous. Collective bargaining is the Act's primary vehicle for the equalization of bargaining power between employer and employee. The Board exists principally to protect the right of employees to choose a bargaining representative free from interference by the employer and to ensure that bargaining proceeds in good faith once the representative is chosen. Prior to selection of a bargaining agent, the employees' statutory right to act in concert is paramount. Employer retaliation against even small employee groups might frustrate employees in their ability ultimately to bring group pressure to bear through collective bargaining. For that reason, NLRB protection of nonunion

213. In a case like *City Disposal*, for example, an arbitrator might interpret the contract clause which allows an employee to refuse to drive unsafe equipment unless the refusal is "unjustified" to sanction a good faith refusal to work.
employees should be vigorous, with only a demonstrated group concern necessary to invoke the shelter of the Act.

After the bargaining representative is chosen, however, the NLRB's responsibility to employees changes. The Board must still protect employees from unlawful discrimination and safeguard those involved in collective bargaining and the administration of the contract. It must also insure that collective bargaining proceeds unhindered by employer or union misconduct. The primary source of employee rights, however, should be the collective bargaining agreement, not the statutory enforcement efforts of the Board. The collective bargaining agreement represents the achievement of the Act's purpose. Although it may not reflect complete bargaining equality, especially in the early years, it at least represents an accommodation reached by conflicting forces using whatever bargaining power they could muster. Absent evidence that the bargaining process has been misused or that employees are suffering for their union sympathies, the government has no function in the relationship between employer and union. It also no longer enjoys a paternalistic relationship with the employees. Having selected a collective bargaining representative—that is, having adopted the procedure favored by the Act—the union assumes the role of protector, at least with respect to the rights provided by the collective bargaining agreement. The Board plays a role in assuring that the union discharges its duty to the employees. It has no business, however, enforcing contract rights or otherwise intervening in the substance of the agreement. When employees have adopted collective bargaining as the means of combating employer power, their contractual rights are to be determined through the collective bargaining process, not by the Board.

3. Section 9(a)

Any interpretation of the Act that limits the right of unionized employees to file grievances must account for the proviso to section 9(a):"Provided, That any 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, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

Gorman and Finkin, for example, argue that the right of individual employees to complain is secured not only by section 7, but by the section 9(a) proviso.

214. "So long as the parties have agreed to a private arbitrator to resolve their disputes, it is difficult to understand why government should intervene and upset their expectations, even if the arbitration process is not the Utopia Mr. Justice Douglas might have us believe." Schatzki, NLRB Resolutions, supra note 196, at 252-53.

as well.\textsuperscript{216} Although section 9(a) does speak of the "right" of individuals or groups to present grievances to their employers, the force of the proviso has been tempered considerably by the Supreme Court's decision in \textit{Emporium Capwell Co. v. Western Addition Community Organization.}\textsuperscript{217} In that case, the Court said that section 9(a) does not grant an affirmative right to employees to force employers to consider their grievances. Instead, it allows employers to consider grievances from individuals without violating section 8(a)(5).\textsuperscript{218} While the Court's decision may appear narrow, it finds some support in the legislative history\textsuperscript{219} and seems justified by the mere placement of the language. Thus, the proviso qualifies language granting the union the right of exclusive representation and seems to say that, notwithstanding the employer's obligation to deal with the union, it can, without violating that duty, consider the grievances of individual employees.

Gorman and Finkin recognize the limitations of the proviso, but argue that \textit{Emporium Capwell} is not dispositive of an individual employee's right to complain. That is, even though the employer may refuse to consider a grievance under section 9(a), "nothing in the Act suggests it should be permitted to discharge an employee for attempting to make that presentation."\textsuperscript{220} Despite their position, however, nothing in the Act suggests that employees have an unfettered right to present grievances to their employer. Section 9(a) is not an affirmative grant of employee power. Rather, the right recognized there is merely illustrative of the protection granted by section 7. In order to receive the shelter of the Act, then, an individual's complaint must qualify as protected concerted activity.

Reading section 9(a) as an affirmative grant of power would mean that unionized employees—who already have the support and protection of unions—could individually petition their employer while unorganized employees are relegated to the rights afforded by section 7. Not only does the legislative

\begin{itemize}
\item \textsuperscript{216} Gorman & Finkin, \textit{supra} note 4, at 355-57.
\item \textsuperscript{217} 420 U.S. 50 (1975).
\item \textsuperscript{218} Id. at 61 n.12.
\item \textsuperscript{219} 8565 Indiana Law Journal 59-4 mc 2/28/85 galley 77A
\item \textsuperscript{219} The 1947 amendments added to section 9(a) the language authorizing adjustment of individual grievances if not inconsistent with the labor contract. Of the amendment, the House Report says: "The bill further adds to the freedom of workers by permitting them not only to present grievances to their employers . . . but also to settle the grievances. . . ." H.R. REP. No. 245, 80th Cong., 1st Sess. 7 (1947), \textit{reprinted in} 1 NLRB, \textit{LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947}, at 298 (1948) (emphasis added) [hereinafter cited as \textit{LMRA LEGISLATIVE HISTORY}]. The House floor managers' statement in the Conference Report reads: "Both the House bill and the Senate amendment amended section 9(a) . . . to specifically authorize employers to settle grievances presented by individual employees. . . ." H.R. REP. No. 510, 80th Cong., 1st Sess. 46 (1947), \textit{reprinted in} \textit{LMRA LEGISLATIVE HISTORY, supra}, at 550 (statement of House managers).
\item \textsuperscript{220} Both of these passages, cited by the Court in \textit{Emporium Capwell}, 420 U.S. at 61 n.12, seem to indicate that the purpose of the amendment was to shield the employer from unfair labor practice liability, not to create affirmative rights in employees.
\item \textsuperscript{220} Gorman & Finkin, \textit{supra} note 4, at 357 (emphais in the original).
\end{itemize}
history reveal no intention on the part of Congress to create such an anomaly, nothing in the policy of the Act argues for it. Indeed, the right of non-union employees to petition their employers should be superior to that of employees represented by a union.

As argued elsewhere in this article, nonunion employees should be eligible for the protection of section 7 when they individually present to their employer, or otherwise protest, a matter which is of common concern to a group. The principal purpose of protecting such concerted protests is to foster unionization. Unionization, however, does not confer special benefits upon individual workers. It merely allows them to combine forces with their colleagues in order to better confront their employer. All the section 9(a) proviso does is recognize that unionized employees have some opportunity to present grievances, just as nonunion workers have; it does not create a new broader right.

Having selected the union as their bargaining agent, organized employees have forfeited the right to bargain on their own. As the decision in Emporium Capwell makes clear, neither individuals nor subgroups within the bargaining unit have any right to bargain with their employer. Nor do they have any right to force their employer to consider their grievances by refusing to work or otherwise. Given the narrowness of the Supreme Court's interpretation in Emporium Capwell, section 9(a) should mean nothing more than that individuals have the right to use whatever grievance-arbitration procedure is established by contract without the intervention of the bargaining agent.

If the contract does not create a grievance-arbitration procedure, unionized employees should have the same right to present grievances that nonunion employees have since neither the employer nor the union can justifiably rely on any exclusive contractual mechanism. If there is such a mechanism, section 9(a) guarantees that, notwithstanding any action on the part of the union, employees shall have the right to attempt use of the procedure, without suffering adverse consequences from the employer. In City Disposal, then, employee Brown's action would have been concerted (and protected) had he attempted to file a grievance over his employer's direction to drive the truck. Moreover, his employer could have considered his complaint without violating section 8(a)(5). Brown's refusal to work, however, and any other action calculated to force employer consideration of an individual grievance should not be deemed activity protected by either section 7 or section 9(a).

III. CONCLUSION

Both the Alleluia progeny and Gorman and Finkin's article were reactions

221. The Court found unprotected the concerted protest of employees that ignored the grievance procedure provided by contract and, instead, sought to force the employer to bargain with a minority. Emporium Capwell, 420 U.S. at 65-70.
to the harshness of the common law employment-at-will doctrine. Faced with a rule that permits employers to discharge employees without reason, the temptation is strong to fashion some protection for the employees. The NLRB, which plays an important role in protecting employee freedom, seemed a likely place to turn. By creating concert where none exists, or worse, by reading the requirement out of the Act altogether, one can overcome the impediment to Board jurisdiction and allow that agency to assess the wisdom of employer action under the guise of protecting the employees' right to organize. The Supreme Court's decision in City Disposal symbolizes the same instinct. Not content to leave enforcement of collectively bargained rights to the union and the employer, the Court's decision interposes the Board as the guardian of employee freedom.

Neither Alleluia nor Gorman and Finkin reached a proper accommodation between the respective rights and obligations of unions, employers, and employees and the underlying policy of the NLRA. And, unfortunately, the Board missed its opportunity to rectify Alleluia with its harsh opinion in Meyers. Even more unfortunate is City Disposal, which not only ignored the nature of collectively bargained rights, but also thrust the Board into the unaccustomed role of contract interpreter. The Board, however, should not have the expansive role suggested for it by Gorman and Finkin or given to it by City Disposal.

The Board's primary function is to ensure that the avenues to collective bargaining remain open. In a nonunion workplace, the Board not only protects employees against discrimination on account of union sympathies, but also serves the more important role of protecting incipient group activity. By protecting small groups, and even by safeguarding individuals who have the courage to speak over matters of mutual interest, the Board fosters an environment where employees can freely turn their common concerns in the direction of collective bargaining.

Once the employees select a bargaining representative, however, the Board's role changes. The Board has neither the expertise nor the statutory authority to define or implement the substantive terms of employment. Nor does it exist to protect employees against all employer wrongdoing. Instead, its function is to safeguard collective bargaining so that employees can protect themselves. The rigidity of the Meyers opinion hinders the ability of the employees to choose collective bargaining. Even worse, City Disposal undermines the process itself by substituting the Board for the union in the role of contract enforcer.

222. In fact, in the early party of their article, Gorman and Finkin refer to the lack of protection for nonunion employees and note that "their only protection will lie with the National Labor Relations Board." Gorman & Finkin, supra note 4, at 288.