CONSTRUCTIVE CONCERTED ACTIVITY AND INDIVIDUAL RIGHTS: THE NORTHERN METAL-INTERBORO SPLIT

I. INTRODUCTION: THE PROBLEM IN CONTEXT

The regulated economic system which characterizes life in this country has not developed in the absence of potentially serious compromises with regard to the rights of the individual employee. Since passage of the National Labor Relations Act in 1935, the emphasis has been on the Act's endeavor to equate the bargaining position of the employees as a group with that of their employer. Yet an employee in an organized bargaining unit might desire to use the right given to him by the Act of asserting grievances independently of union involvement. Such a desire may arise from several motivations: for example, the employee may fear that his union will intentionally use insufficient effort in processing his claim. Alternatively there is the situation where an employee is simply not entitled to union representation. Consequently, both the National Labor Relations Board (the Board) and the courts have been confronted with cases involving the individual employee attempting to enforce a union-negotiated labor agreement.

Much of this litigation concerns the right guaranteed to employees by section 7 of the Act "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." Section 8(a)(1) makes it an "unfair labor practice" for an employer to violate an employee's section 7 rights. Most litigation concerning section 7 involves charges by employees of retaliatory discharge for

4 If a member employee feels that the union has not exercised "good faith" in attempting to process his grievance, he may file charges with the Board. See, e.g., Local 1, Independent Metal Workers, 147 N.L.R.B. 1573 (1964). In addition, an aggrieved employee may file suit against either the union or employer in federal and state court jurisdictions under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970). See, e.g., Humphrey v. Moore, 375 U.S. 335 (1964); Smith v. Evening News Ass'n, 371 U.S. 335 (1964); Smith v. Evening News Ass'n, 371 U.S. 355 (1962).
5 29 U.S.C. § 157 (1970). The Seventh Circuit has noted that the limiting phrase "for mutual aid or protection" connotes action on the part of an employee which identified him with the common interests of his fellow employees. NLRB v. Illinois Bell Tel. Co., 189 F.2d 124 (7th Cir. 1951). It should be noted that all "concerted activity" need not be for "mutual aid or protection." The courts, however, have usually deemed this second requirement of section 7 fulfilled by practically any indication of group involvement. See text accompanying notes 69-73 infra. Indeed in many cases, the requirement is not even discussed. See, e.g., NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967). Consequently this Comment will not include an extensive discussion of the mutual aid requirement, presuming that it will generally be deemed fulfilled once "concerted activity" is found.
engaging in some form of “concerted activity.”” The consequences of a finding of such “unfair labor practices,” have included reinstatement of the discharged employee with full back pay, along with the posting of appropriate explanatory notices. However, the Act gives the employer rights as well as duties. An employer may discharge an employee “for cause,” and both the Board and the courts are precluded from abridging this right. Indeed, an employer may exercise his discharge prerogative for “a good reason, a poor reason, or no reason at all” so long as he does not interfere with an employee’s “concerted activity.” Furthermore, regardless of the protected nature of any particular employee activity, if that employee is discharged for any other “legitimate” reason, there is no violation of the Act. But the employer’s discretion is not absolute:

Where the discharge of a single employee is at issue, the resulting dispute often deals with the ill-defined parameters of “concerted activity.” The concert requirement of section 7 could be enforced according to its literal definition, granting the Act’s protection only to those actions directly involving more than a single employee. The courts, however, have demonstrated a reluctance to adopt such an interpretation and, instead, have generally fastened upon more expansive views. Thus, in many contexts, the term has become more

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11 29 U.S.C. § 160(c) (1970): “No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.” Cf. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1936): “[T]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than . . . intimidation and coercion [of the exercise of § 7 rights].”

12 NLRB v. Condenser Corp. of America, 128 F.2d 67, 75 (3d Cir. 1942). Accord, NLRB v. Century Broadcasting Corp., 419 F.2d 771, 778 (8th Cir. 1969); NLRB v. Arkansas Grain Corp., 392 F.2d 161, 167 (8th Cir. 1968); Steel Indus., Inc. v. NLRB, 325 F.2d 173, 177 (7th Cir. 1963); Cusano v. NLRB, 190 F.2d 898, 902 (3d Cir. 1951).


14 Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1352 (3d Cir. 1969).

15 WEBSTER’S NEW INTERNATIONAL DICTIONARY 470 (3d ed. 1966) defines “concert” as "agreement in a design or plan: union formed by mutual communication of opinions and views: accordance in a scheme . . . ." This definition was quoted by the court in NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971).

16 See text accompanying notes 101-30 infra.
a term of art than a factual description. Consequently, whether the action of an individual employee has been accorded protection under the Act has often turned on the court's interpretation of the purpose and effect of such action and not upon the simple and more limited question of whether there was, in fact, action "in concert."\(^{17}\)

In the case of an individual employee's attempt at contractual enforcement, without the support of a union, the question becomes sharply defined. Indeed, the courts of appeals have differed as to whether such activity should be deemed to be "concerted" within the meaning of section 7. The Second Circuit,\(^ {18}\) adopting the somewhat "fictional" view of the Board,\(^ {19}\) has found the necessary element of concert in the fact that the individual is attempting to enforce collective rights as embodied in a contract. The Third Circuit rejects this view and maintains that the concert requirement cannot fairly be read as including such unitary action within its ambit.\(^ {20}\) Whether the Third Circuit's restrictive reading of "concert" is mandated by the Act, or whether the "constructive" approach as promulgated by the Second Circuit can be justified by either policy or precedent, is the question to be resolved.

Certain policy considerations particularly bear on the "concerted activity" question. In the words of a former chairman of the Board, the policy of the Act is: "to protect the public interest by eliminating certain barriers to peaceful relations between employers and employees . . . ."\(^ {21}\) But the "concerted activity" problem raises doubts as to whether this philosophy, aimed toward an easing of employer-employee tensions, is furthered by adhering to the more traditional approach of the Third Circuit. Whether the Act's protection should turn solely on the presence of more than one grievant is naturally a

\(^{17}\) NLRB v. Ford Radio & Mica Corp., 258 F.2d 457, 461 (2d Cir. 1958): "Regardless of whatever concerted activities the employees were engaging in, if they were discharged for any other reason, the employer does not violate the Act. Thus, the motivation of the employer in ordering the discharge is the crucial element in establishing a violation." For example, actions by employees which are unlawful, violent, or in breach of contract are not accorded protection by the Act. NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962). Nor are activities demonstrating insubordination, disobedience, or disloyalty within the protection of \(\S\) 7. NLRB v. Local 1239, IBEW, 346 U.S. 464, 472-76 (1953). It is not always clear, however, where the line separating protected concerted activity from unprotected concerted activity should be drawn. See 4 STRACUSE L. REV. 377 (1953). See also Cox, The Right to Engage in Concerted Activities, 26 IND. L.J. 319 (1951); Gregory, Unprotected Activity and the NLRA, 39 VA. L. REV. 421 (1953); Note, Unprotected Activity Under the National Labor Relations Act, 3 UTAH L. REV. 358 (1953).

\(^{18}\) NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967).


central policy consideration. Whether the purpose of the Act demands that the established grievance procedures be followed is a second. In considering this, one needs to balance the benefits of not penalizing the grievant who challenges an unresponsive system, against the potentially destructive effect which large numbers of such cases would have on labor-management relations. Consequently, whether the protection of the Act should be extended to include attempts at contractual remedy by individuals acting outside of union procedure, presents a problem with important implications.

II. Interboro AND Northern Metal: THE PROBLEM IN FACT

A. NLRB v. Northern Metal

This question was examined by the Third Circuit in the case of NLRB v. Northern Metal Co. The Northern Metal Company (the Company) had hired Davis, a laborer, for a trial period of thirty days, consistent with the terms of the collective bargaining agreement between Northern Metal and the Union local. Davis was classified as a "probationary employee" who, under the contract, was not entitled to union representation until the thirty-day period expired.

While no employee worked on Labor Day, all but probationary employees were compensated for the holiday. Feeling that he was entitled to such pay under the contract, Davis began to make inquiries about remuneration. Davis' demands met with resistance from, and subsequently resentment by, the Company. He was told by Max Rose, chief executive officer of Northern Metal, that under the contract, probationary employees were not entitled to holiday pay. Following refusals by the Union's local representatives to assist him, because he was not yet a union member, Davis secured a copy of the bargaining agreement and noted that nothing in its provisions expressly excluded non-union or probationary employees from its benefits. He therefore renewed his request to Rose for holiday pay, referring to the relevant provision of the bargaining agreement. Rose again denied that Davis was entitled to such pay, and upon the departure of the employee, instructed

22 Commentators have pointed out the deficiencies of such a distinction: "[E]ven if the activities of an individual employee should never be protected, it hardly follows that it is the distinction between one and two employees which best effectuates the purposes of the Act. And it would scarcely follow at all if we assume a large industrial plant employing thousands of people." Note, The Requirement of "Concerted" Action under the NLRA, 53 Colum. L. Rev. 514, 517 (1953).
23 See text accompanying notes 83-89 infra.
24 440 F.2d 881 (3d Cir. 1971).
25 Id. at 882.
26 Id. at 882-83.
27 Although the contract did not, on its face, negate the possibility that probationary employees were entitled to holiday pay, the company did not, as a long-standing practice acquiesced in by the union, grant holiday pay to such employees. Id. at 883 n.3.
the Company's financial secretary to prepare Davis' final paycheck. When Davis inquired the next day about the cause for his discharge, he was told by Rose that "he could not use a man who told him how to run his business." Subsequently Davis filed charges with the Board, alleging discriminatory discharge and seeking reinstatement with back pay.

The specific problem which Davis' situation raised is whether or not an individual employee is engaged in protected "concerted activity" when attempting to enforce a provision of the bargaining agreement to which he is subject. The Board found that Davis was in fact discharged for pressing his demand for holiday pay to which he thought himself entitled under the contract. Consequently, the Board concluded Davis' conduct was protected activity under the Act:

Grievances within the framework of a contract that affects all employees are concerted activities; and it does not matter that the employee may have been in error in his interpretation of the contract.

The Board had taken a similar position for many years. In Bunney Bros. Construction Co., for example, an employee was discharged for submitting to his employer a pay claim for "show-up" time to which he felt himself entitled under the bargaining agreement. In holding that such activity was protected by the Act, the Board explained that the discharged employee had "sought to implement the collective bargaining agreement applicable to him as well as other drivers and that the implementation of such an agreement by an employee is but an extension of the concerted activity giving rise to that agreement." The Board had interpreted from a policy viewpoint the concert requirement of section 7 in order to create what it viewed as a better substantive result.

The application of this rationale to the Northern Metal situation

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28 Id. at 883.
30 Id.
31 139 N.L.R.B. 1516 (1962).
33 Several later Board cases expand upon this rationale. In New York Trap Rock Corp., 148 N.L.R.B. 374 (1964), the Board stated that neither the fact that an employee's grievances might be numerous, nor his processing some himself while allowing the union to process others, deprived him of the protection of the Act. In J.A. Ferguson Constr. Co., 1968-2 CCH NLRB Dec. ¶ 20,112, the Board found that the protection which § 7 accorded to an employee did not, in any way, depend upon that employee's adherence to the specific form of the grievance procedure set out in the contract. Thus, for example, the Board noted that:

Even assuming that Tolot's request was in derogation of the grievance provisions of the contract, his conduct, nevertheless, constituted concerted activity since the 'grievance', pertaining to a violation of a condition of employment prescribed in the contract, affecting not only Tolot but also all the brick layers on the job.

Id. at 25,222.
was clear. Davis' activity, the Board indicated, would ultimately concern not only himself, but every employee similarly situated. Thus, while he was attempting to enforce the holiday pay provision of the contract solely for his own benefit, the results of his attempt would have precedential value for all other probationary employees who were employed under the same bargaining agreement. In this sense, the action which Davis took in attempting to implement the contract was "constructively concerted" and so deserving of protection under section 7.

When Davis' employer appealed the Board's decision to the court of appeals, however, the Third Circuit declined to follow the Board's "constructive" approach. Although noting that a similar rationale had recently been suggested by the Second Circuit in NLRB v. Interboro Contractors, Inc., the court, despite a strong dissent by Judge Biggs, ruled that it could not adopt an interpretation of section 7 which constituted "a clear expansion of the Act's coverage, in the face of unambiguous words in the statute." In essence, the Third Circuit was unwilling to adopt what they called the "fiction" of viewing a single employee's actions as "concerted." Such a view, the court reasoned, would not encompass a "sound interpretation of the Act." Consequently, the court found that because Davis was acting alone, without any indication of group support, he was not engaged in "concerted activity" and so was not unlawfully discharged under section 7. The fact that the avenue which Davis took in attempting to process his grievance was the only one open to him under the circumstances was not considered a relevant factor by the court.

B. NLRB v. Interboro Contractors

In March 1965, Interboro Contractors, Inc., hired John and William Landers to work as steamfitters at a construction project in New York City. When they arrived at the job site, the Landers brothers discovered "the employer's adherence to the collective bargaining agreement to be minimal." At various times over the next three weeks, John Landers made complaints to both his employer and the union to the effect that Interboro was not fulfilling its obligations pertaining to safety measures as provided for in the contract; William Landers and another worker named Collins made similar complaints on other occasions. At one point, John Landers had considered the

34 388 F.2d 495 (2d Cir. 1967).
35 440 F.2d at 884.
36 Id.
37 Brief for Petitioner at 10, NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967).
38 388 F.2d at 497-98.
39 Id.
failure to provide a steamfitter partner of such consequence that he refused to work until such a partner was provided for him.

Consequently both Landers were discharged for their activity and they subsequently filed a complaint with the NLRB against their employer. The Board, reversing the trial examiner, held that John Landers' complaints constituted protected "concerted activity" and ordered reinstatement. Before the Second Circuit, the Board argued, inter alia, that John Landers' conduct was "concerted" within the meaning of section 7 in that "his complaints—made in an attempt to secure compliance with the contract—affected the rights of all employees covered by the contract."40

After reviewing the facts in some detail, the Second Circuit concluded that John Landers' complaints had not been for himself alone. "[T]he testimony . . . shows," the court said, "that on several occasions John was speaking for William and Collins as well as for himself."41 Significantly, however, the court did not rest its holding entirely on this finding, but went further to say that, in any event, John's activities could be deemed "concerted" within the meaning of section 7 regardless of whether other employees had joined in or even been interested in his complaints:

[W]hile interest on the part of fellow employees would indicate a concerted purpose, activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees.42

This view formulates a doctrine of "constructive concerted activity" whereby attempts to enforce collective rights are viewed as actions on behalf of the group.43 Under the Second Circuit's approach, an employee retains the protection of the Act, even when acting solely for his personal benefit, if he is attempting to implement rights collectively formulated.44 Thus, notwithstanding the explicit wording of the Act—

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40 Brief for Petitioner at 11-12, NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967). Somewhat surprisingly, the brief for respondent barely touched on the question of whether Landers' complaints constituted "concerted activity." Rather, respondent argued (1) that the motivation of the discharge was based upon justifiable cause and not upon employee engagement in concerted activity, (2) that the Board did not satisfy its burden of proving the motivation was based upon employee engagement in concerted activity, and (3) that in fact it was not so based. To support these contentions the respondent sought to invoke the ambit of Caterpillar Tractor Co. v. NLRB, 230 F.2d 357 (7th Cir. 1956), which relies on the employer's right "to exact a day's work for a day's pay and to maintain discipline . . . ." See also note 21 supra. By not attempting to refute the Board's argument, respondent made it easier for the court to adopt the Board's view.

41 388 F.2d at 499.

42 Id. at 500.

43 This doctrine has been referred to as that of "concerted activity per se." NLRB v. Northern Metal Co., 440 F.2d 881, 887 (3d Cir. 1971) (dissenting opinion).

44 "[T]he is doubtful that a selfish motive negates the protection that the Act normally gives to section 7 rights." 388 F.2d at 499.
"concerted activities"—and by viewing the enforcement of the contract to be for concerted purposes, *Interboro* apparently extended the protection of section 7 to include action whose concerted nature was implicit rather than explicit.

A limitation on the farthest reaches of the *Interboro* decision was clarified by the Second Circuit in *NLRB v. John Langenbacher Co.* In that case several employees, believing that under the contract they were entitled to additional compensation for working a split shift, protested the absence of such remuneration and were discharged. In finding the employees' activity to be within the protection of section 7, the court found occasion to explain its previous decision:

[W]e have recently said that an attempt by employees to enforce their understanding of the terms of a collective bargaining agreement is a protected activity under 29 U.S.C. § 157 if the employees have a reasonable basis for believing that their understanding of the terms was the understanding that was agreed upon, *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500, and n.7 (2 Cir. 1967).

In reading *Interboro* as insisting on a reasonable basis for belief on the part of employees (or a single employee) seeking to enforce an understanding of the collective bargaining agreement, the court in *Langenbacher* could rely on particular language used in the *Interboro* decision:

[T]he fact that the complaints were apparently reasonable does support the conclusion that they were made for legitimate union purposes and were not fabricated for personal motives.

The "reasonableness" requirement does not seem so much a limitation on the general rule of *Interboro* as a guarantee that a particular employee's actions are, in fact, attempts to enforce the bargaining agreement and not simply personal gripes. Through the "reasonableness" proviso, the Second Circuit has, it seems, attempted to prevent the protection of the individual enforcement of contract rights outside of a union from becoming a wide-ranging protection of all individual actions.

The differing theories in the Second and Third Circuits are based

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46 398 F.2d 459 (2d Cir. 1968).
47 Id. at 463.
48 The court in *Langenbacher* indicated that it was not fashioning a new requirement.
49 Id.
upon two different conceptions of how section 7 was meant to be applied. The Interboro approach declines to place the rights of an individual acting alone in jeopardy because of his failure to invoke the union’s grievance process—that is, because of his failure to act in concert in the literal sense. Rather, in referring to "concerted purposes," it defines the parameters of section 7’s protection with regard to the effect which an individual’s action might have on other employees through enforcement of the contract. The Third Circuit has rejected this "constructive" approach, arguing that the wide-ranging scope of protection it entails does not serve to further the purposes behind the Act. Rather, the Third Circuit requires that there be "concerted activity" in fact (more than one grievant) or that the single employee invoke the union grievance process and thereby make the union his co-grievant in actingconcertedly. By thus applying a stricter interpretation of section 7, the approach in Northern Metal attempts to fulfill the usually accepted definition of "concert." While the Interboro approach is not free of potential difficulties, the problems and inequities the alternative view necessitates for the individual may well tip the scale toward the Second Circuit’s rationale. Whether such a conclusion is compelled by necessity, whether Interboro’s deficiencies justify the Third Circuit’s rejection of it, or, indeed, whether the concert clause itself has outlived its usefullness, furnishes the basic inquiry in the following discussion.

III. THE JUDICIAL UNDERPINNINGS OF "CONCERTED ACTIVITY"

The courts’ interpretation of the concept of "concerted activity" defines the scope of protection afforded to the individual employee with respect to his right to assert contractual grievances. Among the questions which the courts have considered in defining the scope of "concerted activity" is whether employees need involve a union in their activities in order to be protected by section 7. The Fifth Circuit, in determining that such involvement is not necessary, has set forth its reasoning as follows:

Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions . . . . Consequently the right of employees lawfully to engage in concerted activities for the purpose of mutual aid, outside of a union, is specified by the Act.

The federal judiciary has applied this reasoning to both non-union
employees and to employees who are union members, but who, nevertheless, act independently of their union.

One qualification attached to section 7 protection upon a finding of concerted activity is that it be for "mutual aid or protection," as required by the Act. This phrase has been broadly interpreted, however, to include almost any activity which somehow affects the well-being of the employees as a group. The Seventh Circuit, in NLRB v. Phoenix Mutual Life Insurance Company, included within the protection of the Act a group protest concerning the employer’s frequent hiring and firing of different cashiers, a practice which threatened to result in a loss of valuable time for some employees whose earnings were partially dependent upon the rapid registering of receipts. This and other like opinions indicate that if employee action is somehow job-related, the "mutual aid" provision will be deemed fulfilled. Certainly, an attempt even by a single employee to enforce his employer’s adherence to the contract would seem to satisfy the mutual aid requirement.

Concerted activities are protected only if the employer has some knowledge of the protected nature of such activity before discharging the employee. This view has been adopted both by the courts and by the NLRB. In defining the knowledge requirement, the Second Circuit, while stating that employees need give neither formal nor informal notice of their purpose to be protected by the Act, has held that "where the employer from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they chose to remain silent, bear the risk of being discharged." The Fifth Circuit also requires that an employer’s liability be predicated upon "at least some legally justifiable inference of employer knowl-

56 See, e.g., Salt River Valley Water Users’ Ass’n v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953).
57 "The words ‘concerted activities’ are limited in meaning by the words with which they are associated . . . ." Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 752 (4th Cir. 1949).
58 167 F.2d 983 (7th Cir.), cert. denied, 335 U.S. 845 (1948).
59 See, e.g., Salt River Valley Water Users’ Ass’n v. NLRB, 206 F.2d 325 (9th Cir. 1953).
60 The Ninth Circuit, for example, has held that the “mutual aid” proviso need not be so narrowly construed as to require concerted activities to be related to the purpose of collective bargaining. Morrison Knudsen Co. v. NLRB, 358 F.2d 411, 413 (9th Cir. 1966).
The implications of the knowledge requirement, as it touches the Interboro situation, are unclear. The requirement is not discussed in either the Northern Metal or Interboro decisions. Nevertheless, even if the knowledge provision were mandated, the Interboro approach might be implemented without disturbing the requirement. Although the court in Illinois Ruan Transport Corp. v. NLRB found it unnecessary to consider this question, Judge Lay's dissent in that case does attempt to deal with a closely analogous question. In response to the employer's argument that he was not aware that the discharged employee, in prosecuting a contract grievance, was acting for the "mutual aid or protection" of other employees, Judge Lay noted:

This argument ignores the obvious knowledge of respondent as to the rights of all employees clearly written within the collective-bargaining agreement. These rights do not exist in a vacuum. It is well settled the employee need not use the most reasonable form to express his grievance . . . .

This analysis suggests the argument that an employer should be deemed to know the concerted nature of grievances concerning contract rights. While such an argument embraces what might be called a fiction, it nevertheless presents the basis for conciliation between the knowledge requirement and the Interboro rule.

Section 9(a) of the Act may further complicate the question of the applicability of section 7 to the individual grievant. In his dissent in Northern Metal, Judge Biggs notes that through section 9(a) of the Act "Congress has put its imprimatur on individual processing of grievances." However, Judge Biggs explains neither the nature of the interaction between section 9(a) and the rights guaranteed to employees in section 7, nor the possible implications of the various interpretations of section 9(a).

As originally enacted, section 9(a) provided for an exception to the principle of majority rule which the Act promulgated. 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." Although there was considerable debate concerning the propriety of the majority representation principle, there is little indication in the legislative history of the precise meaning attached to the phrase "any individual employee or a group of employees shall have the right at any time to present grievances to their employer."
to the right granted by this proviso. Consequently there arose in the courts a considerable controversy concerning the implications of the language used with regard to the role of the union in the settlement of individual grievances.

The nature of the debate was altered with the passage of section 9(a) of the Labor Management Relations Act of 1947. This Act added to the proviso, permitting individuals to present grievances to their employer, the right

[T]o 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.

The legislative history of the 1947 provision offers some evidence indicating that section 9(a) was intended to create an "indefeasible right" of grievance prosecution for every employee. Some commentators have interpreted it this way. Since it has been established that a grievance under section 9(a) may include any problem arising under the collective bargaining agreement, the implications of the "indefeasible right" view are considerable. If this view were adopted, it would entail a re-evaluation of the ambit of protection accorded to "concerted activities." Certainly one can make a persuasive argument that a single employee should be protected by the Act when attempting to enforce an "indefeasible right" granted him by that Act. Assuming

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75 For a discussion of the legislative history of § 9(a), see Dunau, Employee Participation in the Grievance Aspect of Collective Bargaining, 50 COLUM. L. REV. 731, 744-46 (1950).
77 See, e.g., Douds v. Local 1250, RWDSU, 173 F.2d 764, 769 (2d Cir. 1949) (L. Hand, C.J.): "It then became the natural understanding that those 'grievances' which could be 'adjusted' comprised all disputes which could be covered in a collective agreement; and that meant every kind of dispute, for all disputes can be covered by a collective agreement."
such an "indefeasible right" existed, failure to support such an interpretation would not only emasculate an employee's section 9(a) rights, but also would draw into question the very meaning of the Act's commitment to employee freedom.

The federal courts, in holding that section 9(a) establishes only a "permissive right" in the employer to hear individual grievances, have followed the view of most commentators and that of the NLRB. Their reasoning was best set forth by the Second Circuit:

The proviso was apparently designed to safeguard from charges of violation of the act the employer who voluntarily processed employee grievances at the behest of the individual employee, and to reduce what many had deemed the unlimited power of the union to control the processing of grievances.

Thus, Judge Biggs' reliance upon section 9(a) in *Northern Metal* is of questionable significance in view of the interpretation given to that section by the courts.

This raises the question whether the court's interpretation of section 9(a) may be undermined by the protection of "concerted activity" offered by section 7. Where two employees rather than one seek to present a grievance other than through the contract grievance procedure, the permissive right interpretation of section 7 loses its importance because the employees are protected by section 7.

This incongruity reinforces a conclusion that the courts have formulated an interpretation of section 9(a) which is at odds with the seemingly clear meaning of that provision. Probably this results from a fear that if every employee were given the right to present complaints directly to an employer, the grievance machinery would break down. However, since two employees will usually be protected in complaining directly to an employer, a decision based upon such apprehension loses its force. As under section 7, the narrow distinction between one and two employees does not seem to be a proper basis on

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79 Prior to the Wagner Act employers had no legal obligation to receive grievances from individuals. Generally speaking, that act was not intended to enlarge the rights of individuals, and the failure to provide any remedy for a refusal to receive their complaints suggests that no enforceable right was intended... The office of a proviso is seldom to create substantive rights and obligations; it carves exceptions out of what goes before. Cox, Rights Under a Labor Agreement, 69 HARV. L. REV. 601, 624 (1956).

80 The Board has ruled that § 9(a) grants only a "permissive" right. See, e.g., General Cable Corp., 20 LAB. ARB. 443 (1953).

81 Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179, 185 (2d Cir. 1962) (emphasis added).

82 See also Note, Section 9(a) of Taft-Hartley Act Confers on Employee No Right to Compel Employer to Hear Individual Grievances, 63 COLUM. L. REV. 1513, 1516 (1963).
which to extend the Act’s protection. Consequently, as a partial alter-
 native to the Second Circuit “constructive” interpretation of section
7, the courts might reconsider interpreting section 9(a) as granting a
right of grievance prosecution to the individual employee. Perhaps by
limiting this right to those situations where the union is unwilling or
unable to aid the grievant, the courts can reconcile the problem of
possible subversion of the grievance procedure with the need to abolish
the often incongruous distinction between the positions of the individ-
ual and the group complainant.

IV. INDIVIDUAL ACTIVITY WHICH THE COURTS HAVE
PROTECTED AS CONCERTED

The courts have accorded protection under the “concerted ac-
tivity” clause to those individual employees who in particular ways or
under particular circumstances have registered grievances with their
employer. By examining a few of the more obvious examples of such
action, and by comparing these examples to the Interboro approach,
we can better evaluate the appropriateness of the Second Circuit’s
view.

The expression of grievances in the manner provided for in the
collective bargaining agreement has marked one area of protected
section 7 activity. In NLRB v. Selwyn Shoe Mfg. Corp., the Eighth
Circuit ordered the reinstatement of an employee who had been dis-
charged for filing a grievance alleging that her employer was not fol-
lowing certain contractual provisions in the assignment of overtime
work. The court reasoned that following the procedure established in
the contract for prosecuting a grievance based on that contract was
protected under the Act “because the collective bargaining agreement
is the result of concerted activities by the employees for their mutual
aid and protection.” The court seemed to find the necessary element
of concert in the union’s indirect involvement, and to imply that
thereby the union became a co-grievant, and the employee’s attempt
to assert her contract claim became a “concerted activity,” effectively
involving all those who had ratified the contract procedure.

As noted by the dissent in Northern Metal, the only substantive
difference between Selwyn Shoe and Interboro was the Selwyn em-
ployee’s utilization of the union grievance procedure. The NLRB
has gone beyond the Selwyn Shoe approach, reasoning that even con-
tract claims prosecuted “in derogation of the grievance provisions of
the contract” should be accorded protection under section 7 since a
decision upon such claims would affect other employees regardless of

83 428 F.2d 217 (8th Cir. 1970).
84 Id. at 221.
85 440 F.2d at 887 n.1.
the procedure used to express them. The language of the court in *Selwyn Shoe* does not clearly refute this argument. The court stated that:

The submission of a grievance based on the collective bargaining agreement cannot be the basis for discharge. To approve [the employee’s] discharge would thwart the very purposes of the Act—the promotion of harmony in labor-management relations and the recognition of an individual’s right to organize for mutual protection and individual security.

It is unclear why a grievance is to any greater degree “based on the collective bargaining agreement” when it is expressed in an established manner than when it is not. Secondly, it is questionable whether “the promotion of harmony in labor-management relations” and the “security” of the individual are put in greater jeopardy by a failure to protect procedurally correct contract grievances than by a failure to protect all contract grievances. It could be argued that following the *Selwyn Shoe* approach is logically necessary because it represents not only the enforcement of collective rights but, as well, enforcement in a collectively agreed-upon manner. But the general policy of the Act should not turn on such narrow distinctions. Perhaps more important, certain individuals in positions analogous to that of Davis in *Northern Metal* may be foreclosed from utilizing the union grievance process. For such employees, the only other opportunity for asserting their rights without risk of discharge would involve finding other similarly situated employees with whom to act in concert. While the inability to do so may well reflect the invalidity of the individual’s grievance, it may also reflect a situation which still warrants protection. Other employees may be unwilling to join in the prosecution of another’s contract claim for many reasons: fear of employer retaliation; preoccupation with other matters; or failure to perceive the importance of the grievance. Further, there are situations which elicit an employee’s immediate protest without affording him an opportunity to contact and persuade others to join him. Each of these makes the *Selwyn Shoe* approach inadequate as the sole touchstone for defining the scope of protection which section 7 should accord to individual grievants.

The decision of the Fifth Circuit, in *Trailmobile Div., Pullman, Inc. v. NLRB*, marks a related area to which the courts have extended the Act’s protection. In that case a union secretary, Green, had attempted on various occasions to present grievances to the manage-

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87 428 F.2d at 221.
88 See, e.g., NLRB v. Interboro Contractors, 388 F.2d 495 (2d Cir. 1967).
89 407 F.2d 1006 (5th Cir. 1969).
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ment on behalf of other employees. One grievance centered around Green's contention that welders were not being promoted from within the plant ranks; on another occasion he complained of written reprimands being given to two fellow employees; and another involved the seniority rights of an employee. The third occasion, involving the welders, resulted in the plant superintendent issuing a written warning to Green to the effect that Green was involving himself in matters with which he was not personally concerned. The warning provided that no further harassment of management representatives would be tolerated even if it was necessary to discharge Green. The court, on these facts, proceeded to find that the presentation of the grievances under the circumstances was within the protective ambit of section 7 of the Act, and that therefore section 8(a)(1) of the Act had been violated by the threat against Green.

Again it appears likely that the court viewed the union as a co-grievant with the individual, this time not because contract grievance procedures were being used, but because the individual presenting the grievance was a union officer. By thus involving the union (and by implication all those individuals who comprise the union), Green apparently was viewed as representing all those employees whose interests he was pledged to protect, in his capacity as an officer of that union.80

Application of the Trailmobile rationale does preserve to some extent an orderly and predictable manner of processing grievances where the complaint of a single employee is at issue. In such cases both employer and employee are put on notice that if individual grievances are pursued through union personnel, the courts will protect their advocate under section 7. In other ways, however, this rationale serves not to effectuate but to discourage the Act's purpose of preserving industrial peace. That similar grievances—introduced by dissimilar procedures—lead to differing outcomes will inevitably seem an injustice to employees unfamiliar with legal procedure. Furthermore, granting protection to those individuals who are union representatives may create a misleading impression in the eyes of the employees. By extending protection to one employee who happens to be a union representative, but not to other employees acting singly, the courts seem to accord the union a privileged position. They therefore tend to make the union influential to a degree which may be undesirable. The principal task of American labor unions has been to represent employees and not to manipulate them; but by giving the single employee the option of acting through the union or not at all, the relationship between the employee and his union representative is compromised. It is

80 The determination whether a union representative is acting for himself or on behalf of other employees is often a difficult question of fact. See, e.g., NLRB v. Gibbs Corp., 284 F.2d 403 (5th Cir. 1960), discussed at text accompanying notes 112-15 infra.
now the employee, rather than his representative, upon whom the burden of maintaining a relationship rests.

Regardless of whether contract procedures are being used, or the individual involved is a union officer, courts have been quick to link individual with group activities. Thus the Third Circuit, in *Mushroom Transportation Co. v. NLRB*,91 required only that for activity to be "concerted" it be 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."92 The Ninth Circuit, applying this test, held that a single employee's verbal support of a threatened strike by the union was protected concerted activity and that the employee's discharge violated his section 7 rights.93 Further, in *NLRB v. Guernsey-Muskingum Elec. Co-op.*,94 the Sixth Circuit protected an employee who acted, without actual authority, as an informal spokesman for other employees. In holding that the employee's right to complain about the qualifications of a new foreman was protected, the court noted that the cohesiveness of "concerted activity" need not be more than "a reasonable inference... that the men involved considered that they had a grievance and decided, among themselves, that they would take it up with management."95

Thus, in several contexts, courts have already departed from literal enforcement of the in concert requirement. Activities undertaken solely by individuals have been found to be "concerted" for the purposes of section 7 under various tests and formulas. Consequently, the suggestion that the Second Circuit's approach in *Interboro* is without precedent is incorrect. The courts have stretched the meaning of "concerted activity" to accord with their conceptions of what Congress meant by that phrase. It is surely only arbitrary to draw the interpretative line short of *Interboro's* "constructive" approach.

A recent Eighth Circuit case, *NLRB v. Century Broadcasting Co.*,96 in applying the *Interboro* rationale to protect a single employee in another context, also presents support for adoption of the Second Circuit's approach. Taylor, sole engineer at a radio station, was employed under the terms of a bargaining agreement between his employer and the union. When Taylor attempted to press a demand for overtime pay, pursuant to the contract, he met first with resistance and subsequently with demotion.97 Finding this to be a constructive discharge, the trial examiner held that it was the result of his attempt to enforce the overtime pay provision of the contract and of his warn-

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91 330 F.2d 683 (3d Cir. 1964).
92 Id. at 685.
93 Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 342-43 (9th Cir. 1968).
94 285 F.2d 8 (6th Cir. 1960).
95 Id. at 12.
96 419 F.2d 771 (8th Cir. 1969).
97 Id. at 780.
ing that he would report the matter to the union.

The court, adopting the reasoning of the trial examiner and citing Interboro as support, held that since Taylor was the sole engineer at the radio station and consequently "the bargaining unit" at the time of his discharge: "[H]e acted in concert in his reliance on the collective bargaining contract" and so was engaging in "concerted activities" for which he was illegally discharged.

Although the court's opinion did not clearly differentiate between the section 8(a)(1) and section 8(a)(3) violations in regard to Taylor's discharge, its relevance lies in its reliance on Interboro in finding Taylor's activities to be "concerted." Confronted with a situation in which an employee was the sole person to whom the relevant provision of the bargaining agreement applied, the Eighth Circuit found that activities so arising should be considered as "concerted" per se and so within the protection of section 7. In effect, the court formulated a type of "constructive" approach, similar to the one utilized by the Second Circuit in Interboro.

No case is more important than Century Broadcasting in illustrating the serious issues with which the Second Circuit has attempted to deal. In that case, the Eighth Circuit recognized that, to an employee in Taylor's position, the denial of the Act's protection because of circumstances beyond his control would negate a necessary and desirable aspect of employee self-help. Even if it is feasible for an employee to process his claim through the union, there inevitably arise situations in which it is either impractical or otherwise undesirable to do so. Thus there is a need to preserve the interests of the individual as against the too-often dominant interests of big business and big unions. The Interboro approach may not be the best safeguard for the interests of individual employees. But in adopting it, Century Broadcasting at least reaffirmed the need for some such safeguard.

V. PROBLEMS OF THE THIRD CIRCUIT APPROACH

Traditional interpretations of section 7's concert requirement as illustrated by Northern Metal have often led to outcomes satisfactory

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99 419 F.2d at 780.
100 "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 . . . ." 29 U.S.C. § 158(a)(3) (1970). See generally Oberer, The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails, 52 CORNELL L. REV. 491 (1967); Note, The Requirement of "Concerted" Action under the NLRA, 53 COLUM. L. REV. 314, 324-26 (1953).
101 The court stated that discharge because of Taylor's concerted activities "discouraged union activities with respect to the contract and among employees generally." 419 F.2d at 780.
102 E.g., NLRB v. Interboro Contractors, 388 F.2d 495 (2d Cir. 1967).
103 See text accompanying notes 1-15 supra.
to neither employees nor employer. By using three illustrative cases as focal points, problems in the traditional interpretation can best be analyzed.

The failure of the courts to afford protection to many individuals with contract grievances has resulted in a serious "safety" problem. *Illinois Ruan Transport Corp. v. NLRB*\(^{104}\) illustrates how vital information may fail to reach appropriate personnel. In that case an employee wrote to his employer concerning certain safety violations of the collective bargaining agreement. Although the Eighth Circuit did not find it necessary to decide "the close and difficult question of whether Adams' alleged safety campaign constituted protected concerted activity,"\(^{105}\) it nevertheless stated that "many of these [complaints] could not fall in the protected activity category."\(^{106}\) The court's rationale for this statement was that the record showed no support—from either fellow employees or the union—for many of Adams' complaints and suggestions in regard to implementation of the safety provisions of the contract.\(^{107}\) Adams' grievances may not all have been valid. Yet a court's reliance on the lack of group support may not be a desirable prerequisite on which to premise either their investigation or the protection accorded to the complainant. While such a view may tend to screen "bad faith" grievances made for purely personal reasons, it does so at the expense of discouraging other employees from reporting safety violations and other dangerous conditions of employment.\(^{108}\)

In *Walls Mfg. Co. v. NLRB*,\(^{109}\) decided by the District of Columbia Circuit, an employee's writing to the state department of health with regard to unsanitary conditions at her employer's premises was held to be protected under the Act—but only because the court declined to reject the Board's determination\(^{110}\) that other employees had approved the letter.\(^{111}\) The court, in supporting the Board, was willing to find the necessary element of concert only in the context of group approval, not in a context of individual enforcement of collective rights. *Walls Mfg.* thus provides a useful example of how strict adherence to the concert requirement may prevent information regarding possibly dangerous or unhealthy working conditions from being transmitted to appropriate regulatory agencies. This situation, poten-

\(^{104}\) 404 F.2d 274 (8th Cir. 1968).

\(^{105}\) The court found that the employee's discharge was not motivated by such activity. *Id.* at 276.

\(^{106}\) *Id.*

\(^{107}\) *Id.*


\(^{109}\) 321 F.2d 753 (D.C. Cir. 1963).

\(^{110}\) The court cited its narrow scope of review as justification. *Id.* at 754. See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

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tially as serious for the individual employee as that found in Illinois Ruan Transport, is a measure of the extent to which safety issues can be raised by given interpretations of the law.

The court's adherence to the concert requirement has led, as well, to considerable inequity among employees generally. In NLRB v. Gibbs Corp., the discharged employee held the position of "shop steward"—the employee responsible for presenting the grievances of other employees to the employer under the bargaining agreement. The case turned on the question whether the shop steward was acting for other employees, or solely for his own benefit, in presenting to the employer a series of grievances concerning seniority rights under the contract. After several such actions by the steward, he received notice of his dismissal. The employer argued that no violation of section 8(a)(1) had occurred because the employee was discharged only as a result of his being an "habitual nuisance." In its decision, the Fifth Circuit adopted the trial examiner's report, finding the immediate cause of the discharge to be the assertion of a grievance "which related solely to a personal gripe" of the steward. Consequently, the court held that the employer's action did not constitute a violation of the Act since the steward's activities were not "concerted."

A comparison between Gibbs and the previously discussed opinion of the Seventh Circuit in Thor Power Tools reveals the inequity of such a result. In the Seventh Circuit case, a union grievance committeeman's remarks in representing an employee were found to be protected under the Act. Thus the court's current interpretation of section 7's scope poses a severe dilemma for an employee acting in such a capacity. While he is accorded the Act's protection in attempting to process other employees' contract grievances, he is not granted such protection when attempting to prosecute his own claim in the same manner. This "unequal protection" problem effectively places certain employees in a difficult position. Obviously it denies them a practical access to their employer to resolve personal contract claims. But, as well, it places their position as employees in jeopardy, should a reviewing court misconstrue their prosecution of others' grievances as their own. Such a dilemma may well dictate a reevaluation of the law in this area along the lines which Interboro has constructed.

112 284 F.2d 403 (5th Cir. 1960).
113 Id. at 404. Both parties agreed that the grounds asserted by the employer for the discharge were truly the grounds for dismissal. The dispute concerned whether the steward was a "nuisance" because of his contract demands on behalf of himself (the employer's position) or because of his demands on behalf of other employees. Id.
114 Id. at 405.
115 Id. at 406.
116 See text accompanying notes 89-90 supra.
117 The Fifth Circuit has recognized the same principle. See note 90 supra & accompanying text.
The principal problem which the traditional approach to section 7 entails, however, involves the discouragement of legitimate employee protest. The failure to protect employee activity at its first stages serves to frustrate much "true" concerted activity. Further, as to the specific problem of individual enforcement of contract rights, the problem takes on an even more ominous character. If an individual must place his security in jeopardy by trying to induce group action to support a grievance and is prohibited from presenting his complaint on his own, his opportunity to communicate with his employer has effectively been denied.

Davis' position in *Northern Metal* was perhaps somewhat unusual in that he, unlike most employees, was not entitled to union representation in the prosecution of his grievance. Although this factor may have some relevance, its significance is severely limited by other considerations. Even an employee entitled to union representation may not, for various reasons, obtain the help or attention his grievance deserves. Furthermore, the pervasive problem of "sweetheart contracts" reduces the significance of this factor even further.

An unknown percentage of employers enter into collusive bargaining agreements with unions which nullify their employees' right to process grievances. In fact, since the bargaining agreement negotiated by the Northern Metal Company with the union denied any grievance recourse to probationary employees, it may have been a form of "sweetheart contract." Certainly, it presents many of the same problems which a genuinely collusive agreement would involve. Thus, the situation there, although it perhaps represents an extreme example, serves to reveal the potential problems of the individual complainant and hence provides a model which highlights the inequities of the present law.

**VI. CONCLUSIONS**

The "constructive" approach to the "concerted activities" question goes far toward diminishing the inequities and dangers of the

118 See, e.g., NLRB v. Office Towel Supply Co., 201 F.2d 838, 841 (2d Cir. 1953) (gripping by employee to other employees held not to be protected activity, though in a sense aimed at group action, because it was "far too 'inchoate'"); Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749 (4th Cir. 1949) (employee's circulating petition on behalf of "personal" grievance held not to be protected; court did not consider possibility that other employees may have had same grievance); Note, *Discharge for Gripping as an Unfair Labor Practice*, 62 YALE L.J. 1263 (1953).

119 E.g., Mushroom Transp. Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964); NLRB v. Office Towel Supply Co., 201 F.2d 838 (2d Cir. 1953).

120 See text accompanying notes 83-86 supra.


122 Employers faced with legitimate organization by a union . . . will all too frequently shop for an organization which will enter into a contract with them at little or no cost in terms of employee benefit, in return for either an outright payment of cash, or in return for a check-off and/or welfare and pension fund contributions.

more traditional, Third Circuit approach. It implicitly recognizes the inconsistency of telling an employee that his assertion of a contract claim will be protected only if certain, often irrelevant, standards are met. By making "concerted purposes" the touchstone, it attempts to apply an interpretation of section 7 which at once accords with an "enlightened" policy view and remains at least arguably within the language of the Act.

In most respects, this attempt is successful. Interboro grants protection to advocates whose legitimate contract claims might otherwise go unexpressed. It de-emphasizes the technicalities of the process used to express a grievance and focuses instead upon the substantive effect which a complaint will have through enforcement of the bargaining agreement. Finally, it challenges, at least in part, the arbitrary distinction between one and two grievants upon which has often turned the remedial action taken by the courts. At the same time, however, the "constructive" approach does not foresake the "concerted activities" requirement of section 7. Although it does apply something other than a literal interpretation of that provision, the courts have acted similarly in other contexts. Both the "union co-grievant" theory suggested by Selwyn Shoe and Trailmobile, and the "inducement" test of Mushroom Transportation, are examples of constructions of the "concerted activity" language to encompass situations where policy dictated extending the Act's protection to individual grievants. The rationale used to justify the Second Circuit's decision in Interboro is, arguably, only an extension of this process.

The "constructive" approach presents an additional problem, however. Following Interboro might encourage individuals in large numbers to bypass the contractually prescribed grievance procedure without good reason. Judge Biggs' assertion in his dissent in Northern Metal that where an employee is entitled to union representation "he would undoubtedly request the union to process his grievance" seems too broadly generalized a conclusion. Indeed, the inaccuracy of such a view is suggested by the recent actions of black union members who, feeling that their grievances have not been treated seriously by white union leaders, have begun to challenge "discriminatory practices and complacent labor bureaucracies." Under Interboro, an ever larger number of black workers might fail to process their grievances through the union machinery and so produce a substantial strain on the collective bargaining system. Although such an outcome is not inevitable, it at least bears careful consideration.

In another sense, however, this consideration is more academic

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123 440 F.2d at 888.
124 The unions have uniformly denied such charges. In a recent study, for example, "the UAW [United Auto Workers] took strong exception to the allegations that it was not adequately representing the black workers in connection with grievances and other complaints." Stetson, Negro Members are Challenging Union Leaders, N.Y. Times, June 29, 1969, at 37, col. 2.
125 Id.
than real. The fact that it is desirable to prevent single employees from subverting the established grievance process becomes considerably less significant when considered with the fact that two employees, acting together, can usually subvert that process at will. Consequently, the underlying problem with which Interboro attempts to deal may require not simply the kind of ad hoc solution which the "constructive" approach represents, but rather a more searching examination of the concert requirement as a concept.

While the legislative history is unrevealing as to the purposes for which Congress inserted the "concerted activities" provision in section 7, several alternatives, as discussed by previous commentators, are conceivable. First, the phrase may represent a legislative determination that the conduct of an individual is likely to be too insignificant to merit governmental protection. That is, Congress may have believed that the authority of the Board should be focused on those activities of sufficient importance to involve the participation of more than one person. To do otherwise may have been viewed as an unnecessary waste of limited resources. Second, Congress may have denied protection to individual activity to provide an incentive for workers to combine in expressing their grievances. This would help provide stronger labor organizations capable of counterbalancing the power of the corporate employer. If employees were able to prosecute their own grievances, the incentive for supporting the union would decrease proportionately.

Both of these possible purposes have little relevance today. Many businesses are either small enough, or employ so heterogeneous a group of workers that a single employee's action may be highly significant and worthy of consideration. Further, the need to encourage the growth of strong labor unions has since passed. Modern conditions elicit at least as much a need to shield the individual from the collective force as to protect the individual from the employer by means of a strong union. Thus, the reasons which probably underlay Congress' insertion of the concert provision in 1935 are today largely displaced by very different considerations.

The best interests of labor would be served if the legislature deleted the requirement of "concerted activity" from section 7. The courts' reluctance to construe that provision literally, as well as their attempts to broaden the ambit of section 7's protection, are persuasive indications that the literal meaning of that section is unrealistic. Furthermore, retention of the "mutual aid or protection" language would

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128 Id. 528.
129 Id. 530.
still insure that the Act's scope would not be extended to activities whose significance was limited to individuals. On balance, the basic policy of industrial peace underlying the Act would best be served by such a change.