

Individual Employee Rights Versus the Rights of Employees as a Group: *NLRB v. City Disposal Systems, Inc.*¹ — The National Labor Relations Act (NLRA or Act)² is based upon the premise that employees, as individuals, are not strong enough to bargain effectively with their employers over wages, hours, or other conditions of employment.³ In section 7 of the NLRA, Congress sought to equalize bargaining power between employees and their employer by guaranteeing employees the right to organize and act collectively for purposes of bargaining and other mutual aid or protection.⁴ Central to this right to organize is the concept of exclusive representation by a union selected by a majority of the employees in a bargaining unit.⁵ Without the provision of exclusive representation, Congress believed that unions' collective bargaining power would be meaningless, and that some employers would be encouraged to divide their employees against themselves.⁶ Consequently, the NLRA's model of collective bargaining requires that many individual interests be subordinated to the interests of the group.⁷ The Act recognizes, however, that the rights of individuals must be protected in the process.⁸

¹ 465 U.S. 822 (1984).

² 29 U.S.C. §§ 151–69 (1982).

³ See *id.* § 151. See also 79 CONG. REC. 7565 (1935) (statement of Sen. Wagner). In explaining the reasons for allowing and encouraging collective action by workers, Senator Wagner said, "[c]aught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, [the worker] can attain freedom and dignity only by cooperation with others of his group." *Id.*

⁴ 29 U.S.C. § 157 (1982). Section 7 provides:

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

Id.

Senator Wagner explained that section 7 of the Act merely provides that employees, if they desire to do so, are "free to organize for their mutual aid or benefit . . . to make the worker a free man in the economic as well as the political field." 79 CONG. REC. 2371 (1935).

⁵ 29 U.S.C. § 159(a) (1982). Section 9(a) of the NLRA provides that the majority of employees may choose a representative to be the sole representative of all employees in that unit for the purposes of bargaining over wages, hours, and other conditions of employment. Section 9(a) states in pertinent 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

Id.

⁶ 79 CONG. REC. 2372 (1935) (statement of Sen. Wagner). In introducing the bill that became the NLRA, Senator Wagner argued that the exclusive representation clause of section 9(a) meant that a majority of employees in a unit may decide who is to be the spokesman for all in making agreements over wages, hours, and other conditions of employment. He pointed out that the concept of exclusive representation conformed with the democratic procedure followed in every business and in governmental life. Without a provision establishing exclusive representation, Senator Wagner argued, the phrase "collective bargaining" would be meaningless and some unfair employers would be encouraged to divide workers against themselves. *Id.*

⁷ *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62 (1975); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944).

⁸ See Schwartz, *Different Views of the Duty of Fair Representation*, 34 LAB. L.J. 415, 429 (1983). Schwartz states that not only must labor laws protect individual rights, but also that the union movement itself "must ensure and enforce fair representation and guarantee the broad rights of

Since the Act's inception, courts have struggled to maintain a balance between the principles of exclusive representation and individual rights.⁹ Despite attempts to balance individual rights with group interests, the tension between these two principles continues in labor law today.

This tension between the principles of exclusive representation and individual rights can be seen in the problems which courts have experienced in interpreting the language of section 7 of the NLRA. Section 7 guarantees employees the right to self-organization, to choose an exclusive representative for collective bargaining, and to engage in other concerted activities for the purpose of collective bargaining or other mutual benefit.¹⁰ In interpreting this provision of the NLRA, the United States Courts of Appeals have disagreed about which actions by individual employees fit within the section 7 definition of "concerted activities" for the "purpose of collective bargaining or other mutual aid or protection."¹¹ The circuit courts' different interpretations of section 7's "concerted activities" language have been a function of the disagreement over whether more emphasis should be placed on protecting the individual rights of employees or, instead, on protecting unions' bargaining power as the exclusive representatives of employees.¹² In one line of cases, five courts of appeals interpreted the "concerted activities" language of section 7 literally, and required that either the activity be engaged in by more than one employee or, if engaged in by an individual, that the activity be intended to induce group action.¹³ In a conflicting line of cases, three courts of appeals held that the language of section 7 must be interpreted in light of the broader principles underlying the Act.¹⁴ These courts reasoned that an action by an individual employee was concerted

individuals" in order to balance protection of individual rights with protection of group interests by the principle of exclusive representation. *Id.*

⁹ See *Emporium Capwell*, 420 U.S. at 60-62; *J.I. Case*, 321 U.S. at 338-39. Both the *Emporium Capwell* and *J.I. Case* decisions are discussed *infra* notes 55-85 and accompanying text.

¹⁰ 29 U.S.C. § 157 (1982).

¹¹ Compare *Royal Dev. Co. v. NLRB*, 703 F.2d 363, 374 (9th Cir. 1983) (Ninth Circuit limited its interpretation of "concerted activities" to the express language of the Act); *Roadway Express, Inc. v. NLRB*, 700 F.2d 687, 693-94 (11th Cir. 1983) (Eleventh Circuit adhered to limited interpretation of "concerted activities" announced in *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (where Third Circuit interpreted "concerted activities" to require that activity be "looking toward group action")); *ARO, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979) ("We think this expansive reading of the concerted activity clause of section 7 goes too far."); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973) (Fifth Circuit questioned statutory basis for *Interboro* doctrine); *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884-85 (3d Cir. 1971) (Third Circuit adhered to strict definition of "concert"), with *NLRB v. Ben Pekin Corp.*, 452 F.2d 205, 206 (7th Cir. 1971) (Seventh Circuit adhered to broad interpretation of "concerted activity" employed in *Interboro*); *NLRB v. Selwyn Shoe Mfg. Corp.*, 428 F.2d 217, 221 (8th Cir. 1970) (Eighth Circuit based its interpretation upon its recognition of the broad purposes of the Act); *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967) (Second Circuit interpreted "concerted activities" as encompassing an individual's actions).

¹² See *infra* notes 86-118 and accompanying text.

¹³ *Royal*, 703 F.2d at 374 (Ninth Circuit limited its interpretation of what constitutes concerted activities to the express language of the Act); *Roadway*, 700 F.2d at 693-94 (Eleventh Circuit adhered to limited interpretation of "concerted activities" announced in *Mushroom*, 330 F.2d at 685 (where Third Circuit interpreted "concerted activities" to require that activity be "looking toward group action")); *ARO*, 596 F.2d at 717 ("We think this expansive reading of the concerted activity clause of section 7 goes too far."); *Buddies Supermarkets*, 481 F.2d at 719 (Fifth Circuit questioned statutory basis for *Interboro* doctrine); *Northern Metal*, 440 F.2d at 884-85 (Third Circuit adhered to strict definition of "concert"). See *infra* notes 100-15 and accompanying text.

¹⁴ *Interboro*, 388 F.2d at 500 (Second Circuit interpreted "concerted activities" as encompassing

under section 7 so long as the activity was grounded in a right contained in the collective bargaining agreement.¹⁵ The United States Supreme Court recently resolved this split among the circuit courts. Adopting a broad interpretation of section 7, the Court, in *NLRB v. City Disposal Systems, Inc.*,¹⁶ held that a single employee's invocation of a right provided for in the collective bargaining agreement constitutes concerted activity.

In *City Disposal*, a collective bargaining agreement between the employer, City Disposal Systems, Inc., and Local Union No. 247 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) provided that City Disposal Systems would not require employees to drive any vehicle not in safe operating condition.¹⁷ If an employee refused to operate an unsafe truck, that refusal was not a violation of the collective bargaining agreement unless such refusal was "unjustified."¹⁸ The dispute in *City Disposal* arose when an employee covered by the collective bargaining agreement brought his regularly assigned truck to the garage for repairs and then refused to drive a second truck, claiming the second truck was also unsafe.¹⁹ Arguments between this employee and two of his supervisors ensued,²⁰ and City Disposal Systems discharged the employee.²¹

The day after his discharge, the employee filed a written grievance, pursuant to the collective bargaining agreement, asserting that the truck that he had been requested to drive was defective,²² that the employer had improperly ordered him to drive the truck,²³ and that his discharge was, therefore, improper.²⁴ The union, however, found no objec-

an individual's actions). See also *Ben Pekin*, 452 F.2d at 206 (Seventh Circuit adhered to broad interpretation of concerted activities employed in *Interboro*); *Selwyn Shoe*, 428 F.2d at 221 (Eighth Circuit based its interpretation upon its recognition of the broad purposes of the Act). See *infra* notes 90-99 and accompanying text.

¹⁵ See *infra* notes 95-99 and accompanying text.

¹⁶ 465 U.S. 822 (1984).

¹⁷ *Id.* at 824-25 (1984). The collective bargaining agreement provided:

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.

¹⁸ *Id.* at 825.

¹⁹ *Id.* at 826-27. On Saturday, May 12, 1979, the employee, James Brown, having nearly collided with truck number 244 while he operated truck number 245, observed that a fellow employee had difficulty with the brakes of truck number 244. When truck number 244 was returned to the employer's truck-repair facility, both Brown and the driver of truck number 244 were told that the brakes on number 244 would be repaired either over the weekend or on the morning of Monday, May 14, 1979. *Id.*

On Monday, May 14, Brown experienced problems with his regular truck, number 245, and he brought number 245 in for repair. Brown's supervisor first ordered Brown to punch out and go home, but then changed his mind and asked Brown to drive truck number 244. Brown refused, explaining that something was wrong with the brakes, but he did not explicitly refer to the collective bargaining agreement. *Id.*

²⁰ *Id.* at 827. Brown's supervisor angrily told Brown to go home, but an argument ensued. Another supervisor intervened and repeated the request that Brown drive number 244. Brown again refused, claiming number 244 "had problems." The supervisors returned to their offices, and Brown punched out and went home. Later that day Brown received word that he had been discharged. *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

tive merit in the grievance and declined to process it.²⁵ The employee then filed an unfair labor practice charge against City Disposal Systems with the National Labor Relations Board (the Board), challenging his discharge as a violation of his rights protected by section 7 of the NLRA.²⁶

Following the initial hearing, the administrative law judge held that an individual employee who acts alone in asserting a right under a collective bargaining agreement may be engaged in concerted activities,²⁷ and that the employee's actions in *City Disposal* were concerted within the meaning of section 7 of the Act.²⁸ The administrative law judge reasoned that an individual complaining of safety matters that are embodied in the collective bargaining agreement is complaining not only in his own interest, but is also attempting to enforce such contract provisions in the interest of all employees covered under the agreement.²⁹ Adopting the findings and conclusions of the administrative law judge, the Board ordered that the discharged employee be reinstated with back pay.³⁰

Upon the Board's petition for enforcement of its reinstatement and back-pay order, the United States Court of Appeals for the Sixth Circuit overruled the administrative law judge's and the Board's interpretation of "concerted activities."³¹ Finding that the employee's refusal to drive the second truck was an action taken solely on his own behalf,³² the court of appeals stated that for an individual's act or complaint to amount to concerted activity under the NLRA, the activity must not have been made solely on behalf of an individual employee.³³ Rather, the court required that the activity be made on behalf of other employees, or at least be made with the object of inducing or preparing

²⁵ *Id.*

²⁶ *Id.* The employee filed an unfair labor practice charge against his employer, claiming that his employer violated section 8(a)(1) of the NLRA, which makes it an unfair labor practice for an employer to interfere with an employee's attempts to exercise rights guaranteed to him under section 7. 29 U.S.C. § 158(a)(1) (1982).

²⁷ *City Disposal Systems, Inc.*, 256 N.L.R.B. 451, 454, 107 L.R.R.M. 1267, 1267 (1981). See 29 U.S.C. §§ 153, 160 (1982). The procedure in an unfair labor practice case begins with the filing of a charge. In *City Disposal*, the employee, James Brown, filed with the Regional Office of the NLRB. Section 10 of the NLRA provides for the issuance of a complaint stating the charges and notifying the charged party of a hearing to be held concerning the charge. 29 U.S.C. § 160(b) (1982). Complaints issue only after investigation by the Regional Office. The unfair labor practice hearing is conducted before an NLRB administrative law judge, under the authority of section 10(b) of the Act. *Id.* All parties to the hearing may appeal the administrative law judge's decision to the Board itself. The Board may then make its own determination on the unfair labor practice charge, and if it finds an unfair labor practice, the Board may issue a cease and desist order. *Id.* § 160(c). If a party fails to comply with the Board's cease and desist order, the Board may seek enforcement of its order in the United States Court of Appeals. *Id.* § 160(e). Additionally, any party aggrieved by a final order of the Board may obtain review of such order in any appropriate circuit of the United States Court of Appeals. *Id.* § 160(f). See also C. MORRIS, *THE DEVELOPING LABOR LAW* 832-36 (1971) (summary of procedures in unfair labor practice cases).

²⁸ *City Disposal*, 256 N.L.R.B. at 454, 107 L.R.R.M. at 1267.

²⁹ *Id.*

³⁰ *Id.* at 451, 107 L.R.R.M. at 1267.

³¹ *NLRB v. City Disposal Systems, Inc.*, 683 F.2d 1005, 1006 (6th Cir. 1982).

³² *Id.* at 1007.

³³ *Id.* In *City Disposal*, the Sixth Circuit followed the standards it set forth in *ARO* for determining whether activity was concerted. *Id.* See *ARO, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979).

for group action,³⁴ and that the activity have some arguable basis in the collective bargaining agreement.³⁵ Having reasoned that the employee's refusal to drive a truck was solely in his own interest,³⁶ the appeals court concluded that such refusal did not constitute concerted activity within the meaning of section 7 of the NLRA.³⁷

In a five-to-four decision delivered by Justice Brennan, the United States Supreme Court reversed the court of appeals decision and adopted the Board's interpretation of what constitutes "concerted activities" under the NLRA.³⁸ According to the Court, an individual employee's reasonable and honest invocation of a right provided for in his or her collective bargaining agreement is concerted activity within the meaning of section 7 of the Act.³⁹

Although the Supreme Court's method of interpreting the concerted activities clause of section 7 was consistent with the broader principles underlying the Act, the Court failed to consider the impact of its decision on the basic principle of exclusive representation. In enacting sections 7 and 9(a) of the Act, Congress intended to encourage employees to organize into a united body, rather than into a number of units that could be isolated and dominated by the employer.⁴⁰ The bargaining strength of employees lies not only in their right to organize but also in their ability to present one united position for the unit as a whole.⁴¹ The Court's decision, permitting individual employees to pursue claims independently under the collective bargaining agreement, however, may reduce the bargaining power of the exclusive representative. This reduction of bargaining power may weaken the grievance and arbitration process and eventually cause a decline in unionization. When a union loses bargaining power or is abandoned by its members, there is a real danger that employee rights obtained and enforced through collective bargaining will disappear with the bargaining power of the union. If the *City Disposal* decision causes a decline in the bargaining power of elected employee representatives, or in unionization in general, as this casenote maintains it will, then this decision aimed at preserving individual employee rights, ironically, will ultimately weaken the economic strength that employees possess as a collective group.

This casenote will first outline the development of the principle of exclusivity, and explain that concept's continued importance in national labor policy. Section II will discuss the split among the circuit courts over the interpretation of "concerted activities." Following this discussion, Section III will present the Court's decision and reasoning in *City Disposal*. Finally, Section IV will examine the method the Court used to interpret section 7, and will then analyze the impact that the Court's decision may have on employees' rights and benefits. The *City Disposal* Court used the majority approach of interpreting section 7 of the NLRA when it considered the underlying principles of the Act. The analysis of the *City Disposal* decision will focus on the Court's failure to consider the principle of exclusive representation. The *City Disposal* Court's decision may cause a

³⁴ *City Disposal*, 683 F.2d at 1007.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1008.

³⁸ *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 841 (1984).

³⁹ *Id.*

⁴⁰ See *supra* notes 3 & 5 for text of sections 7 and 9(a) of the Act.

⁴¹ See *infra* notes 42-49 and accompanying text.

derogation of the grievance and arbitration process and eventually a decline in unionization. The casenote concludes that although individual employees may be better able to enforce collective rights after *City Disposal*, employees may have fewer rights to enforce.

I. THE CONFLICT BETWEEN INDIVIDUAL RIGHTS AND UNION POWER

The national labor policy of the United States, as embodied in the NLRA, requires that one union serve as the sole representative for all the employees in a plant or other bargaining unit.⁴² According to section 1 of the NLRA, the inequalities in bargaining power between individual employees and their employer are eliminated through the practice of collective bargaining by means of exclusive representation of all employee interests.⁴³ Section 9(a) of the NLRA provides that a representative elected by a majority of the employees in a unit⁴⁴ shall be the sole representative of all employees in the unit for purposes of collective bargaining over wages, hours, and other conditions of employment.⁴⁵ Congress adopted the principle of exclusive representation because it perceived that the individual employee was too weak to bargain effectively with the large

⁴² Dunlop, *Structure of Collective Bargaining*, in 4 READINGS IN LABOR ECONOMICS AND LABOR RELATIONS 144 (R. Rowan ed. 1980). The practice of exclusive representation followed the American political custom of electing single representatives by majority vote. *Id.* In 1880, the American Federation of Labor adopted the principle of exclusive representation as a method to reduce conflict among unions by permitting only one union to represent employees in a particular unit. *Id.* Employers generally accepted exclusivity because it reduced disputes among rival unions and thus stabilized labor relations in their plants. *Id.* The national labor policy also embodied the principle of exclusive representation once the government decided to regulate collective bargaining. *Id.* In early twentieth century labor legislation, including the Railway Labor Act of 1926, Congress adopted legislation that permitted employees to elect by majority vote a single representative for the entire group. *Id.* Finally, Congress enacted the NLRA with its provision for majority rule in 1935. *Id.*

⁴³ 29 U.S.C. § 151 (1982). Section 1 of the NLRA recognizes an inequality in bargaining power between employees who are unorganized and employers who are organized in corporate or other forms of ownership association. *Id.* By protecting the right of employees to organize and bargain collectively, the national labor policy best promotes a free flow of commerce; encouraging collective bargaining and restoring equality of bargaining power between employers and employees removes many of the recognized sources of industrial unrest. *Id.* See 79 CONG. REC. 7565 (1935) (statement of Sen. Wagner). In defending the proposed bill that became the NLRA and its protection of collective action, Senator Wagner argued that employees were too small and weak as individuals to attain freedom and dignity in the industrial world; only by cooperating with each other could workers achieve gains in their employment contracts. *Id.* In introducing that same bill, Senator Wagner said that without the provisions establishing exclusive representation, the phrase "collective bargaining" was devoid of meaning, and some employers would be encouraged to divide their employees against themselves. 79 CONG. REC. 2372 (1935). See also Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 638, 652 (1956). Cox stated that individual interests would be better protected by first recognizing group interests in labor contract administration and then by increasing the group representative's awareness of its obligations, both legal and moral, of representing all employees fairly, rather than by favoring individual causes of action by individuals over union representation. *Id.* at 652.

⁴⁴ In *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971), the Supreme Court held that the standard for determining an appropriate unit is whether those included in the group share a "community of interests." In *Allied*, the Court held that pensioners did not share with active employees a community of interests broad enough to be included in the bargaining unit, irrespective of whether pensioners are employees within the definition of section 2 of the NLRA in the first place. *Id.* Therefore, the Court held that unilateral activity by the employer to offer changed pension benefits to pensioners was not an unfair labor practice against the union then in place. *Id.*

⁴⁵ 29 U.S.C. § 159(a) (1982).

and organized corporate employer.⁴⁶ The policy favoring collective bargaining through the exclusive representative over piecemeal action by individuals and small groups of employees represents a calculation by Congress that in a business world populated by powerful corporations, the individual employee lacks the economic power to strike an advantageous employment bargain.⁴⁷ Collective action as a unit represented by one bargaining agent, therefore, serves the economic interest of employees as a group and individually.⁴⁸ Congress felt that without exclusive representation to establish majority rule within the unit, organizing for the purpose of collective bargaining would be meaningless because some employers would be encouraged to divide organized but varied groups of their employees against themselves.⁴⁹

The NLRA recognizes that although the concept of exclusive representation requires that many individual interests be subordinated to the interests of the union as a whole,⁵⁰ the rights of individuals also must be protected. Thus, national labor policy has provided a balance between the principles of exclusive representation and individual rights. First, the United States Supreme Court has implied a duty of fair representation on the exclusive representative.⁵¹ Under this doctrine, a union must serve the interests of its members in good faith and without discrimination.⁵² Second, the NLRA permits employees to vote out an exclusive representative in a decertification election.⁵³ Third, since 1959, the Landrum-Griffin Act has provided a bill of rights for union members to assure that minority voices are heard in labor organizations, as they are heard in other democratic institutions.⁵⁴

⁴⁶ 79 CONG. REC. 7565 (1935) (statement of Sen. Wagner). See *supra* note 43.

⁴⁷ 29 U.S.C. § 151 (1982). See *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 63 (1975) (Supreme Court emphasized exclusive representation as the key to equalizing bargaining power under the NLRA); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 *passim* (1967); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 *passim* (1944).

⁴⁸ *Emporium Capwell*, 420 U.S. at 63; *Allis-Chalmers*, 388 U.S. at 180; *J.I. Case*, 321 U.S. at 338.

⁴⁹ 79 CONG. REC. 2371-72 (1935) (statement of Sen. Wagner). Senator Wagner argued that without provisions establishing exclusive representation as a basic principle of labor policy, collective bargaining would be almost meaningless because employers could divide workers among themselves. *Id.*

⁵⁰ *Emporium Capwell*, 420 U.S. at 62; *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *J.I. Case*, 321 U.S. at 338. See also *Crenshaw v. Allied Chem. Corp.*, 387 F. Supp. 594, 599 (D.D.C. 1974) (court provides excellent summary of Supreme Court decisions in this area); *Cox*, *supra* note 43, at 625-27, 638, 652 (promoting group interests is the better way to protect individual interests).

⁵¹ *Emporium Capwell*, 420 U.S. at 64; *Vaca*, 386 U.S. at 182.

⁵² *Vaca*, 386 U.S. at 177.

⁵³ 29 U.S.C. § 159(c) (1982). Employees have the right periodically to vote out a union in a decertification election, though such a right is limited by rules designed to provide stability for a representative newly recognized or in the process of negotiating a new collective bargaining agreement. *Id.*

⁵⁴ 29 U.S.C. §§ 411-415 (1982). Section 101 of the Landrum-Griffin Act guarantees to every member of a labor organization equal rights and privileges within that organization. *Id.* § 411(a)(1). The Landrum-Griffin Act also guarantees freedom of speech and assembly to every member of any labor organization. *Id.* § 411(a)(2). This bill of rights for employees also provides a guarantee against increased dues, initiation fees, or assessments without compliance with standards intended to guarantee due process. *Id.* § 411(a)(3). The right to sue is protected by the Landrum-Griffin Act, and due process is guaranteed before disciplinary action by the union may be taken. *Id.* §§ 411(a)(4)-(5).

Section 101(b) of the Landrum-Griffin Act nullifies any labor organization's constitution or bylaw provision that is inconsistent with the above-listed rights. *Id.* § 411(b). An employee's right to bring civil suit against the union is protected, as is any other remedy otherwise available to the

While attempting to maintain a balance between group interests and individual rights, the Supreme Court traditionally has recognized that the principle of exclusive representation is a central premise of the NLRA and the key to effective collective bargaining by unions.⁵⁵ For example, in the 1944 case of *J.I. Case Co. v. NLRB*,⁵⁶ a union was certified as the exclusive bargaining representative for employees whose individual employment contracts were still in effect.⁵⁷ The employer claimed that the individual contracts were a bar to negotiating over matters affected by those individual contracts.⁵⁸ The union then filed unfair labor practice charges, claiming that the employer had refused to bargain with it in violation of section 8(a)(5),⁵⁹ and had impeded employees in the exercise of rights guaranteed by section 7 of the Act.⁶⁰ The Court found the employer's refusal to bargain over matters covered by individual contracts to be an unfair labor practice, and upheld the enforcement of the Board's bargaining order.⁶¹

The Court in *J.I. Case* reasoned that the purpose of providing for collective agreements by statute was to replace individual contracts with provisions that served the interests of the group and that reflected the strength and bargaining power inherent in an organized group of employees.⁶² According to the Court, national labor policy was intended to obtain improved benefits for employees as a group through the process of collective bargaining. Maintaining that "majority rules,"⁶³ the Court recognized that such a practice might result in some individuals losing rights by the collective agreement.⁶⁴ The Court held, however, that the theory and practice of collective bargaining looked with suspicion on individual agreements that provided for individual advantages,⁶⁵ because individual advantages would often be earned only at the expense of some other benefit thought to be for the welfare of the group.⁶⁶

employee under state or federal law. *Id.* §§ 412, 413. Employees are also guaranteed the right to obtain copies of their collective bargaining agreements. *Id.* § 414. Finally, every labor organization is required to inform all members of their rights under these provisions. *Id.* § 415.

⁵⁵ *Emporium Capwell*, 420 U.S. at 62 ("Central to the policy of fostering collective bargaining where the employees elect that cause, is the principle of majority rule."); *Allis-Chalmers*, 388 U.S. at 180 (the Court recognized that by acting through a labor organization, employees have the most effective means of bargaining for improvements in working conditions); *J.I. Case*, 321 U.S. at 338-39 (the Court acknowledged that exclusive representation is necessary to benefit the group as a whole).

⁵⁶ 321 U.S. 332 (1944).

⁵⁷ *Id.* at 333.

⁵⁸ *Id.* at 334.

⁵⁹ *Id.* Section 8(a)(5) makes it an unfair labor practice for employers to refuse to bargain with the exclusive representative of the employees over wages, hours, and other conditions of employment. 29 U.S.C. § 158(a)(5) (1982).

⁶⁰ *J.I. Case*, 321 U.S. at 334. Interference with employees' attempts to exercise rights guaranteed by section 7 is a violation of section 8(a)(1) of the Act, and thus an unfair labor practice. 29 U.S.C. § 158(a)(1) (1982).

⁶¹ *J.I. Case*, 321 U.S. at 341-42.

⁶² *Id.* at 338.

⁶³ *Id.* at 339.

⁶⁴ *Id.* at 338.

⁶⁵ *Id.*

⁶⁶ *Id.* at 338-39. The Court reasoned that individual advantages are a "fruitful way" of interfering with organization and choice of representatives. *Id.* at 338. Even if individual advantage is deserved, the Court held that such advantage is earned at the expense of breaking down some other standard believed to be for the benefit of the group. *Id.* at 339. Thus, the Court held that

The Court re-affirmed its adherence to the principle of exclusive representation thirty years later in the case of *Emporium Capwell Co. v. Western Addition Community Organization*.⁶⁷ In *Emporium Capwell*, a union invoked the grievance procedure under the collective bargaining agreement by demanding a full hearing by the Union-Management Adjustment Board on charges that the employer was racially discriminating against employees.⁶⁸ Four employees felt that this procedure was inadequate and suggested that the union picket the employer.⁶⁹ The union refused, and advised these employees to participate in the grievance procedure hearing.⁷⁰ At the first meeting of the Adjustment Board, those four employees demanded another method of resolving the issue, and then walked out of the hearing.⁷¹ The employees distributed handbills and picketed the employer.⁷² The employer warned the employees that further picketing and public statements about the company could result in their discharge.⁷³ When the employees picketed the employer again, they were discharged.⁷⁴ The Court found no unfair labor practice on the employer's part, and upheld the discharge of the employees.⁷⁵

The Court held that even though the important principle of nondiscrimination was embodied in national labor policy "as a matter of highest priority,"⁷⁶ the employees' picketing of their employer was unprotected by the NLRA.⁷⁷ Although the collective bargaining agreement contained a no-strike clause,⁷⁸ the Court did not rely on this fact in reaching its decision. Instead, the Court explained that a labor union has legitimate interests in presenting a united front on issues such as discrimination and in seeing that its bargaining power is not reduced by subgroups within the unit pursuing what they perceive as interests separate from those of the group as a whole.⁷⁹ The Court stated that exclusive representation is the principle at the very base of the process of collective bargaining that is encouraged by national labor policy.⁸⁰ Although recognizing that the picketing was conducted for the laudable purpose of combating discrimination,⁸¹ the *Emporium Capwell* Court concluded that the principle of exclusive representation could not endure the fragmentation of the unit along racial lines.⁸² The Court, therefore, held that the employees' picketing was unprotected.⁸³

While attempting to maintain the balance between the principles of exclusive representation and individual rights, the Supreme Court recognized in *J.I. Case* and *Empor-*

the majority rules, and if the majority decides to collectivize the employment bargain, then individual advantages will generally be sacrificed as a contribution to the collective result. *Id.* at 338-39.

⁶⁷ 420 U.S. 50 (1975).

⁶⁸ *Id.* at 53-54.

⁶⁹ *Id.* at 54.

⁷⁰ *Id.* at 54-55.

⁷¹ *Id.* at 55.

⁷² *Id.* at 55-56.

⁷³ *Id.* at 56.

⁷⁴ *Id.*

⁷⁵ *Id.* at 73.

⁷⁶ *Id.* at 66.

⁷⁷ *Id.* at 72.

⁷⁸ *Id.* at 53.

⁷⁹ *Id.* at 70.

⁸⁰ *Id.* at 62.

⁸¹ *Id.* at 70.

⁸² *Id.*

⁸³ *Id.* at 72.

um Capwell that a presumption behind national labor policy is that the individual employee lacks the economic power to achieve an equitable employment agreement. According to the Court, national labor policy dictates that the interests of individuals and minority groups within the bargaining unit be subordinated to the exclusive bargaining status of the majority-elected labor organization.⁸⁴ Providing for representation of all employee interests by one labor organization, the Court has held, eliminates the inequality in bargaining power between employees and employers and thus fulfills a major purpose of the Act: to encourage collective bargaining in order to promote industrial peace.⁸⁵

II. THE CIRCUIT COURTS OF APPEALS SPLIT OVER HOW TO INTERPRET "CONCERTED ACTIVITIES"

In interpreting the meaning of section 7 of the NLRA, the United States Courts of Appeals also have struggled to maintain a balance between the principles of exclusive representation and individual rights. Section 7 provides employees with the right to self-organization, to choose an exclusive representative for collective bargaining, and to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁸⁶ In construing the concerted activities clause of section 7, the courts of appeals have reached different conclusions on the issue of whether actions by individual union members constitute concerted activities under the Act. In one line of cases, three federal courts of appeals asserted that the concerted activities clause must be interpreted in light of the broader principles of the Act.⁸⁷ These courts held that individual action attempting to enforce a collective bargaining agreement is simply an extension of the concerted activity that produced the contract, and that because it affects the interests of all workers under the contract, such individual action constitutes a concerted activity under the NLRA.⁸⁸ Conversely, in a conflicting series of cases, five circuit courts maintained that concerted activities should be more literally construed, and that individual action must not only be based in the collective bargaining agreement, but also must be conducted on behalf of other employees, and not solely for the benefit of the individual.⁸⁹

⁸⁴ See *supra* notes 62-66, 80-83 and accompanying text.

⁸⁵ See 29 U.S.C. § 151 (1982). Section 1 of the NLRA recognizes that unequal bargaining power between employees and employers is the cause of much industrial strife; however, by allowing employees to organize and elect an exclusive representative, the inequality is eliminated, and collective bargaining is thereby encouraged, with the ultimate result being industrial stability. *Id.*

⁸⁶ See *supra* note 4 for text of section 7.

⁸⁷ *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967) (Second Circuit interpreted "concerted activities" as encompassing an individual's actions). See also *NLRB v. Ben Pekin Corp.*, 452 F.2d 205, 206 (7th Cir. 1971) (Seventh Circuit adhered to broad interpretation of "concerted activities" employed in *Interboro*); *NLRB v. Selwyn Shoe Mfg. Corp.*, 428 F.2d 217, 221 (8th Cir. 1970) (Eighth Circuit based its interpretation of "concerted activities" upon its recognition of the broad purposes of the Act).

⁸⁸ See *supra* note 87.

⁸⁹ *Royal Dev. Co. v. NLRB*, 703 F.2d 363, 374 (9th Cir. 1983) (Ninth Circuit limited its interpretation of "concerted activities" to the express language of the Act); *Roadway Express, Inc. v. NLRB*, 700 F.2d 687, 693-94 (11th Cir. 1983) (Eleventh Circuit adhered to limited interpretation of "concerted activities" announced in *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (where Third Circuit interpreted "concerted activities" to require that activity be "looking toward group action")); *ARO, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979) ("We think this

The 1967 case of *NLRB v. Interboro Contractors, Inc.* is the leading case upon which courts advocating a broad interpretation of section 7's requirement of concert have based their decisions.⁹⁰ In *Interboro*, two employees were discharged because they had complained about working conditions.⁹¹ The United States Court of Appeals for the Second Circuit found substantial evidence that one of the discharged workers was speaking for both, and thus was engaged in concerted activities.⁹² The court approved the Board's finding that the employer had violated section 8(a)(1) of the Act by restraining the employees' right to engage in concerted activities protected by the Act.⁹³ The Second Circuit, therefore, enforced the Board's order to reinstate the complaining workers.⁹⁴

In an alternative holding, the court also ruled that, even absent an interest by fellow employees, an individual employee's attempts to enforce the provisions of a collective bargaining agreement may be deemed to be concerted activities.⁹⁵ This alternative holding, which has become known as the *Interboro* doctrine, represents a broad interpretation of the "concerted activities" language of section 7. Courts that adopted the *Interboro* doctrine gave two justifications for employing this approach to determining what constitutes concerted activities under section 7. First, courts asserted that individual action seeking to implement the terms of a collective bargaining agreement is merely an extension of the concerted activities which gave rise to the agreement in the first place.⁹⁶ Second, courts also maintained that the assertion of a collectively bargained right affects the rights of all employees covered by the collective bargaining agreement.⁹⁷ This line of reasoning involves interpreting the "concerted activities" language of section 7 in view of the principles and purposes underlying the NLRA.⁹⁸ Therefore, the courts adopting the *Interboro* doctrine reasoned that permitting individual employees to enforce their collectively bargained rights was consistent with the NLRA's principle of encouraging collective bargaining in order to promote industrial stability.⁹⁹

expansive reading of the concerted activity clause of section 7 goes too far."); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973) (Fifth Circuit questioned statutory basis for *Interboro* doctrine); *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884-85 (3d Cir. 1971) (Third Circuit adhered to strict definition of "concert").

⁹⁰ 157 N.L.R.B. 1295, 61 L.R.R.M. 1537 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967).

⁹¹ *Interboro*, 388 F.2d at 497-98.

⁹² *Id.* at 498.

⁹³ *Id.* Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with an employee's exercise of section 7 rights. 29 U.S.C. § 158(a)(1) (1982). Section 7 guarantees an employee the right to self-organization, to join or form labor unions, and to engage in other concerted activities for the purpose of collective bargaining or other mutual benefit. *Id.* § 157.

⁹⁴ *Interboro*, 388 F.2d at 501.

⁹⁵ *Id.* at 499.

⁹⁶ See *Ben Pekin*, 452 F.2d at 206; *Selwyn Shoe*, 428 F.2d at 221. Both cases held that rights secured by the collective bargaining agreement, though personal to each employee, are protected rights under section 7 of the NLRA because the collective bargaining agreement is the result of concerted activities by the employees for their mutual aid and protection. *Ben Pekin*, 452 F.2d at 206; *Selwyn Shoe*, 428 F.2d at 221.

⁹⁷ *Interboro Contractors Inc.*, 157 N.L.R.B. 1295, 1298, 61 L.R.R.M. 1537, 1537 (1966).

⁹⁸ See *Selwyn Shoe*, 428 F.2d at 221. In analyzing the individual employee's activity under the "concerted activities" language of section 7, the court determined that approving 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." *Id.*

⁹⁹ See *supra* note 43 for a discussion of why Congress considered collective bargaining vital when it enacted the NLRA.

Twelve years later, in *ARO, Inc. v. NLRB*,¹⁰⁰ the United States Court of Appeals for the Sixth Circuit rejected the *Interboro* doctrine and called for a more literal interpretation of what constituted concerted activities under section 7.¹⁰¹ In *ARO*, the employer terminated a temporary employee due to a newly adopted cost-cutting policy.¹⁰² The terminated employee complained repeatedly about the order of discharge, since permanent employees hired after she began employment kept their jobs.¹⁰³ The terminated employee sought reemployment for the next several months, but six months later the employer informed her that she would not be rehired because of her complaints regarding the order of termination.¹⁰⁴ Arguing that the employer's reason for refusing to rehire her interfered with her section 7 right to engage in protest which would have benefited other employees, the employee filed an unfair labor practice charge with the Board.¹⁰⁵ Reasoning that even individual protests that benefit the unit are concerted activities, the Board ordered that the terminated employee be reinstated.¹⁰⁶ In a suit for enforcement of the Board's order, however, the Sixth Circuit Court of Appeals denied enforcement.¹⁰⁷

In considering the terminated employee's unfair labor practice charge against her former employer,¹⁰⁸ the United States Court of Appeals for the Sixth Circuit declined to adopt the holding of *Interboro*.¹⁰⁹ The Sixth Circuit held that *Interboro's* interpretation of the concerted activities clause of section 7 was too expansive.¹¹⁰ The *ARO* court held that the "concerted activities" language of section 7 meant what it said, reasoning that section 9(a) of the Act did not expand the scope of section 7's "concerted activities" language.¹¹¹ For individual claims or complaints to amount to concerted activities under the Act, the *ARO* court reasoned that the activity at issue must not have been made solely on behalf of an individual employee.¹¹² Rather, according to the court of appeals, the employee must have acted on behalf of other employees or at least have acted with the object of inducing or preparing for group action.¹¹³ In addition, the court concluded that the employee must be able to base her assertion on a right provided for in the collective bargaining agreement.¹¹⁴ Finding that the record fully supported the conclusion that the terminated employee's complaints were made on her own behalf, the Sixth Circuit held that the complaints were not protected concerted activities.¹¹⁵

The principal distinction between courts following *Interboro* and courts following *ARO* was the breadth of the interpretation given section 7 of the Act. Courts following

¹⁰⁰ 596 F.2d 713 (6th Cir. 1979).

¹⁰¹ *Id.* at 717.

¹⁰² *Id.* at 714-15.

¹⁰³ *Id.* at 715.

¹⁰⁴ *Id.*

¹⁰⁵ 227 N.L.R.B. 243, 243-44, 94 L.R.R.M. 1010, 1010-11 (1976).

¹⁰⁶ *Id.* at 244-45, 94 L.R.R.M. at 1011-12.

¹⁰⁷ 227 N.L.R.B. 243, 94 L.R.R.M. 1010 (1976), *enforcement denied*, 596 F.2d 713 (1979).

¹⁰⁸ 596 F.2d at 713-14. The employee charged the employer with violating section 8(a)(1), which makes it an unfair labor practice for an employer to interfere with an employee's exercise of rights guaranteed by section 7 of the Act. *Id.*

¹⁰⁹ *Id.* at 717.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 718-19.

¹¹² *Id.* at 718.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Interboro called for a broad interpretation of "concerted activities." These courts asserted that an individual's attempt to implement the terms of a collective bargaining agreement was part of the same concerted activity which produced that agreement in the first place, and thus affected the rights of all employees covered by the agreement.¹¹⁶ Conversely, courts following *ARO* proposed a narrower, more literal interpretation of section 7.¹¹⁷ The *Interboro* doctrine, according to these courts, was too expansive an interpretation of the express language of the Act, and thus the doctrine had a questionable statutory basis.¹¹⁸

III. THE COURT'S DECISION IN *CITY DISPOSAL*

A. *The Majority Opinion*

In *NLRB v. City Disposal Systems, Inc.*,¹¹⁹ the United States Supreme Court, in a five-to-four decision, resolved the split among the circuit courts and held that an individual employee's attempts to enforce the provisions of a collective bargaining agreement are concerted activities within the meaning of section 7 of the NLRA.¹²⁰ Justice Brennan, writing for the majority, first stated that the Board has the primary responsibility for defining the scope of the NLRA.¹²¹ Noting that the scope of section 7 was an issue that implicated the NLRB's expertise in labor relations,¹²² the Court narrowed the issue before it to whether the Board's construction of the "concerted activities" language of section 7 was reasonable.¹²³

¹¹⁶ *Ben Pekin*, 452 F.2d at 206; *Selwyn Shoe*, 428 F.2d at 221. Both cases held that rights secured by the collective bargaining agreement, though personal to each employee, are protected rights under section 7 of the NLRA because the collective bargaining agreement is the result of concerted activities by the employees for their mutual aid and protection. *Ben Pekin*, 452 F.2d at 206; *Selwyn Shoe*, 428 F.2d at 221. See *supra* notes 95-99 and accompanying text.

¹¹⁷ See, e.g., *Royal*, 703 F.2d at 374; *Roadway*, 700 F.2d at 693-94; *ARO*, 596 F.2d at 717; *Buddies Supermarkets*, 481 F.2d at 719; *Northern Metal*, 440 F.2d at 884-85.

¹¹⁸ See, e.g., *Royal*, 703 F.2d at 374 (Ninth Circuit limited its interpretation of "concerted activities" to the express language of the Act); *Roadway*, 700 F.2d at 693-94 (Eleventh Circuit adhered to limited interpretation of concerted activities announced in *Mushroom*, 330 F.2d at 685 (where Third Circuit interpreted "concerted activities" to require that activity be "looking toward group action")); *ARO*, 596 F.2d at 717 ("We think this expansive reading of the concerted activity clause of section 7 goes too far."); *Buddies Supermarkets*, 481 F.2d at 719 (Fifth Circuit questioned statutory basis for *Interboro* doctrine); *Northern Metal*, 440 F.2d at 884-85 (Third Circuit adhered to strict definition of "concert").

¹¹⁹ 465 U.S. 822 (1984).

¹²⁰ *Id.* at 841.

¹²¹ *Id.* at 829.

¹²² *Id.*

¹²³ *Id.* at 830. The Court rejected the argument made by the employer in this case that since the scope of the "concerted activities" clause is essentially a jurisdictional or legal question concerning the coverage of the Act, the Court should not defer to the expertise of the Board in this case. *Id.* The Court reasoned that the issue in this case was substantially similar to issues upon which the Court had not hesitated to defer to the Board's interpretation in the past. *Id.* at 830 n.7. See, e.g., *Bayside Enter., Inc. v. NLRB*, 429 U.S. 298, 302-03 (1977) (the Court deferred to the Board's interpretation of the definition of agricultural workers under section 2 of the NLRA); *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975) (the right under section 7 to have the union representative present at an investigatory interview of the employee was an issue upon which the Court deferred to Board's "fair and reasoned" interpretation of the scope of section 7).

In examining the Board's interpretation of this portion of section 7, the Court first noted that the term "concerted activities" is not explicitly defined by section 7 or by any other provision of the NLRA.¹²⁴ Nevertheless, the Court found that "concerted activities" clearly encompasses acts of employees who have joined together to achieve common goals.¹²⁵ "Concerted activities," the Court held, however, should not be read to refer only to situations in which two or more employees are working together for a common goal.¹²⁶ Instead, the Court held that this language of section 7 must be interpreted in light of the underlying principles of the NLRA.¹²⁷

Citing the NLRA's goal of equalizing bargaining power between employees and their employer,¹²⁸ the *City Disposal* Court analyzed the Board's interpretation of section 7 in light of this goal.¹²⁹ Because the potential for inequality between employee and employer continues beyond the signing of a collective bargaining agreement, the Court stated that the collective bargaining process extends through the enforcement of the agreement.¹³⁰ Thus, according to the Court, the invocation of a right that is rooted in the collective bargaining agreement is unquestionably a part of that process.¹³¹ Therefore the Court held that an individual's assertions of a right contained in a collective bargaining agreement may be protected by the NLRA because it is an extension of the concerted activities which produced the collective bargaining agreement.¹³² The Court determined that holding such activities to be concerted mitigated the inequality in bargaining power that existed between employee and employer throughout the duration of the employment relationship.¹³³ Thus, the Court held that the Board's finding that an individual's assertion of a right contained in the collective bargaining agreement constitutes concerted activities, was consistent with the congressional intent of equalizing bargaining power between employee and employer.¹³⁴

The Court defended its decision to grant protection to an individual's assertions of collective bargaining agreement provisions by pointing out that the decision did not undermine the grievance and arbitration process,¹³⁵ which is favored by national labor policy.¹³⁶ First, the Court stated that any employee who intentionally provoked discharge

¹²⁴ *City Disposal*, 465 U.S. at 830.

¹²⁵ *Id.* at 831.

¹²⁶ *Id.*

¹²⁷ *Id.* at 831-39. The Court noted the policy of equalizing bargaining power throughout the term of the labor-management relationship. *Id.* at 833-36. The Court found the *Interboro* doctrine consistent with the purposes of the Act: to encourage collective bargaining and industrial peace in resolving differences over wages, hours, and other conditions of employment. *Id.* at 833-34. The Court also considered the effect on the grievance and arbitration process of permitting individual enforcement of collectively bargained rights. *Id.* at 837-39.

¹²⁸ *Id.* at 832-34.

¹²⁹ *Id.* at 833-34. See *supra* notes 90-99 and accompanying text for a presentation of the Board's interpretation of "concerted activities" in *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 61 L.R.R.M. 1537 (1966).

¹³⁰ *City Disposal*, 465 U.S. at 831-33.

¹³¹ *Id.* at 832.

¹³² *Id.* at 832, 835-36.

¹³³ *Id.* at 835.

¹³⁴ *Id.* at 834-35.

¹³⁵ *Id.* at 838-39.

¹³⁶ *Id.* See *infra* notes 177-84, 207-09 and accompanying text for a discussion of the favored status of the grievance and arbitration process.

in order to come under the Board's jurisdiction and to bypass the grievance procedure does so, at the risk of having such action found unprotected, even though concerted.¹³⁷ Second, the Court stated that granting the NLRA's protection to individual assertions of collectively bargained rights did not shift dispute resolution from the grievance procedure to the Board any more than the Sixth Circuit's requirement that the individual intend to induce group action or group benefit to obtain NLRA protection does.¹³⁸ Third, the Court pointed out that to the extent that any factual issues raised in an unfair labor practice proceeding had been, or could be, addressed through the grievance and arbitration process, the Board may defer to that process.¹³⁹

The Court further placed three limitations on its holding that an individual's assertions of collectively bargained rights constituted concerted activities under section 7 of the NLRA. First, the Court stated that an employee can lose the protection of the Act if he or she engaged in concerted activities in an "abusive" manner.¹⁴⁰ Second, the Court held that employers were free to negotiate a provision in collective bargaining agreements which limited the manner in which employees may invoke their collectively bargained rights.¹⁴¹ Finally, the Court noted that, at some point, an individual employee's actions become so remotely related to the activities of fellow employees that it cannot reasonably be said that the individual employee was engaged in concerted activities.¹⁴²

Thus, adopting a broad interpretation of section 7, the Court upheld the Board's ruling that an individual's assertions of collectively bargained rights constitutes concerted activities under this provision of the NLRA.¹⁴³ The Court found that this holding was consistent with one of the underlying purposes of the NLRA, the equalization of bargaining power between employee and employer.¹⁴⁴ The Court did not, however, extend NLRA protection to all assertions by individuals of collective bargaining provisions:

¹³⁷ *City Disposal*, 465 U.S. at 838.

¹³⁸ *Id.* The Court reasoned that when an individual employee invokes a right which at the very least is intended to induce at least one other employee to join him, his action is concerted in all jurisdictions. *Id.* But in that situation, the Court explained, the underlying substance of the dispute between the employees and the employer is the same as when a single employee invokes a collectively bargained right by himself. *Id.* The *City Disposal* Court stated that both individuals are in identical situations, and because the employee in each of the situations is "equally well-positioned" to go through the grievance and arbitration process, there is no basis for singling out the *Interboro* doctrine as undermining that process any more than the approach taken by the Courts of Appeals which had rejected the *Interboro* doctrine. *Id.*

¹³⁹ *Id.* at 838-39.

¹⁴⁰ *Id.* at 837. See *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 729 (5th Cir. 1970). Some behavior is so abusive that it falls outside the protection of the NLRA. *Id.* The Supreme Court's apparent standard of "abusive conduct," however, rests upon the principle that emotions run high in any labor dispute, and thus some leeway for impulsive behavior should be granted. *City Disposal*, 465 U.S. at 837 (citing *Crown Central*, 430 F.2d at 729). The right to engage in impulsive behavior is to be balanced against the employer's right to maintain order. *Crown Central*, 430 F.2d at 730.

¹⁴¹ *City Disposal*, 465 U.S. at 837. For example, no-strike provisions in the collective bargaining agreement are one way of limiting employee methods of invoking collectively bargained rights. *Id.*

¹⁴² *Id.* at 833 n.10. The Court noted that action that could be characterized as "purely personal griping" would not be held to be concerted activity because it is so unrelated to the interests and activities of fellow employees. *Id.*

¹⁴³ *Id.* at 832-41. See *supra* note 127 and accompanying text.

¹⁴⁴ *City Disposal*, 465 U.S. at 833-36. See *supra* notes 124-34 and accompanying text.

concerted activities may nonetheless be unprotected if abusive, restricted by the terms of the collective bargaining agreement, or only remotely related to the activities of fellow employees.¹⁴⁵

B. *The Dissenting Opinion*

Justice O'Connor, writing for the four dissenting justices, rejected the majority's holding that an individual employee's assertion of a collectively bargained right constitutes concerted activities under section 7 of the NLRA.¹⁴⁶ According to the dissent, the concepts of individual action for personal gain and concerted activities are incompatible.¹⁴⁷ The dissent asserted that the Court should have adopted the narrow interpretation of concerted activities proposed by the Sixth Circuit in *ARO*.¹⁴⁸

In her dissenting opinion, Justice O'Connor argued that finding an individual employee's assertions of collectively bargained rights to be concerted contradicted the "concerted activities" language of section 7.¹⁴⁹ The dissent stated that by providing increased statutory protection for employees who participate as a group in the enforcement of the agreement, the labor laws encourage and preserve the "practice and procedure of collective bargaining."¹⁵⁰ Therefore, according to the dissent, interpreting section 7 so that the NLRA protects two employees acting together, but not one employee acting alone, is entirely consistent with the national labor laws' emphasis on collective action.¹⁵¹ In contrast, the dissent argued, where an employee acts alone in expressing a personal concern, contractual or otherwise, such action is not concerted.¹⁵² Interpreting the concerted activities clause of section 7 to mean instructing individual employees to seek vindication through their union, and where necessary, through the courts, the dissent argued that the Act's protection was reserved for collective activity.¹⁵³

The dissent proposed that providing the protection of the NLRA to individuals who assert collectively bargained rights transfers the ultimate authority for contract construction and dispute resolution to the Board.¹⁵⁴ Such a transfer of authority, according to the dissent, is a step toward governmental regulation of the terms of collective bargaining agreements.¹⁵⁵ The dissent noted that this transfer of authority is a step Congress expressly declined to make.¹⁵⁶ Therefore, the dissent argued that extending the protection of the NLRA to individuals who assert collectively bargained rights is contrary to Congress' judgment as to how contract rights are best vindicated.¹⁵⁷

¹⁴⁵ *City Disposal*, 465 U.S. at 837. See *supra* notes 140-42 and accompanying text.

¹⁴⁶ *City Disposal*, 465 U.S. at 842 (O'Connor, J., dissenting).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 847 (O'Connor, J., dissenting).

¹⁴⁹ *Id.* at 846-47 (O'Connor, J., dissenting).

¹⁵⁰ *Id.* at 844-45 (O'Connor, J., dissenting) (citing *Emporium Capwell*, 420 U.S. at 62).

¹⁵¹ *Id.* at 845 (O'Connor, J., dissenting).

¹⁵² *Id.* at 844-45 (O'Connor, J., dissenting).

¹⁵³ *Id.* at 845-46 (O'Connor, J., dissenting).

¹⁵⁴ *Id.* at 842-43 (O'Connor, J., dissenting).

¹⁵⁵ *Id.* at 843 (O'Connor, J., dissenting).

¹⁵⁶ *Id.* (citing H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 42 (1946)).

¹⁵⁷ *Id.* at 845-46 (O'Connor, J., dissenting). The dissent argued that section 7 of the NLRA merely points to the proper vindication of rights under the collective bargaining agreement; vindication is obtained either through private or judicial processes (arbitration or the courts) if the activity is not concerted, and through the administrative processes of the NLRB if the activity is

The dissent also criticized the Board's failure to defer to the grievance process in this case and in other cases that had come before the Board.¹⁵⁸ Pointing out that in unfair labor practice proceedings, the Board normally defers to factual determinations made during the grievance and arbitration process,¹⁵⁹ the dissent noted that the Board had failed to defer to that process in *City Disposal*,¹⁶⁰ where the union determined that the employee's grievance lacked objective basis.¹⁶¹

Justice O'Connor's dissenting opinion recognized that the statutory language of "concerted activities" did not prevent the activity of an individual employee from being concerted.¹⁶² The dissent acknowledged that the statutory language could be stretched to cover an individual employee's actions when undertaken to induce, prepare for, or initiate group action.¹⁶³ The dissent, however, stated that "it stretches the language [of section 7] past its snapping point to cover an employee's action that is taken solely for personal benefit."¹⁶⁴

IV. RECONCILING CONCERTED ACTIVITIES AND EXCLUSIVE REPRESENTATION

The Court in *City Disposal* held that an individual employee's invocation of a right provided for in his or her collective bargaining agreement constitutes concerted activities.¹⁶⁵ Since such individual action constitutes concerted activities, the action may be afforded the protection of the NLRA under section 7.¹⁶⁶ While the *City Disposal* Court correctly considered some of the underlying principles of national labor policy when it interpreted the "concerted activities" language of section 7, the Court ignored the principle of exclusive representation,¹⁶⁷ which is one of the central premises of the NLRA.¹⁶⁸ This failure to recognize the principle of exclusive representation may result in a decline in the bargaining power of the exclusive representative, derogation of the grievance and arbitration process, and a decline in unionization. Ironically, therefore, a ruling designed to expand the concept of concerted activities could ultimately weaken workers' collective strength.

This section will first examine the method of analysis that the *City Disposal* Court used to interpret section 7 of the NLRA. This section will then assert that although the

concerted. *Id.* According to the dissent, the integrity of contract rights is upheld under either scenario. *Id.*

¹⁵⁸ *Id.* at 844 n.4 (O'Connor, J., dissenting). Justice O'Connor criticized the Court for mentioning the policy of deferral to the grievance process while failing to discuss why the Board did not defer to the grievance process in *City Disposal*. *Id.*

¹⁵⁹ *Id.* at 844 (O'Connor, J., dissenting). The dissent pointed out that the Court in *City Disposal* did not discuss why the NLRB did not defer to the grievance process in this case, and criticized the NLRB's failure to apply its deferral criteria evenhandedly or consistently. *Id.* at 844 n.4 (O'Connor, J., dissenting).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 827; *id.* at 844 n.4 (O'Connor, J., dissenting).

¹⁶² *Id.* at 846 (O'Connor, J., dissenting).

¹⁶³ *Id.* at 846-47 (O'Connor, J., dissenting) (citing *ARO*, 596 F.2d at 717).

¹⁶⁴ *City Disposal*, 465 U.S. at 847 (O'Connor, J., dissenting).

¹⁶⁵ *Id.* at 841.

¹⁶⁶ *Id.* The Court did not decide the issue of whether the activity was protected. For a discussion of the possible ramifications of this limitation of the Court's decision, see *infra* note 197.

¹⁶⁷ *City Disposal*, 465 U.S. at 830-39. In considering the policies of collective bargaining, industrial peace, equalized bargaining power between employees and employer, and deferral to the arbitration process, the Court focused on individual rights. *Id.*

¹⁶⁸ See *supra* notes 42-85 and accompanying text.

City Disposal Court used the proper method of analysis, the Court ignored the principle of exclusive representation when it interpreted that provision. As a result of the *City Disposal* Court ignoring the principle of exclusive representation, unions' bargaining power will decrease, grievance-arbitration procedures will lose effectiveness, and unionization will decline.

A. *Section 7 Should Be Interpreted in Light of the Underlying Principles of the NLRA*

Section 7 provides: "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 . . ."¹⁶⁹ Prior to the Supreme Court's decision in *City Disposal*, circuit courts were split into two camps, however, over how to interpret the term "concerted activities."¹⁷⁰ One view, taken by the *City Disposal* Court, argued that "concerted" should be interpreted in light of the underlying principles of the NLRA,¹⁷¹ and not merely by the strict language of section 7.¹⁷² The opposing view, taken by Justice O'Connor in the dissenting opinion to *City Disposal*,¹⁷³ and by those circuit courts that had rejected the *Interboro* doctrine,¹⁷⁴ advocated a more literal interpretation of the language of section 7.

A broad interpretation of section 7, which considers the concepts which underlie the Act, will produce decisions more consistent with the purposes of the NLRA. The Act cannot be read in a vacuum.¹⁷⁵ As Justice Frankfurter once noted, statutes "are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends."¹⁷⁶ Thus the meaning of "concerted activities" may only be understood after examining the underlying principles of the NLRA.

Moreover, the Supreme Court traditionally has interpreted the meaning of the language of the Act in light of the Act's underlying purposes. The Supreme Court has

¹⁶⁹ 29 U.S.C. § 157 (1982).

¹⁷⁰ See *supra* notes 86-118 and accompanying text.

¹⁷¹ *City Disposal*, 465 U.S. at 830-39. The Court considered the policy of encouraging collective bargaining as a means of resolving industrial disputes. *Id.* at 833-35. The Court also recognized the principle of equal bargaining power between employer and employees when it interpreted section 7 of the NLRA, and discussed the policy of deferring to the grievance procedure. *Id.* at 835-39. See *supra* notes 90-99, 115-18 and accompanying text for a discussion of cases in which lower courts previously had adopted this method of interpretation.

¹⁷² *City Disposal*, 465 U.S. at 831.

¹⁷³ *Id.* at 846-47 (O'Connor, J., dissenting).

¹⁷⁴ *Royal*, 703 F.2d at 374 (Ninth Circuit limited its interpretation to the express language of the Act); *Roadway*, 700 F.2d at 693-94 (Eleventh Circuit adhered to limited interpretation of concerted activities announced in *Mushroom*, 330 F.2d at 685 (where Third Circuit interpreted "concerted activities" to require that activity be "looking toward group action")); *ARO*, 596 F.2d at 717 ("We think this expansive reading of the concerted activity clause of section 7 goes too far."); *Buddies Supermarkets*, 481 F.2d at 719 (Fifth Circuit questioned statutory basis for *Interboro* doctrine); *Northern Metal*, 440 F.2d at 884-85 (Third Circuit adhered to strict definition of "concert").

¹⁷⁵ See Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 329-31 (1981) (although they support the rationale behind the *Interboro* doctrine, these commentators advocate a reading of section 7 which considers the policies behind the language of the Act).

¹⁷⁶ Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947).

long accepted the grievance and arbitration process as the preferred method of labor dispute resolution.¹⁷⁷ A strictly literal interpretation of the Act, however, does not suggest that the grievance and arbitration procedure is the quid pro quo for a no-strike provision in the collective bargaining agreement, or is the favored method of labor dispute resolution.¹⁷⁸ In the *Steelworkers Trilogy*,¹⁷⁹ however, the Supreme Court attempted to satisfy an underlying goal of the Act, which is to encourage the collective bargaining process in order to promote industrial peace. Thus the Court established the arbitration process as the quid pro quo for a no-strike agreement and as the favored method of labor dispute resolution.¹⁸⁰ Therefore, while the Act does not expressly grant such favored status to the grievance and arbitration process, this process has become as much a part of the national labor policy as collective bargaining at the negotiating table.¹⁸¹

The rigid interpretation of the language of the Act advocated by Justice O'Connor in the dissenting opinion to *City Disposal*,¹⁸² and by courts such as the Sixth Circuit in *ARO*,¹⁸³ may have failed to discover the advantages of the grievance and arbitration process in resolving labor disputes. Interpreting section 7 in a vacuum risks failing to incorporate practices like the grievance and arbitration process that encourage collective bargaining and industrial peace; or even worse, a strictly literal interpretation may result in decisions that are contrary to underlying principles of the NLRA.¹⁸⁴ Therefore, the

¹⁷⁷ See *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 n.4 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567 (1960).

¹⁷⁸ Although section 203(d) of the Labor Management Relations Act of 1947 (Taft-Hartley Act) provides in part that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement," nothing in the labor legislation suggests a quid pro quo relationship between an arbitration clause and a no-strike provision. 29 U.S.C. § 173(d) (1982).

¹⁷⁹ *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 567 (1960) (Court viewed arbitration clause as quid pro quo for no-strike clause). See also *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (followed *American Mfg.* holding that arbitration was favored method of labor dispute resolution and quid pro quo for no-strike clause); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 n.4 (1960).

¹⁸⁰ *Warrior & Gulf*, 363 U.S. at 578.

¹⁸¹ See, e.g., *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 373 (1974). The *Gateway* Court, citing *Warrior & Gulf*, held that an order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Id.* (citing *Warrior & Gulf*, 363 U.S. at 578).

¹⁸² *City Disposal*, 465 U.S. at 847 (O'Connor, J., dissenting) (the Court's decision "stretches the language past its snapping point to cover an employee's action that is taken solely for personal benefit").

¹⁸³ 596 F.2d at 717 (court objected to expansive reading of concerted activities clause of section 7).

¹⁸⁴ For example, in spite of the express exclusion of picketing from the shelter of the proviso to section 8(b)(4) of the Act, the Court has concluded that some consumer picketing is in fact exempted from the reach of that section. *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 63 (1964). The proviso to section 8(b)(4)(D) of the Act provides that publicity to inform the public that a product is produced by an employer with whom the union has a primary dispute is not prohibited by that section, unless such publicity induces employees not of the primary employer to refuse to perform their jobs at their workplace. 29 U.S.C. § 158(b)(4)(D) (1982). The proviso, however, expressly excludes picketing from its protection. "[N]othing contained in [the proviso] shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . ." 29 U.S.C. § 158(b)(4). Rather than construing the language of section 8(b)(4)

City Disposal Court's method of considering the underlying principles of the Act when interpreting section 7 is the preferred approach. Despite using the proper approach, however, the Court focused too narrowly on individual rights and ignored the more basic principle of exclusive representation upon which the Act rests.

B. *The City Disposal Court Ignored the Principle of Exclusive Representation*

Exclusive representation is a fundamental principle upon which the NLRA is based.¹⁸⁵ Section 9(a) of the Act expressly establishes the concept of exclusive representation as a basic principle of national labor policy,¹⁸⁶ and the Supreme Court has developed the concept in cases such as *J.I. Case* and *Emporium Capwell*.¹⁸⁷ In these cases, the Court recognized that the NLRA is based on the premise that employees can most effectively obtain improvements in wages and other working conditions by pooling their economic strength and bargaining through a system of exclusive representation.¹⁸⁸ As discussed above, the *City Disposal* Court utilized the preferred approach of interpreting section 7 by considering the underlying principles of the NLRA.¹⁸⁹ In examining the underlying purposes of the Act, however, the Court focused on individual employee rights and failed to consider a dominant principle of the Act, the concept of exclusive representation.¹⁹⁰

The Court's emphasis on the rights of individual employees to have their collectively bargained rights enforced is unjustified in *City Disposal*. Individual rights are adequately protected by federal labor policy. The principle of exclusive representation that the *City Disposal* Court ignored does not authorize tyranny by the majority, as some legislators

literally, the Court examined the legislative history of that section of the NLRA and determined that a proviso which excepts "publicity other than picketing" did not reflect with enough clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites. *Vegetable Packers*, 377 U.S. at 63. The Court's conclusion was based on a consideration of the purposes underlying section 8(b)(4) and not just on the express language of that provision. *Id.*

But see *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983); 1983-1984 *Annual Survey of Labor Law, The Limits of an Expansive Reading of the Section 8(b)(4) Publicity Proviso*: Edward J. DeBartolo Corp. v. NLRB, 26 B.C.L. REV. 230 (1984) (discussion of a more limited interpretation of the section 8(b)(4) publicity proviso).

¹⁸⁵ 79 CONG. REC. 2372 (1935) (statement of Sen. Wagner). In introducing the bill that became the NLRA, Senator Wagner emphasized the importance of the provisions establishing majority rule as an underlying principle of the NLRA: "[W]ithout them [the provisions establishing exclusive representation] the phrase 'collective bargaining' is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves." *Id.* See *Cox*, *supra* note 43, at 638, 652.

¹⁸⁶ 29 U.S.C. § 159(a) (1982). Section 9(a) of the NLRA provides:

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

Id.

¹⁸⁷ *Emporium Capwell*, 420 U.S. at 68; *J.I. Case*, 321 U.S. at 338-39. See *supra* notes 55-85 and accompanying text for a more detailed discussion of these cases.

¹⁸⁸ *Emporium Capwell*, 420 U.S. at 62; *J.I. Case*, 321 U.S. at 338.

¹⁸⁹ See *supra* notes 169-84 and accompanying text.

¹⁹⁰ See *City Disposal*, 465 U.S. at 830-39. Nowhere in the opinion of the Court does Justice Brennan discuss the effect of *City Disposal* on the rights of the group.

maintained.¹⁹¹ National labor policy attempts to balance individual rights with those group rights advanced by the principle of exclusive representation. First, the Court has imposed a duty of fair representation on the union representative.¹⁹² Second, the NLRA provides for decertification elections of exclusive representatives when dissatisfied employees request such a procedure.¹⁹³ Third, federal legislation has provided a bill of rights for labor organization members to assure that minority voices are heard in unions as they are heard in the functioning of other democratic institutions.¹⁹⁴

Thus, the protection that the *City Disposal* Court afforded to individual employees attempting to enforce collectively bargained rights is misplaced. If the union unfairly represented the employee's interests in *City Disposal* by refusing to process his grievance, the individual employee has causes of action against the union for violation of its duty of fair representation¹⁹⁵ and against the employer for interfering with his or her right to engage in concerted activities.¹⁹⁶ The facts of *City Disposal* do not provide any indication that the union violated its duty of fair representation when it found the employee's grievance unmeritorious and declined to process it. Indeed, the employee himself did not even allege such a violation. Thus, in interpreting the "concerted activities" language of section 7, the *City Disposal* Court should have focused on the concept of exclusive representation, which is a basic principle underlying the Act.

C. Effects of the City Disposal Court Ignoring the Principle of Exclusive Representation

By ignoring the principle of exclusive representation and focusing on the rights of individual employees, the *City Disposal* decision is likely to affect the function of unions in labor-management relations. This section of the casenote will assert that the *City Disposal* decision has a negative impact on labor-management relations in three ways. First, by permitting employees to bring suit individually to seek enforcement of their collectively bargained rights, the *City Disposal* decision may reduce unions' ability to keep their members organized as a group. This reduction in the solidarity of unions could significantly diminish some exclusive representatives' ability to exert economic pressure on employers through threatened group action. Second, derogation of the grievance and arbitration process may also result because some employees may be able to get more favorable settlements on their own and some employers may be encouraged to engage

¹⁹¹ See 93 CONG. REC. 3443-44 (1947) (statement of Rep. Gwinn). During the time labor unions have been important institutions in labor-management relations, they have been criticized. Rep. Gwinn expressed his dissatisfaction with labor unions during debates over the Labor Management Relations Act of 1947, claiming that the American worker was no longer free. He argued that the worker's whole economic life was dominated by the monopolistic union, that the union in every way had ruled the worker's life. "In short, his mind, his soul, and his very life have been subject to a tyranny more despotic than one could think possible in a free country." *Id.*

¹⁹² *Emporium Capwell*, 420 U.S. at 64; *Vaca*, 386 U.S. at 177.

¹⁹³ 29 U.S.C. § 159(c) (1982). Employees have the periodic right to vote out a union in a decertification election, though such right is limited by rules designed to provide stability for a representative newly recognized or in the process of negotiating a new collective bargaining agreement. *Id.*

¹⁹⁴ *Id.* §§ 411-415. See *supra* note 54 for a discussion of the relevant provisions of the Landrum-Griffin Act.

¹⁹⁵ *Emporium Capwell*, 420 U.S. at 64; *Vaca*, 386 U.S. at 177.

¹⁹⁶ Section 8(a)(1) of the NLRA provides that it is a violation of the Act for an employer to interfere with an employee's exercise of his or her rights to organize, bargain collectively, and engage in other concerted activities for mutual aid or protection. 29 U.S.C. § 158(a)(1) (1982).

in tactics that further undercut the bargaining power of the union. Finally, the role of unions in labor-management relations may decline, and thus a reduction in rights for employees as a group may be anticipated.¹⁹⁷

1. Reduction in Bargaining Power of the Exclusive Representative

A great deal of a bargaining representative's power is derived from the mere fact that it is the exclusive representative of all employee interests.¹⁹⁸ Control over the grievance procedure allows the union to consider the collective interests of the unit and act on behalf of these collective interests.¹⁹⁹ In recognition of these benefits of exclusive representation, the NLRA encourages employees to act together in order to equalize

¹⁹⁷ The *City Disposal* decision may also shift the focus of inquiry when interpretation of section 7 is involved from whether activity is "concerted" to whether it is "protected." The Court did not decide whether the activity at issue in *City Disposal* was protected by the Act; it decided only that it was concerted. *City Disposal*, 465 U.S. at 841. Applying the standards stated by the Court in *City Disposal*, the employee loses the protection of the Act if the concerted activity he or she engaged in was undertaken in an "abusive manner, or if the concerted activity violated a provision in the collective bargaining agreement which limits the manner in which employees may invoke their collective bargained rights." *Id.* at 837. The battle over how to interpret section 7 of the NLRA may merely shift in focus from "concerted" to "protected" activities. Instead of debating over the meaning of "concerted," courts might very well shift the debate to a determination of what activity is abusive enough to render itself unprotected by the Act. In *Yellow Freight Sys., Inc.*, 247 N.L.R.B. 177, 103 L.R.R.M. 1154 (1980), under facts similar to *City Disposal*, similar employee activity was found to be unprotected. *Id.* at 181, 103 L.R.R.M. at 1156-57. The employee's concerted activity in *City Disposal*, however, was found to be protected under both standards on remand by the Sixth Circuit. 766 F.2d 969, 973-74 (6th Cir. 1985) (on remand from 465 U.S. 822 (1984)).

First, in *City Disposal* the Sixth Circuit did not find that this employee's activity was "abusive." 766 F.2d at 974. The Supreme Court's stated standard of "abusive conduct" rests upon the principles that passions run high in any labor dispute, and thus an employee's right to engage in concerted activity may permit some leeway for impulsive behavior. *City Disposal*, 465 U.S. at 837 (citing *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 729 (5th Cir. 1970)). This right to engage in impulsive concerted activities must be balanced against the employer's right to maintain order and respect. *Crown Central*, 430 F.2d at 730. In *City Disposal*, the Sixth Circuit would have been out of line with those cases interpreting this standard if it had found on remand that this employee's refusal to drive a truck that he felt was unsafe to be abusive, and thus unprotected, activity. See *Crown Central*, 430 F.2d at 731 (abusive and profane language still held to be protected); *Hugh H. Wilson Co. v. NLRB*, 414 F.2d 1345, 1356 (3d Cir. 1969). Second, the Sixth Circuit held that the employee's activity in *City Disposal* did not violate a provision of the collective bargaining agreement and was not "unjustified" under Article XI of that agreement. *City Disposal*, 766 F.2d at 974.

While the Supreme Court's *City Disposal* decision appears to point to a finding that the activity at issue was protected, by leaving that issue undecided, the Supreme Court in *City Disposal* made it possible that the standards for "protected" activity may change to account for the new standard of "concerted activities" that the Court established. The law of "concerted activities" may merely reflect the changing values that have prompted Congress, the Board, and the courts to attempt to solve a problem to which no solution exists. The concept of "concerted activities" necessarily involves conflicting poles, the employer's prerogative to hire and fire for legitimate business reasons versus employees' right to exert economic pressure on their employer. See Note, *Concerted Activity Under Section 7 of the National Labor Relations Act*, 1955 U. ILL. L.F. 129, 144.

¹⁹⁸ *Emporium Capwell*, 420 U.S. at 62; *J.I. Case*, 321 U.S. at 338-39. See *supra* notes 56-85 and accompanying text for a discussion of *Emporium Capwell* and *J.I. Case*.

¹⁹⁹ A union's power of control over the grievance procedure is always checked by its duty of fair representation, the threat of a decertification election, and the possibility of an unfair labor practice suit. See *supra* notes 191-96 and accompanying text.

bargaining power between employees and their employer.²⁰⁰ The *City Disposal* decision, however, permits individuals to circumvent the exclusive representative by simply basing their claims in a right contained within the collective bargaining agreement.²⁰¹ When individuals can circumvent the elected bargaining representative, opportunity for individual advantage within the unit exists. When individuals can resolve grievances concerning the collective bargaining agreement on their own, without any consideration for group interests, opportunity for individual advantage creates rivalry, mistrust, and unrest among employees.²⁰²

Further, a weakness in group unity will be difficult to hide from the employer because employees can deal directly with the employer to settle lawsuits. Knowing that the exclusive representative is bargaining on behalf of a unit with divided interests, the employer may engage in much tougher negotiating tactics at subsequent contract negotiations because the threat of a strike may be diminished when employees have many divergent interests and the opportunity for individual gain exists.

The power of the elected union to protect against erosion of its status as exclusive representative by disciplining members who violate union rules during a strike has been held to be an integral part of national labor policy.²⁰³ The power to control union membership by disciplining strike-breakers is essential if the union is to be an effective bargaining agent for its members.²⁰⁴ As long as a union functions with the purpose of fighting the employer for economic gains, any acts which interfere with the union's effectiveness are a threat to the union's existence.²⁰⁵ Dissension within its membership

²⁰⁰ Section 1 of the NLRA recognizes the inequality in bargaining power between corporate employers and employees who are unorganized. See 29 U.S.C. § 151 (1982). Section 1 therefore states as a policy of the NLRA that the practice and procedure of collective bargaining will be encouraged, and that workers will have freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating a collective agreement. *Id.* See *supra* notes 42-49 and accompanying text.

²⁰¹ The fact that unions pay the cost of the grievance process while the individual employee must bear the cost of his own lawsuit, however, may deter many employees from pursuing their own actions.

²⁰² 93 CONG. REC. 3624 (1947) (statement of Rep. Lanham). Representative Lanham argued against granting individual employees the right to present and settle grievances over wages, hours and conditions of employment without participation of the exclusive representative who represented the interests of the majority. Allowing employers to thus play off one group of employees against the other, according to Representative Lanham, would result in "rivalry, dissension, suspicion, and friction among employees," and thus undermine the collective bargaining representative. *Id.*

²⁰³ *Allis-Chalmers*, 388 U.S. at 181 (the Court held that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities contained in section 8(b)(1)(A) of the Act did not include a ban against fines on members who refused to honor an authorized strike).

While a union may discipline its members, the Board has recently held that unions could not enforce any rules which limited members' right to resign, even during a strike. *International Ass'n of Machinists & Aerospace Workers, Local 1414 and Neufeld Porsche-Audi, Inc.*, 270 N.L.R.B. 1330, 1332-33, 116 L.R.R.M. 1257, 1258-59 (1984). The Board's *Neufeld* decision overruled prior cases which had permitted "reasonable" union rules restricting resignations. Previous Board precedent had found rules restricting resignation for thirty days to be *prima facie* reasonable. See *Machinists, Local 1327 (Dalmo Victor II)*, 263 N.L.R.B. 984, 111 L.R.R.M. 1115 (1982).

²⁰⁴ *Allis-Chalmers*, 388 U.S. at 181. See Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1049, 1100 (1951) ("[d]iscipline of individual [union] members is essential if a union is to survive," yet some consistent body of law is needed to "protect union members from injustice").

²⁰⁵ See Summers, *Disciplinary Powers of Unions*, 3 INDUS. & LAB. REL. REV. 483, 488-91 (1950)

weakens the union's bargaining position with the employer.²⁰⁶ Thus, the employer can afford to withhold benefits it otherwise might have granted to employees because the exclusive representative may be unsuccessful in organizing an effective strike where employees are not united. The bargaining power of the exclusive representative may thus eventually be reduced by the *City Disposal* decision, which permits employees to individually enforce collectively bargained rights.

2. Derogation of the Grievance and Arbitration Process

In addition to permitting individual employees to seek enforcement of their collective bargaining agreement on their own, the *City Disposal* decision may also diminish the effectiveness of the grievance and arbitration process. Exclusive representation by a union is attractive to employees not only because of the bargaining power such a representative has at contract negotiations, but also because of the exclusive representative's ability to enforce the collective bargaining agreement through the grievance and arbitration process. The Supreme Court has recognized the grievance and arbitration process as "part and parcel of the collective bargaining process itself."²⁰⁷ The Court has held that the grievance and arbitration process is the method of labor dispute resolution that best serves the purpose of the NLRA: to encourage collective bargaining in order to reduce industrial strife.²⁰⁸ Federal labor policy strongly favors arbitration of labor disputes because the relatively peaceful arbitration process replaces the industrial upheaval of a strike.²⁰⁹

The *City Disposal* decision, however, permits an individual employee to circumvent the grievance and arbitration process favored by federal labor policy by basing his or her claim upon a right contained in the applicable collective bargaining agreement. Where individuals can circumvent the grievance and arbitration process to get collectively bargained rights enforced for their personal benefit, employees may no longer perceive the exclusive representative as necessary to enforce those rights effectively. Recent reports indicate that employees may be abandoning the union in some circumstances

[hereinafter cited as *Summers, Disciplinary Powers*]. "The union's primary function is to obtain economic benefits for its members. Its strength, in fact, its very existence depends on its being an effective instrument for the workers . . ." *Id.*

²⁰⁶ See *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 495 (1960) (holding that use of economic weapons to pressure the employer to concede more favorable provisions to employees is authorized by the NLRA and national labor policy). Collective bargaining presupposes the availability to parties of certain economic weapons. A strike is probably the most effective economic weapon the employees possess, and the Court in *Insurance Agents* recognized the legitimacy of using an economic weapon such as a strike because it is both sides' risk of loss from a strike that makes collective bargaining work. *Id.* See also C. MORRIS, *supra* note 27, at 517 ("the use of economic pressure is part and parcel of collective bargaining").

²⁰⁷ *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). See *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) ("arbitrators . . . are indispensable agencies in a continuous collective bargaining process").

²⁰⁸ *Enterprise Wheel*, 363 U.S. at 596 (Court noted the arbitrator's unique ability to settle disputes at the plant level); *Warrior & Gulf*, 363 U.S. at 581 (arbitration gives meaning and content to the collective bargaining agreement); *American Mfg.*, 363 U.S. at 567 ("[a]rbitration is a stabilizing influence").

²⁰⁹ See *supra* notes 177-81 and accompanying text.

because the exclusive representative is less effective in obtaining or enforcing these rights than an individual employee attempting to obtain or enforce rights on his own.²¹⁰

Perhaps as important, however, such individual action by employees may afford employers an opportunity to rid themselves of the union by further undercutting the power of the exclusive representative. By granting favorable settlements to individual employees who seek enforcement of their collectively bargained rights on their own, and by hotly contesting grievances when resolution is sought through the grievance and arbitration process, an employer may create strong incentives for employees to ignore the exclusive representative and the grievance procedure as means of enforcing the collective bargaining agreement.²¹¹

The union in *City Disposal* found that the individual employee's grievance lacked merit and refused to process it.²¹² The Court, however, permitted the employee to seek enforcement of his collective bargaining agreement outside the grievance and arbitration process.²¹³ Employees acting individually and employees who have acted in conjunction with at least one other employee, according to the Court, are equally well-positioned to go through the grievance and arbitration process.²¹⁴ The Court reasoned that an individual's assertions of a collectively bargained right do not undermine the grievance and arbitration process any more than does the approach of those courts that had rejected the *Interboro* doctrine and required individual's actions to be intended to benefit other employees.²¹⁵ The Court's reasoning misses the point. The erosion of the grievance and arbitration process that the *City Disposal* decision may cause is contrary to national labor policy, regardless of whether that derogation is more or less inimical to labor policy than

²¹⁰ Boston Globe, Feb. 24, 1985, at 61, col. 1. Today, organized labor represents less than twenty percent of the American workforce, the lowest level in decades. *Id.* Workers' decisions to form or join unions is primarily based upon the expected economic benefits from union membership. B. FLEISHER & T. KNIESNER, *LABOR ECONOMICS* 223-25 (2d ed. 1980); Summers, *Disciplinary Powers*, *supra* note 205, at 488-91 ("The union's primary function is to obtain economic benefits for its members.").

While other factors such as product market and labor market shifts account for some of the decline in unionization, see Roomkin & Juris, *Unions in the Traditional Sectors: The Mid-Life Passage of the Labor Movement*, in 4 *READINGS IN LABOR ECONOMICS AND LABOR RELATIONS* 98, 98-100 (R. Rowan ed. 1980), the effect of public policy and judicial decisions on the effectiveness of unions in obtaining increases in wages and other benefits is also determinative of the rate of unionization. B. FLEISHER & T. KNIESNER, *supra*, at 228-32. Historically, the legal environment has affected the rate of organization by reinforcing the economic circumstances influencing employees' decisions to organize. *Id.* at 228. *But see id.* at 332 (state right to work laws may have little effect on the downtrend in union membership); Roomkin & Juris, *supra*, at 101-02 ("It is not clear that public policy factors make a separate contribution to union growth or decline.").

²¹¹ 93 CONG. REC. 3624 (1947) (statement of Rep. Lanham). Representative Lanham argued that there would be grave consequences in the labor relations area if individual and group bargaining were required, despite the certification of a collective bargaining representative. Mr. Lanham pointed out that soon after the Wagner Act (the NLRA) had been declared constitutional, many unions nevertheless succumbed quickly because favorable settlements of grievances occurred only when the workers sought adjustment individually. *Id.* Representative Lanham noted that workers soon found that the union in their unit had evaporated, and the employer had then returned to its prior practice of denying most reasonable requests. Employees were then forced to start all over again and establish a new union. *Id.*

²¹² *City Disposal*, 465 U.S. at 827.

²¹³ *Id.* at 841.

²¹⁴ *Id.* at 838.

²¹⁵ *Id.*

other standards of "concert" proposed by some circuit courts.²¹⁶ Allowing two employees to process grievances outside the grievance and arbitration processes without any union participation also erodes the grievance and arbitration process. The bargaining representative ought to have some ability under a collective bargaining agreement to control prosecutions of claims of breach of contract, whether by pressing grievances, invoking arbitration, or initiating legal proceedings.²¹⁷ Individuals are best protected through the bargaining representative's duty of fair representation,²¹⁸ not by pressing their grievances separately.

Thus, by permitting individual employees to avoid the grievance and arbitration process by basing their claims on their collective bargaining agreement, the *City Disposal* decision may seriously diminish the effectiveness and use of that process. Employers, employees, and the exclusive representative may no longer perceive the grievance procedure as important or effective²¹⁹ when the union cannot screen frivolous claims out of the process,²²⁰ or when those same claims may be pursued outside that process.²²¹

²¹⁶ *Id.*

²¹⁷ See Cox, *supra* note 43, at 625-27, 638. Cox listed six policy reasons why the bargaining representative should have control over the processing of contract breach claims. First, in some instances no one individual is harmed to pursue the claim. *Id.* at 625. Second, resolutions of disputes affect not only the current parties, but the future implementation of the collective bargaining agreement. *Id.* at 625-26. Third, many claims of contract violations affect other employees besides the claimant. *Id.* at 626. Fourth, union control over claims promotes uniformity, and thus reduces competition and discrimination within the unit. *Id.* Fifth, without control, a union may get caught between rival groups of employees, keeping the union from taking a "reasonable position," and thus delaying resolution. *Id.* at 625. Finally, many claims are actually disputes between employees, and these are better handled by the union than by arbitration. *Id.* at 626-27.

²¹⁸ *Id.* at 638. Cox advanced the idea that collective bargaining would work better, without sacrifice of individual interests, if "contracts which provide for their administration through the grievance and arbitration procedure controlled by the union are construed to place the sole authority to settle grievances in the union," subject to its fiduciary duty of fair representation. *Id.*

²¹⁹ See Note, *Protection of Individual Action as "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 391 (1983) (student authors contend that when individuals can circumvent the grievance procedure too frequently, the employer and employees no longer accept that procedure as the most efficacious means of resolving a labor dispute) [hereinafter cited as Note, *Protection of Individual Action*]; Note, *Constructive Concerted Activity and Individual Rights: The Northern Metal-Interboro Split*, 121 U. PA. L. REV. 152, 173-74 (1972) (the note recognizes that adoption of the *Interboro* doctrine may result in circumvention of grievance procedures by large numbers of employees, but argues that a distinction between one employee and two employees in determining who may pursue claims of contract breach is not meaningful).

²²⁰ See *Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179, 186 (2d Cir. 1962). The Second Circuit concluded that chaos would result if every disenchanted employee who harbored a dislike for his employer could harass both the union and employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union. *Id.* at 186. See also Note, *Protection of Individual Action*, *supra* note 219, at 391 (student authors point out that the *Interboro* doctrine, which was adopted by the *City Disposal* Court, provides an effective means for disgruntled individuals to harass employers); Note, *The Sixth Circuit Spurns Interboro and the Doctrine of Constructive Concerted Activity* — *ARO, Inc. v. NLRB Leaves Non-Union Employees at the Mercy of Their Bosses*, 11 U. Tol. L. Rev. 1045, 1068 (1980) (recognizing the same).

²²¹ *Griffin v. International Union, United Auto., Aerospace, and Agriculture Implement Workers of Am.*, 469 F.2d 181, 183 (4th Cir. 1972) (the court permitted a union to screen grievances and then process those the union concludes will justify the expense and time involved in terms of benefiting the membership at large).

3. Decline in Unionization

If the exclusive representative loses effectiveness in negotiating labor agreements and in enforcing those agreements, employees in that particular unit may no longer perceive the union as useful. The union may continue to collect dues, but it may obtain only insignificant gains for employees because it lacks bargaining power and is routinely circumvented in processing grievances by individual employees. Even if employees choose not to decertify the exclusive representative,²²² they may gradually lose interest in a union that is essentially nonfunctional, and in some cases employees and union officials alike may abandon it.

Recent statistics show that employees are abandoning unions.²²³ While some of that decline in union membership may be attributed to shifts in the composition of the workforce, a significant cause of the decline may be the diminished effectiveness of unions.²²⁴ A union's bargaining power for the unit is diminished after decisions like *City Disposal*, which in effect promote the rights of individuals at the cost of reducing the power of the organized unit. Employees may decide to resign from union membership when their union has not been instrumental in obtaining or enforcing gains in benefits for employees. There is a real danger, however, that as unions disappear from some units, the rights already obtained for employees in those units will disappear also. Without the presence of a union, the employer can unilaterally adopt new work rules, unilaterally adjust wages, exercise favoritism in settling grievances, grant pay increases to certain individuals, and promote and lay off selected employees.²²⁵ These same practices probably caused the employees to organize in the first place, and will likely be the moving force behind the reorganization of the unit sometime in the future.²²⁶ In the meantime, however, employees will unnecessarily lose rights.

²²² Section 9(c) of the NLRA provides for decertification elections, so long as the exclusive representative is not insulated within one of the decertification election-bars. 29 U.S.C. § 159(c) (1982). See *supra* note 193 and accompanying text.

²²³ Roomkin & Juris, *supra* note 210 (the data on union membership unambiguously document a decline in the percentage of the workforce affiliated with unions); Boston Globe, Feb. 24, 1985 at 61, col. 1 (organized labor represents less than twenty percent of American workforce today, the lowest figure in decades).

²²⁴ See *supra* note 210 and accompanying text.

²²⁵ 29 U.S.C. § 158(d) (1982). Section 8 of the NLRA has been interpreted to require employers to bargain with the elected representative over mandatory subjects of bargaining. The employer may not make unilateral changes in mandatory subject areas such as wages, layoffs, contracting for work, and other subjects that directly affect the employee, unless it has bargained to an "impasse" with the bargaining representative. See R. GORMAN, BASIC TEXT ON LABOR LAW 496-98 (1976). If the employees choose not to bargain collectively, however, the employer is free to make changes in those mandatory subject areas as it sees fit. Cf. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210 (1964) (the Court discussed the parties' freedom to refuse to bargain in the context of nonmandatory subjects as defined in section 8(d)). A more detailed analysis of section 8 and its interpretation is beyond the scope of this article.

²²⁶ See B. FLEISHER & T. KNIESNER, *supra* note 210, at 223-24; A. GOLDMAN, LABOR LAW AND INDUSTRIAL RELATIONS IN THE UNITED STATES OF AMERICA 122 (1979); Ryscavage, *Measuring Union-Nonunion Earnings Differences*, 97 MONTHLY LAB. REV. 3 (Dec. 1974). Employees' decisions to form or join labor unions are a function of the economic benefits which union membership can provide. B. FLEISHER & T. KNIESNER, *supra* note 210, at 223-24. In 1974, the union-represented worker was better paid than his nonorganized counterpart. Ryscavage, *supra*, at 3. Furthermore, nonwage benefits, such as job security clauses, grievance procedures, rest periods, and clean-up periods, which are typically enjoyed by union workers, are usually unavailable to nonunion members. A. GOLDMAN, *supra*, at 122.

In interpreting the "concerted activities" clause of section 7 of the NLRA, the *City Disposal* Court examined the underlying purposes of the Act. Although the Court correctly recognized that statutory language cannot be read in a vacuum, the Court focused on individual employee rights and not on the principle of exclusive representation. Exclusive representation, however, is the basic principle underlying the NLRA; it is that principle which encourages employees to unite as a group for their mutual benefit in order to achieve equal bargaining power with their employer. The *City Disposal* decision, therefore, may reduce the bargaining power of the exclusive representative, derogate the grievance and arbitration process, and cause a decline in unionization. Thus, the relative economic strength of employees will be weakened. The irony is that, after *City Disposal*, employees may find themselves with fewer collective rights to enforce.

CONCLUSION

The Supreme Court's decision in *City Disposal* resolved the split among the circuit courts over what constitutes concerted activities under section 7 of the NLRA. Some courts of appeals, like the Second Circuit in *Interboro*, advocated taking a broad approach to this issue and considered the underlying policies of the NLRA. Other circuits followed the decision of the Sixth Circuit in *ARO* and took a more literal approach in determining which activities by individual employees would constitute concerted activities under section 7.

In *City Disposal*, the Supreme Court adopted a broad interpretation of the "concerted activities" language of section 7 of the NLRA. The Court held that an individual employee's assertion of a collectively bargained right was a concerted activity under the Act. The Court reasoned that its decision was consistent with the intent of the NLRA to encourage collective bargaining by equalizing bargaining power between employees and employer throughout the term of the employment relationship. The Court, therefore, asserted that the *City Disposal* decision was consistent with the national labor policy goal of promoting industrial stability. The dissenters, however, argued that holding the individual's activity to be concerted was too expansive an interpretation of the language of section 7 of the NLRA, and shifted labor contract dispute resolution from arbitrators and the courts to the NLRB without congressional action.

Although the *City Disposal* Court examined the underlying purposes of the NLRA in interpreting the meaning of "concerted activities," the Court mistakenly focused on the concept of individual employee rights and ignored the more basic principle of exclusive representation that underlies the NLRA. This principle of exclusive representation gives meaning to the term collective bargaining because employees have bargaining power only as an united group. Permitting individual employees to circumvent the grievance and arbitration process and the exclusive representative merely by couching their complaints in a provision of the collective bargaining agreement may eventually reduce the bargaining power of the exclusive representative. If this reduction occurs, employees as a group will obtain fewer rights from their employers in future collective bargaining agreements. Ironically, individual employees, whom the *City Disposal* Court sought to protect by permitting them to independently seek enforcement of collectively bargained rights, may now have fewer of those collective rights to enforce.

BRIAN D. SHONK