

## CASE NOTES

### Labor Law—National Labor Relations Act—Interpretation of Section 7 Concerted Activities—*NLRB v. Northern Metal Co.*<sup>1</sup>—

Employee Davis, upon inquiring why he had not been paid for the Labor Day holiday, was told by his employer that he was not entitled to holiday pay because he was still a probationary employee.<sup>2</sup> Davis then consulted his shop steward and the local union's financial secretary. Both informed Davis that the union could do nothing for him because he was not a member of the union.<sup>3</sup> Davis thereafter obtained a copy of the collective bargaining contract which contained a provision that employees were entitled to full pay for seven holidays, including Labor Day, subject only to the condition that any employee claiming holiday pay must have worked the scheduled day before and the scheduled day after the holiday. Davis informed his employer that the contract's language did not exclude non-union or probationary employees from its holiday pay provision. Thereupon, the employer accused Davis of "trying to tell me how to run my business." Shortly thereafter, Davis was discharged.

Davis filed a complaint against the company with the National Labor Relations Board, charging that his discharge was a violation of Section 8(a)(1) of the National Labor Relations Act. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ."<sup>4</sup> Section 7 provides that employees shall have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>5</sup> The Board determined that the company violated section 8(a)(1) and ordered Davis' reinstatement.<sup>6</sup> The case went to the Court of Appeals for the Third Circuit on application of the NLRB, pursuant to Section 10(e) of the National Labor Relations Act,<sup>7</sup> for enforcement of the order.

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<sup>1</sup> 440 F.2d 881 (3d Cir. 1971).

<sup>2</sup> "The company did not, as a long standing practice acquiesced in by the Union, pay holiday pay to probationary employees." 440 F.2d at 883 n.3.

<sup>3</sup> "Disputes of probationary employees were not subject to the contract's grievance procedure." *Id.* n.4.

<sup>4</sup> 29 U.S.C. § 158(a)(1) (1970).

<sup>5</sup> Section 7, 29 U.S.C. § 157 (1970), provides, in part, as follows:

"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. . . ."

<sup>6</sup> The Board's Decision and Order are reported in 175 N.L.R.B. No. 145, 71 L.R.R.M. 1110 (1969).

<sup>7</sup> 29 U.S.C. § 160(e) (1970) states, in part:

"The Board shall have power to petition any court of appeals of the United States . . . within any circuit or district . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the

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The court HELD: Davis was not engaged in concerted activities within the protection of section 7 because his actions had not been for the purpose of initiating, inducing, or preparing for group action.<sup>8</sup> The court therefore found it unnecessary to determine whether there was substantial evidence to support the Board's finding that Davis' activities in attempting to obtain holiday pay were the cause of his dismissal.<sup>9</sup> In addition, the court indicated that had it found differently, it would nonetheless have denied enforcement because the Board's decision could not be considered reasonable and fair when viewed on the record as a whole.<sup>10</sup>

The primary question presented to the *Northern Metal* court was whether a single employee acting alone was engaged in protected activity when he pressed demands for holiday pay, to which he deemed himself entitled under the provisions of the collective bargaining agreement.<sup>11</sup> The Board urged the court to hold that the employee's efforts constituted section 7 concerted activity. It contended that the necessary element of concert could be supplied from the fact that the employee presented a grievance which concerned the interpretation of the collective bargaining agreement and which affected rights of all probationary employees.

The court rejected the theory of "constructive concerted activity" as a legal fiction,<sup>12</sup> and instead followed the more limited rule of *Mushroom Transportation Co. v. NLRB*,<sup>13</sup> an earlier Third Circuit decision, which held that talk, in order to be protected as a concerted activity, must be talk looking toward group action.<sup>14</sup> *Mushroom* involved a part-time employee whose name was removed from the extra driver list of the employer motor carrier. The evidence demonstrated that the employee had made a habit of talking to other employees and advising them as to their rights regarding questions of holiday pay and vacations. The Board found that the employee's activities in general were directly related to the other employees' legitimate interests in terms and conditions of employment, and that it was not his prime motive to advance his personal interest. The Board therefore concluded that the employee's activities fell within the protected ambit of section 7 concerted activities, and ordered the employee's reinstatement with back pay.<sup>15</sup>

On appeal, the *Mushroom* court found no evidence that the em-

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enforcement of such order and for appropriate temporary relief or restraining order. . . ."

<sup>8</sup> 440 F.2d at 884-85.

<sup>9</sup> Id. at 885.

<sup>10</sup> Id. at 884, 886, citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951).

<sup>11</sup> 440 F.2d at 884.

<sup>12</sup> Id.

<sup>13</sup> 330 F.2d 683 (3d Cir. 1964).

<sup>14</sup> Id. at 685.

<sup>15</sup> 142 N.L.R.B. No. 123, 53 L.R.R.M. 1206 (1963).

ployee's talks with fellow employees involved any effort on his or their part to initiate or promote any concerted action to deal with complaints and grievances which they may have discussed.<sup>16</sup> The court stated that in order for conversation to constitute concerted activity, it must appear at the very least that it was engaged in with the object of initiating, inducing or preparing for group action, or that it had some relation to group action in the interest of the employees.<sup>17</sup> Activity which consists of mere talk, in order to be protected, must be talk looking toward group action; activity which looks forward to no action at all is more than likely to be mere "gripping."<sup>18</sup> The court held that there was no evidence that any question of group action had entered into the conversations and that the employee was therefore not engaged in protected concerted activities.<sup>19</sup>

It is submitted that the *Mushroom* court gave section 7 an overly strict interpretation in holding that an individual's activities not intended to induce or prepare for group action are unprotected, regardless of whether the results of the activities might benefit the group.<sup>20</sup> Thus, under *Mushroom*, employers have relatively wide freedom in dealing with troublesome or "gripe" prone employees.

The *Northern Metal* court also supported its holding with the Seventh Circuit's decision in *Indiana Gear Works v. NLRB*.<sup>21</sup> This case involved an employee who prepared and displayed cartoons ridiculing both a wage increase and the company's president. The Board reversed the decision of its trial examiner and held that the employee's discharge was a violation of section 8(a)(1).<sup>22</sup> The court applied the rule that, in order to prove concerted activity under section 7, it is necessary to demonstrate that the activity was for the purpose of inducing or preparing for group action to correct a grievance. The court found no evidence in the record demonstrating that the employee prepared and posted the cartoons for the purpose of inducing or preparing for any group action by the employees.<sup>23</sup> In-

<sup>16</sup> 330 F.2d at 684-85.

<sup>17</sup> *Id.* at 685.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The Ninth Circuit, in *Signal Oil and Gas Co. v. NLRB*, gave a broader interpretation to the *Mushroom* language that "a conversation may constitute a concerted activity" if it appears "that it had some relation to group action in the interest of the employees." It held that a single non-union employee's comment to another non-union employee that he hoped the union would carry out a threatened strike was protected because it was supportive of joint action. 390 F.2d 338, 343 (9th Cir. 1968). Although the *Signal* court was aware of the necessity of some relationship of speech to group action, it was adamant on its view that individual utterances supporting joint action should be protected. "To employees as to other groups in society, speech—whether directed at a multitude or at a single listener—is often an essential means of achieving (albeit slowly and indirectly) social or economic goals." *Id.*

<sup>21</sup> 371 F.2d 273 (7th Cir. 1967).

<sup>22</sup> The Board's Decision and Order are reported in 156 N.L.R.B. No. 40, 61 L.R.R.M. 1056 (1965).

<sup>23</sup> 371 F.2d at 276.

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stead, the court agreed with the Board's trial examiner, who had found that the employee was merely satisfying his own personal whim or gratification by carrying out habitual sarcastic reflections against those for and with whom he worked.<sup>24</sup>

The most expansive interpretation of section 7 concerted activities as viewed by the *Mushroom* and *Indiana Gear Works* courts would go no further than protecting talk looking toward group action. This interpretation does not give protection to an employee, such as the one in *Northern Metal*, who, alone, asserts a claim arising out of a collective bargaining agreement. However, individual efforts to enforce a collective bargaining agreement were held to be protected under section 7 in *NLRB v. Interboro Contractors, Inc.*,<sup>25</sup> which formed the basis for the dissenting opinion in *Northern Metal*. *Interboro* involved two employees who complained to their employer about alleged violations of the collective bargaining contract. The employees were discharged. The Board determined that the employer had violated section 8(a)(1) and ordered the reinstatement of the employees.<sup>26</sup> In granting the Board's petition for enforcement of its order, the Second Circuit stated that "while interest on the part of fellow employees would indicate a concerted purpose, activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees."<sup>27</sup>

The Second Circuit subsequently qualified its *Interboro* rationale in *NLRB v. John Langenbacher Co.*,<sup>28</sup> wherein it stated that an attempt by employees to enforce their understanding of the terms of a collective bargaining agreement "is a protected activity . . . if the employees have a *reasonable basis for believing* that their understanding of the terms was the understanding that had been agreed upon . . ."<sup>29</sup> Thus, efforts by an individual employee to enforce a provision of a collective bargaining contract are not protected concerted activity per se. Rather, it would seem that individual claims by employees will be statutorily protected only if a condition of reasonableness exists as to interpretation of the contractual provisions in issue.

The *Interboro* approach was followed in *NLRB v. Selwyn Shoe Mfg. Corp.*,<sup>30</sup> where the Eighth Circuit stated that "[w]e think it obvious that rights secured by such . . . [a collective bargaining] agreement, though personal to each employee, are protected rights under § 7 of the Act because the collective bargaining agreement is the result of concerted activities by the employees for their mutual

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<sup>24</sup> Id. at 277.

<sup>25</sup> 388 F.2d 495 (2d Cir. 1967).

<sup>26</sup> 157 N.L.R.B. No. 110, 61 L.R.R.M. 1537 (1966).

<sup>27</sup> 388 F.2d at 500.

<sup>28</sup> 398 F.2d 459 (2d Cir. 1968).

<sup>29</sup> Id. at 463 (emphasis added).

<sup>30</sup> 428 F.2d 217 (8th Cir. 1970).

aid and protection."<sup>81</sup> The *Selwyn Shoe* court held that it was an unfair labor practice for the employer to discharge an employee for vigorously presenting a personal grievance based upon a clause in the collective bargaining agreement.<sup>82</sup>

*Selwyn Shoe* may be distinguished from *Northern Metal* by noting that in *Selwyn*, the employee was utilizing the union grievance procedure which was available to her. However, the *Northern Metal* employee could not invoke the grievance machinery available to regular employees since he was a non-union probationary employee. Yet, as the *Northern Metal* dissent indicated, it would be unfair to deny the benefits provided by the National Labor Relations Act to probationary employees who are not yet entitled to utilize the union grievance machinery<sup>83</sup> while extending benefits to regular employees who are entitled to process their grievances through the union.<sup>84</sup>

The dissent further stated that "although an individual employee, in processing his complaint based upon a contractual provision, might be concerned primarily with accomplishing a result which will benefit him personally, his success will redound to the direct benefit of all employees similarly situated."<sup>85</sup> In *Northern Metal*, the employee was concerned primarily with convincing his employer that he was entitled to holiday pay under the collective bargaining agreement. However, the employee was, in effect, representing all other probationary employees (both present and future) for, if successful, his efforts would benefit this entire class of persons. It is therefore submitted that this status should generate inclusion of the employee's actions within the ambit of protected section 7 activities.

Both the majority and the dissent agreed that even if the *Interboro* rule were followed, it would still be necessary under *Langenbacher*<sup>86</sup> to remand the case to the Board for a finding as to whether the employee had had a reasonable basis for believing he was entitled to holiday pay under the collective bargaining contract.<sup>87</sup> The majority determined that the trial examiner's findings of fact clearly showed that the examiner had not considered whether there had been a *reasonable basis* for the employee's belief. He found, simply, that the employee was discharged for pressing for holiday pay *to which*

<sup>81</sup> Id. at 221.

<sup>82</sup> Id.

<sup>83</sup> 440 F.2d at 887 n.1.

<sup>84</sup> The recent decision of the Board in *J.A. Ferguson Constr. Co.*, 172 N.L.R.B. No. 165, 68 L.R.R.M. 1578 (1968) illustrates the superficiality of any attempt to make this distinction. In extending protection to an employee who had not availed himself of the contract's grievance procedure, the Board ruled that "his conduct, nevertheless, constituted concerted activity since the 'grievance' pertained to a violation of a condition of employment prescribed in the contract, affecting not only [this employee] but also all the bricklayers on the job." Id., 68 L.R.R.M. at 1579.

<sup>85</sup> 440 F.2d at 888.

<sup>86</sup> See discussion at text accompanying note 28 supra.

<sup>87</sup> 440 F.2d at 885, 888.

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he thought he was entitled under the collective bargaining contract.<sup>38</sup> *Langenbacher* did not indicate what factors, other than examining the language of the contract itself, should be considered in determining whether an employee has a reasonable basis for his grievance or complaint. A number of cases, however, have noted several obvious factors that should be considered. A mere "gripe" has been held not protected,<sup>39</sup> nor a complaint made out of malice and in bad faith.<sup>40</sup> Therefore, for an employee to be protected, it would seem essential that he have a bona fide purpose in implementing or interpreting the bargaining agreement. The language of *Interboro* suggests that a grievance or complaint concerning a provision of a collective bargaining contract is not protected if it is "*fabricated* for personal motives."<sup>41</sup>

The *Interboro* rationale has been followed by the NLRB in recent years.<sup>42</sup> As compared with the *Mushroom* rule, *Interboro* is more consistent with the language of Section 7 and the basic policy of the Act. The scope of the words "concerted activities" may be ascertained by noting the statutory language immediately following in section 7: "for the purpose of collective bargaining or *other mutual aid or protection*" (emphasis added). It has also been made clear that section 7 is for the benefit of employees and not the union.<sup>43</sup> Thus, it is suggested that, under this interpretation of the statutory language, it may be concluded that concerted activity exists if there is some reasonable relationship connecting an employee's activity with the "mutual aid or protection" of other employees, and if such activity is based upon rights of the group recognized within the bargaining agreement. The requisite relationship to mutual aid or protection can be inferred if the *effect* of the activity is to benefit other employees.<sup>44</sup> It is also submitted that activity looking toward the implementation of a bargaining agreement is encompassed in the explicit language of section 7 which protects the right to "assist labor organizations."

In further support of the individual's right to be protected in activities involving enforcement of a collective bargaining agreement, it should be pointed out that Congress has indirectly sanctioned the

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<sup>38</sup> Id. at 885.

<sup>39</sup> *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *NLRB v. Office Towel Supply Co., Inc.*, 201 F.2d 838, 841 (2d Cir. 1953).

<sup>40</sup> *Socony Mobile Oil Co., Inc. v. NLRB*, 357 F.2d 662, 664 (2d Cir. 1966); *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 753 (4th Cir. 1949).

<sup>41</sup> 388 F.2d at 500 (emphasis added).

<sup>42</sup> See, e.g., *H.C. Smith Constr. Co.*, 174 N.L.R.B. No. 180, 70 L.R.R.M. 1462 (1969); *New York Trap Rock Corp.*, 148 N.L.R.B. No. 41, 56 L.R.R.M. 1526 (1964); *B&M Excavating, Inc.*, 155 N.L.R.B. No. 105, 60 L.R.R.M. 1466 (1965) (dictum), enforced per curiam, 368 F.2d 624 (9th Cir. 1966); *Bunney Bros. Constr. Co.*, 139 N.L.R.B. No. 133, 51 L.R.R.M. 1532 (1962).

<sup>43</sup> *NLRB v. Schwartz*, 146 F.2d 773, 774 (5th Cir. 1945).

<sup>44</sup> *International Ladies' Garment Workers' Union v. NLRB*, 299 F.2d 114, 117 (D.C. Cir. 1962).

individual processing of grievances in Section 9(a) of the Act.<sup>45</sup> This section allows any individual employee to present grievances to his employer without the intervention of the union and to have such grievances adjusted, so long as the adjustment is not inconsistent with the terms of the collective bargaining agreement. Congress clearly intended through sections 9 and 7 to recognize that an individual employee's rights are not totally submerged by the group when assertion of those rights is otherwise consistent with the interest of the group. It has been stated that "to reason otherwise is to deny the very purpose for which the union exists; that is, the protection of the rights of the individual employee."<sup>46</sup>

A second question presented in *Northern Metal* was whether the court correctly interpreted the scope of judicial review of NLRB decisions as enunciated by the Supreme Court in *Universal Camera Corp. v. NLRB*.<sup>47</sup>

We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.<sup>48</sup>

The *Northern Metal* court took a broad view of its mandate under *Universal Camera* and stated that even if it had found differently on the issue of the interpretation of "concerted activities," its respon-

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<sup>45</sup> 29 U.S.C. § 159(a) (1970) provides:

"Representatives . . . selected for the purposes of collective bargaining by the majority of the employees . . . 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: *Provided*, That any individual employee . . . shall have the right at any time to present grievances to [his] employer and to have such grievances adjusted, without the intervention of the bargaining representative. . . ."

<sup>46</sup> *Illinois Ruan Transp. Corp. v. NLRB*, 404 F.2d 274, 289 (8th Cir. 1968) (dissenting opinion).

<sup>47</sup> 340 U.S. 474 (1951).

<sup>48</sup> *Id.* at 490.

sibility for the reasonableness and fairness of Board decisions would require the court to deny enforcement of the order. The court suggested that the Board would have to explain, by remand to its trial examiner or in some other way, the trial examiner's crediting that amount of the employee's testimony needed to make out a case against the company, while rejecting part of the employee's testimony as "implausible."<sup>49</sup>

It is submitted that the responsibility of courts of appeal for the reasonableness and fairness of Board decisions arises from, and is limited by, their responsibility for insuring that the evidence supporting the Board's decision appears substantial when viewed on the record as a whole. The National Labor Relations Act provides that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."<sup>50</sup> The Supreme Court in *Universal Camera* held that the scope of review under the NLRA is the same as that required in the Administrative Procedure Act,<sup>51</sup> which directs reviewing courts to set aside agency findings unsupported by substantial evidence.<sup>52</sup> The Court has construed substantial evidence to be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>53</sup> The responsibility of a court to view the record as a whole in determining the substantiality of evidence requires that it take into account the body of evidence opposed to the Board's decision.<sup>54</sup>

It would appear, therefore, that the inquiry in *Northern Metal* should have been whether there was substantial evidence on the record as a whole to support the Board's decision.<sup>55</sup> The substantial evidence rule directs the court's attention to whether the Board could reasonably have made the finding.<sup>56</sup> Because the record includes the examiner's report,<sup>57</sup> it has been argued that the court, in making its determination, may properly consider the fact that an experienced trial examiner who saw and heard the witnesses made the findings that he did.<sup>58</sup> *Universal Camera* determined that nothing in the statutes suggests that the Board should not be influenced by the

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<sup>49</sup> 440 F.2d at 886.

<sup>50</sup> 29 U.S.C. § 160(e) (1970).

<sup>51</sup> 340 U.S. at 487.

<sup>52</sup> 5 U.S.C. § 706 (1970).

<sup>53</sup> *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

<sup>54</sup> 340 U.S. at 488.

<sup>55</sup> In the recent case of *Ginsburg v. Richardson*, the Third Circuit stated that "it is unnecessary for this court to be in accord with all of the examiner's findings and reasoning as long as his ultimate conclusion is based upon substantial evidence." 436 F.2d 1146, 1151 (3d Cir. 1971).

<sup>56</sup> 4 K. Davis, *Administrative Law Treatise* § 29.11 (1958).

<sup>57</sup> 340 U.S. at 493.

<sup>58</sup> 2 K. Davis, *Administrative Law Treatise* § 10.04 (1958).

examiner's opportunity to observe witnesses he hears and sees and which the Board does not.<sup>69</sup>

*Universal Camera* does not alter the primary function of the Board in making fact determinations. The requirement for canvassing the whole record in order to ascertain substantiality is not intended to reduce the role of the Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of expertise which courts do not possess and therefore must respect.<sup>60</sup> Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views.<sup>61</sup> Therefore, as the *Northern Metal* dissent suggested, it would be permissible in satisfying the substantial evidence test for the trial examiner to reject only part of the employee's testimony without rejecting all of it.<sup>62</sup>

It is submitted that the *Northern Metal* holding that an individual employee is not engaged in protected concerted activity when he attempts, outside of the grievance machinery, to enforce rights under a collective bargaining agreement thwarts the purposes of the Act—the promotion of harmony in labor-management relations and the recognition of the individual's right to engage in activities for mutual protection and individual security. It is true that the overall policy of the Act may be better served if the employee processes his grievance through the union representative. However, as the facts of *Northern Metal* demonstrate, this avenue is not always available to the employee. In any case, where the employee is asserting a right which he has a reasonable basis to believe is provided by the collective bargaining contract, both Sections 7 and 9 of the Act give him the right to proceed alone.

PHILLIP A. WICKY

**Administrative Law—Due Process Implications in Agency Proceedings—*Sterling National Bank of Davie v. Camp*.<sup>1</sup>**—Appellant, a bank in Davie, Florida, brought suit to invalidate the granting of a national bank charter by the Comptroller of the Currency to a group of individuals wishing to establish a new national bank in Davie. Both proponents and opponents of the proposed bank were given the opportunity to present evidence at a hearing to consider the propriety of chartering the new bank. The complaint alleged that despite evidence in the administrative file supporting his action, award

<sup>69</sup> 340 U.S. at 495.

<sup>60</sup> Id. at 488.

<sup>61</sup> Id.

<sup>62</sup> 440 F.2d at 889.

<sup>1</sup> 431 F.2d 514 (5th Cir. 1970), cert. denied, 401 U.S. 925 (1971).