City Disposal Systems and the Interboro Doctrine: The Evolution of the Requirement of "Concerted Activity" Under the National Labor Relations Act

Raymond T. Mak
CITY DISPOSAL SYSTEMS AND THE INTERBORO DOCTRINE: THE EVOLUTION OF THE REQUIREMENT OF "CONCERTED ACTIVITY" UNDER THE NATIONAL LABOR RELATIONS ACT

Raymond T. Mak*

Section 8(a)(1) of the National Labor Relations Act (the Act) provides, "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . . ."1 Section 7 guarantees to employees "the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."2 The question of which specific concerted activities are protected by the broad language of section 7 has consistently troubled those charged with enforcing the Act. In the absence of any legislative history clearly defining the phrase,3 certain standards have been developed by the courts to determine whether an employer has violated section 8(a)(1).

Accordingly, the Act will not protect unlawful concerted activities,4 mere personal griping,5 or protests unrelated to employment

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* B.A., magna cum laude, St. John's University; J.D., St. John's University; LL.M., New York University; Associate, Seligman & Seligman, New York, New York.
2. Id. at § 157.
4. See, e.g., Southern S.S. Co. v. NLRB, 316 U.S. 31, 48 (1942) (mutiny by sit-down strikers violated the federal criminal code and was unprotected concerted activity).
5. The Board has always held that personal "gripping" by an employee is unprotected activity. For example, in Richdel, Inc., 265 N.L.R.B. 439, 111 L.R.R.M. 1653 (1982), the Board held that an employee's efforts to enlist other workers' assistance in furtherance of a personal dispute between another employee and a supervisor did not warrant the protection of
conditions. In addition, an employer's discharge of an employee is not wrongful unless made with the knowledge of the employee's activity. Over the years, the courts have been consistent in determin-

the Act. Similarly, in Natural Wax Co., 251 N.L.R.B. 1064, 105 L.R.R.M. 1371 (1980), an employer made harassing efforts to obtain a merit increase without support or involvement from his fellow workers. The Board held that his discharge was lawful because the employee's actions were purely personal. They did not directly further the interests or rights of fellow workers. See, e.g., Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973); Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967); Mushroom Transp. Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964). See also Inked Ribbon Corp., 241 N.L.R.B. 7, 100 L.R.R.M. 1480 (1979) (employee's threat to go to "Labor Department" if she did not get pay raise and other benefits held unprotected); Tabernacle Community Hosp. & Health Center, 233 N.L.R.B. 1425, 97 L.R.R.M. 1102 (1977)(employee's protests of management's refusal to transfer her to another department were purely personal and unprotected); Midland-Ross Corp., 216 N.L.R.B. 302, 88 L.R.R.M. 1214 (1975)(employee's protest of employer's dress code unprotected); Snap-on Tools Corp., 207 N.L.R.B. 238, 84 L.R.R.M. 1417 (1973)(employee's complaints concerning supervisor's decision to assign another worker to fill temporary vacancy held to be personal griping and unprotected).

6. See, e.g., Puerto Rico Food Prods. Corp. v. NLRB, 619 F.2d 153 (1st Cir. 1980)(concerted work stoppage to protest the discharge of a supervisor unprotected because it was not a protest over actual conditions of employment); NLRB v. Leslie Metal Arts Co., 509 F.2d 811 (6th Cir. 1975)(walkout by group of employees based solely on antipathy towards a co-worker not deemed protected activity because personal quarrels not related to a labor dispute with the employer); G & W Elec. Specialty Co. v. NLRB, 360 F.2d 873 (7th Cir. 1966)(employees' dispute with credit union and consequent discharge unprotected because unrelated to working conditions or matters incident to the employment relationship); Keyway, 263 N.L.R.B. 1168, 111 L.R.R.M. 1196 (1982). See generally Cloke, Concerted Activity and the National Labor Policy, 5 SAN. FERN. V.L. REV. 289 (1976); Cox, The Right to Engage in Concerted Activities, 26 IND. L.J. 319 (1951).

7. In order to violate § 8(a)(1) the employer must knowingly interfere with protected rights of the employee and discharge the employee because of them. E.g., Air Surrey Corp. v. NLRB, 601 F.2d 256, 257 (6th Cir. 1979) ("[A]n employer cannot be held in violation of § 8(a)(1) of the Act when it discharges an employee for activity which may in fact be protected under the Act but the employer lacks knowledge of its protected character."); NLRB v. Office Towel Supply Co., 201 F.2d 838 (2d Cir. 1953); NLRB v. Westinghouse Elec. Corp., 179 F.2d 507 (6th Cir. 1949). The Supreme Court enunciated this requirement in NLRB v. Burnup & Sims Inc., 379 U.S. 21 (1964):

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

Id. at 23 (emphasis added).

See also, Walls Mfg. Co., 128 N.L.R.B. 487, 46 L.R.R.M. 1329 (1960); Meyers Products Corp., 84 N.L.R.B. 32, 24 L.R.R.M. 1216 (1949). In addition, as the Supreme Court noted: An employer commits an unfair labor practice if he or she interfere[s] with, [or] restrain[s] concerted activity. It is possible, therefore, for an employer to commit an unfair labor practice by discharging an employee who is not himself involved in concerted activity, but whose actions are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities.


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ing that section 8(a)(1) is violated when an employee is discharged for union or other group activity. However, much inconsistency has arisen in applying the Act to actions by individual employees.

The Interboro Doctrine stands for the proposition that a worker who individually seeks to enforce his rights under a collective bargaining agreement engages in concerted activity protected by section 7 of the Act, even though he is acting solely for his own purpose. This concept is based upon the premise that the collective bargaining agreement itself is the product of concerted activity and that the employee’s act of asserting a right contained in that agreement is an extension of that process. In addition, asserting a right contained in the collective bargaining agreement is viewed as affecting the rights of all the employees covered by the agreement.

The Interboro Doctrine’s interpretation of concerted activities enjoyed only limited success after its formulation. Although at least three circuit courts accepted this broad view, other circuit courts either rejected or misunderstood it.

A split of the various circuit courts of appeals regarding the validity of the Interboro Doctrine inevitably arose as a result of their respective interpretations of the term “concerted activities.” The right to engage in concerted activities lies at the heart of the National Labor Relations Act, and is, in effect, the bill of rights of employees. The need for clarification by the Supreme Court of

8. Most activities involving a significant minority of employees are generally within the scope of § 7. See, e.g., NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (employees who walked off the job because the building in which they worked was cold were protected against discharge); NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859 (5th Cir. 1966) (group walkout protesting treatment of a co-worker protected).

9. See infra text accompanying notes 76-83.


13. See, e.g., NLRB v. Ben Pekin Corp., 452 F.2d 205 (7th Cir. 1971); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217 (8th Cir. 1970); Interboro Contractors, 388 F.2d 495 (2d Cir. 1967).

14. See, e.g., Royal Dev. Co. v. NLRB, 703 F.2d 363 (9th Cir. 1983); Roadway Express, Inc. v. NLRB, 700 F.2d 687 (11th Cir. 1983); Aro, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973). But see Anchortank, Inc. v. NLRB, 618 F.2d 1153 (5th Cir. 1980); NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971). See infra text accompanying notes 74-83 for a formal discussion of both the acceptance and rejection by the courts.

15. See infra text accompanying notes 84-98 discussing the court’s misunderstanding of the Interboro Doctrine in Kohls v. NLRB, 629 F.2d 173 (D.C. Cir. 1980).

16. Section 7 of the National Labor Relations Act provides that “[e]mployees shall have
what actions constitute "concerted activities" was satisfied by the definition expressed by the Court in *NLRB v. City Disposal Systems.*

This article will (1) review the underlying policy, history and legislative intent behind section 7; (2) discuss the development of the Interboro Doctrine; (3) examine the reasons for its rejection prior to City Disposal Systems; and (4) analyze the impact of *City Disposal Systems* upon employees' rights to engage in concerted activities as provided by section 7 of the NLRA.

I. THE UNDERLYING POLICY OF SECTION 7

A primary objective of the National Labor Relations Act is the elimination of industrial strife. Congress believed that the protection of certain employees' activities was essential to achieve this objective. Therefore, section 7 of the Wagner Act (NLRA) was enacted to delineate the basic rights covered by the Act. Section 7 provides that "[e]mployees 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. . . ."\(^\text{19}\)

The courts and the National Labor Relations Board emphasized the "concerted activities" language rather than the phrase "mutual aid or protection"\(^\text{20}\) as the test to determine whether a given em-

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18. Section 1 of the Act provides in pertinent part that:
   It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.\(^\text{29}\) U.S.C. § 151 (1976) (emphasis added).
20. The phrase "mutual aid or protection" has been broadly interpreted to include almost any activity which somehow affects the well-being of the employees as a group. The Seventh Circuit has noted that the phrase connotes action on the part of an employee which identifies him with the common interests of his fellow employees. *NLRB v. Illinois Bell Tel. Co.*, 189 F.2d 124 (7th Cir. 1951). The Ninth Circuit has held that "mutual aid or protection" need not be so narrowly construed as to require that the concerted activity be related to the purpose of collective bargaining. *Morrison-Knudsen Co. v. NLRB*, 358 F.2d 411, 413 (9th Cir.

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ployee activity was protected. This focus stemmed from the Board’s view that activity for mutual aid or protection referred to all acts reasonably related to the employees’ jobs or to their status as employees. Thus, almost any activity that related to wages, hours, or terms and conditions of employment was deemed to be for mutual aid or protection. This liberal definition was affirmed by the Supreme Court in *Eastex, Inc. v. NLRB*, in which the Court rejected prior circuit court holdings which restricted the “mutual aid or protection” clause to matters under the employer’s control. Since the “mutual aid or protection” language was read so liberally, the significant obstacle to protecting individual activity became the “concerted activities” language.

The concept of concerted activities protects a broad spectrum of employee activities which, prior to the enactment of the NLRA, were all valid grounds for which an employer could retaliate by discharging an employee. Current protection of concerted activities helps to serve one of the declared purposes of the Act by allowing workers to self-organize and designate their own representatives for the purpose of negotiating the terms and conditions of employment.

Section 7 rights were designed primarily “to write equity into the law, to make the relationship between labor and management equitable, and to place them on an equal basis.” Indeed, the activities protected by section 7 are so important that the Supreme Court has considered their exercise to be essential to the success of the national labor policy. Protection of section 7 rights is guaranteed by section...
8(a)(1) of the Act.\textsuperscript{28} The protective language of section 7 is very broad on its face. However, the language is misleading. While it appears that an employer may not discharge an employee solely because the employee engages in concerted activities, section 7 does not protect all activities performed in concert. Even if the conduct admittedly constitutes concerted activity, certain categories of employee activities fall outside of section 7's protection, and thus are unprotected \textit{per se}. For example, activities which are unlawful,\textsuperscript{29} violent,\textsuperscript{30} disloyal,\textsuperscript{31} disruptive,\textsuperscript{32} or those unrelated to working conditions,\textsuperscript{33} are clearly not protected by section 7. The resulting discharge of employees who engage in such activity will therefore not constitute an unfair labor practice. Thus, the test for whether an activity is protected depends not only upon the wording of the Act, but also upon the precise nature and effect of the employee's conduct.\textsuperscript{34}

In situations where the activity is not protected \textit{per se}, the determination of section 7 coverage rests upon the ill-defined meaning of the term "concerted activity."\textsuperscript{35} All courts agree that the activity is "concerted" when more than one employee is involved.\textsuperscript{36} The circuit courts had been divided over whether a single employee's claim, predicated upon a collective bargaining agreement, constitutes concerted activity. Congressional silence as to the meaning of concerted activity further complicates the issue.\textsuperscript{37} An analysis of the history of

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\item \textsuperscript{28} 29 U.S.C. § 158(a)(1) (1976).
\item \textsuperscript{29} See, e.g., Southern S.S. Co. v. NLRB, 316 U.S. 31, 40 (1942) (mutiny by sit-down strikers violated the federal criminal code and was unprotected concerted activity).
\item \textsuperscript{30} See, e.g., NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 253 (1939)(a sit-down strike which involved the illegal seizure of property was not protected); UAW v. Russell, 356 U.S. 634, 649 (1958) (concerted activity which is marked by violence is deemed outside the protection of § 7).
\item \textsuperscript{31} See, e.g., NLRB v. Local Union No. 1229, 346 U.S. 464, 476-78 (1953)(excessive disloyalty to an employer is not protected).
\item \textsuperscript{32} See, e.g., Liberty Mutual Ins. Co. v. NLRB, 592 F.2d 595, 604-05 (1st Cir. 1979).
\item \textsuperscript{33} See, e.g., NLRB v. Leslie Metal Arts Co., 509 F.2d 811, 814 (6th Cir. 1975)(walkout by group of employees based solely on antipathy towards a co-worker not deemed protected activity since the personal quarrels were not related to a labor dispute with the employer).
\item \textsuperscript{34} For a general discussion on what is deemed unprotected concerted activity, see Cox, \textit{The Right to Engage in Concerted Activities}, 26 Ind. L.J. 319 (1951); Gregory, \textit{Unprotected Activity and the NLRA}, 39 Va. L. Rev. 421 (1953); Koretz & Rabin, \textit{The Development and the History of Protected Concerted Activity}, 24 Syracuse L. Rev. 715 (1978); Schatzski, \textit{Some Observations and Suggestions Concerning a Misnomer-"Protected" Concerted Activities}, 47 Tax L. Rev. 378 (1969);
\item \textsuperscript{35} See infra text accompanying notes 38-55.
\item \textsuperscript{36} See infra text accompanying notes 80-83.
\item \textsuperscript{37} The Supreme Court noted in NLRB v. City Disposal Systems, 104 S. Ct. 1505
\end{itemize}
the term “concerted activity,” before the enactment of the NLRA, sheds little light on what the drafters intended.

II. HISTORICAL BACKGROUND OF CONCERTED ACTIVITIES

The process of worker self-organization was at first thwarted by the doctrine of criminal conspiracy and restraint of trade. In the 1800's, one of the employer's most effective weapons against union organization was the common law proscription against conspiracy. Such concerted activities as strikes and picketing, were deemed to comprise criminal conspiracies. The antitrust laws, which subjected unions to treble damage suits, posed a second barrier which restricted the growth of the labor movement. The restraint of trade prohibition in the Sherman Anti-Trust Act was successfully applied to inhibit most union activities. These doctrines imposed heavy sanctions for the combined or concerted activity of employees but


39. The criminality resulted from the mere combination and it did not matter if the purpose for that combination was lawful. For example, in The King v. Journeymen-Taylors of Cambridge, 88 Eng. Rep. 9, 10 (K.B. 1721), the court held that “a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it.” See also J. LANDIS & M. MONAFF, CASES ON LABOR LAW, 1-40 (2d. ed. 1942); Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393, 412-20 (1922); Witte, Early American Labor Cases, 35 YALE L.J. 825 (1926).

40. In 1890, Congress, in the Sherman Act, declared unlawful “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations.” 15 U.S.C. § 1 (1964). The Act created a cause of action for treble damages for persons injured by violations, authorized injunctions and criminal prosecutions of violations, and created federal jurisdiction over all such proceedings. Although the objective of the legislation was the elimination of agreements between manufacturers or suppliers to fix the price or regulate the supply of goods, or allocate customers or exclude competitors, the Sherman Act was often invoked against the activities of labor unions. In Loewe v. Lawlor (the Danbury Hatters Case), 208 U.S. 274 (1908), the Supreme Court decided that unions were covered by the Sherman Act and that their concerted activities violated the Act when it obstructed the flow of the employer's goods and products in interstate commerce.

had no restrictive effect on the unilateral bargaining power of employers.

The Clayton Act of 1914 was an early attempt to protect the concerted activities of employees. It provided that “no . . . injunction shall prohibit any person or persons, whether singly or in concert, . . . from ceasing to perform any work or labor [or other specified concerted activities].”41 In effect, it sought to give employees the right to act in combination and to protect them from the threat of injunctions.42 The Clayton Act was followed by the passage of the Norris-LaGuardia Act in 1932. This legislation also sought to protect concerted activities by setting forth the public policy of the United States that “[the individual unorganized worker] shall be free from the interference, restraint, or coercion of employers . . . in self-organisation or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .”43 Protection became broader with the implementation of section 7(a) of the National Industrial Recovery Act,44 and later, through section 7 of the NLRA.45 The protection afforded concerted activities contributed to the rapid growth of the labor movement.

III. INTERPRETATION OF LEGISLATIVE INTENT

The history of the term “concerted activities” suggests that it

42. A COX, D. BOK, & R. GORMAN, CASES AND MATERIALS ON LABOR LAW (9th ed. 1981). Sections 6 and 20 of the Clayton Act, adopted at the urging of organized labor, were supposed to have substantially curtailed the courts’ recourse to the labor injunction. Samuel Gompers hailed these two sections as “labor’s charter of freedom.” Id. at 44. He, and many others knowledgeable about labor issues at the time, believed that these sections “swept out of the federal courts the precedents at common law and under the Sherman Act which had proved so detrimental to the labor movement.” Id. at 40. This enthusiasm by labor organizers was, however, misplaced and short lived. The United States Supreme Court in Duplex Printing Press v. Deering, 254 U.S. 443 (1921), and cases that followed, rendered these sections “impo-
tent” as a bar to the courts’ use of injunctions against secondary boycotts. As a result, The Clayton Act’s significance was substantially undermined. Its application as a bar to the courts’ use of the injunctions was limited to disputes between an employer and his own employee. COX, BOK, & GORMAN at 48.
44. Ch. 90, § 7 (a), 48 Stat. 198 (1933). This section is recognized as the predecessor of § 7 of the National Labor Relations Act. See H.R. Rep. No. 1147, 74th Cong., 1st Sess. 108 (1935); S. Rep. No. 573, 74th Cong., 1st Sess. 77 (1935). The National Industrial Recovery Act was held to be unconstitutional by the Supreme Court in Schecter Poultry Corp. v. United States, 295 U.S. 495, 505-06 (1935).
City Disposal Systems was utilized to protect the labor movement from the common law proscriptions against conspiracies and antitrust laws. However, the history fails to explain why employees have to act in concert to be protected from employer retaliation. There is nothing in the legislative history of the Act which mandates that employees must act together to be protected under section 7 of the NLRA.46

Many courts interpreted the section 7 requirement literally, requiring that the concerted activity involve at least two employees in order to be protected.47 According to these courts, individual activity constituted concerted activity only when the employee was acting on behalf of, or as a representative of, other employees.48 Several possible justifications have been suggested to explain the requirement that concerted activity involve the participation of more than one employee.

It has been suggested that Congress considered individual activity to be too insignificant to warrant protection under the Act.49 This explanation, however, fails to adequately justify the requirement of a literal interpretation. Why should insignificant action by only two employees in a large operation be afforded protection, while an individual worker’s complaint in a small shop with few employees be ignored? This section presumes that any activity which involved more than one employee acquired greater significance, even if objectively its importance to the overall operation of the company would be minimal.50

Also in support of a literal interpretation is the view that congressional intent was to encourage collective bargaining in order to equalize bargaining power between employees and employers.51 However, the Act only partially supports this view.52 Furthering the

46. A suggestion had been made that Congress should delete the concerted requirement of § 7. Note, supra note 37, at 530. That commentator believed that the most plausible explanation of its insertion was that the drafters of the National Labor Relations Act inadvertently borrowed a phrase from earlier legislation where it was meaningful and inserted it in a context where it became, at best, redundant. It has also been posited that the Board and the courts have largely read it out of the Act, and where they have not done so, it has served only to confuse and mislead. Id.

47. E.g., Aro, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979); NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971); see also infra notes 79-83.


49. See R. Gorman, supra note 24, at 299; Note, supra note 37, at 528.

50. Note, supra note 37, at 529.


52. The Supreme Court found that the legislative history of § 7 indicates Congressional intent to equalize the bargaining power of the employee with that of his employer. City Disposal Systems, 104 S. Ct. 1505, 1507. This Congressional intent is still no justification for re-
cause of unionization is only one of the goals of the Act; section 7 also provides that employees have the right "to refrain from any or all such activities . . . ." Thus, the Act recognizes the employee's right to refrain from such union activity as much as it encourages the formation of unions and collective bargaining agreements.

Finally, it had also been posited that Congress used the phrase "concerted activity" to exclude minority group activity from section 7's protection. That explanation is neither supported by the courts nor the Board. There have never been any interpretations which differentiate between majority and minority employee representation for purposes of concerted activity.

IV. DEVELOPMENT OF THE INTERBORO DOCTRINE PRIOR TO CITY DISPOSAL SYSTEMS

Under section 7, it is apparent that the key test in determining whether worker activity is concerted is to assess the number of employees participating. A plain meaning reading would require that at least two employees must act in order to satisfy the requirements of acting in concert. Several federal circuit courts of appeal had adopted this reasoning and had held that concerted activity must involve more than one employee's action or complaint. Difficulties therefore arose when an individual employee's activity was premised upon a provision in a collective-bargaining agreement. It was in this context that the circuit courts were divided upon the interpretation of what constituted concerted activity under section 7 of the Act.

As early as 1962, the Board held that an employee who asserted claims based on a collective bargaining agreement was engaged in concerted activity. The Board decided that "in asserting such a claim, [the employee] sought to implement the collective bargaining agreement," and that "the implementation of such an agreement by an employee is but an extension of the concerted activity giving rise to that agreement." In Bunney Bros. Construction Co., when rain forced the employer to shut down after only two hours of work, requiring a literal interpretation of § 7. Indeed, the Supreme Court held otherwise. Id. See also supra notes 16 and 18.

54. See Note, supra note 37, at 528.
55. Id.
56. See supra note 47; infra notes 80-83.
58. Id.
59. Id.
an employee submitted a claim for a half day's pay, pursuant to an express provision in the collective bargaining agreement. The Board held that the employee's subsequent discharge constituted a violation of section 8(a)(1) of the Act. Under *Bunney Bros.*, the single employee whose protest was contractually based was afforded protection under section 7.

*Interboro Contractors, Inc.* embraced the rule previously adopted in *Bunney Bros.* In *Interboro*, John Landers and his brother were hired by Interboro Contractors to work as steamfitters. During the course of their employment, John Landers complained about working conditions covered by the collective bargaining agreement. Both men were summarily discharged and each filed unfair labor practice charges.

The trial examiner dismissed the unfair labor practice complaint. He concluded that the protests were made by John alone and that he complained not for "legitimate union or concerted objective[s]" but rather "for his own personal selfish benefit and aggrandizement." Later, the Board reversed, finding that John's brother and another employee had also been "involved in the complaints." However, the Board clarified further that:

> [E]ven if the complaints were made by John alone, they still constituted protected activity since they were made in the attempt to enforce the provisions of the existing collective bargaining agreement. [We have] held that complaints made for such purposes are grievances within the framework of the contract that affects the rights of all the employees in the unit, and thus constitute concerted activity which is protected by section 7 of the Act.

On appeal, the Second Circuit affirmed and adopted the position that when an individual engages in such activity, he is acting in concert with his fellow employees under that agreement. It also held that "while interest on the part of fellow employees would indicate a

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60. *Id.*
62. *Id.* at 1295-98, 61 L.R.R.M. at 1537.
63. *Id.* at 1298, 61 L.R.R.M. at 1537.
64. *Id.* at 1311, 61 L.R.R.M. at 1537.
65. *Id.* at 1298, 61 L.R.R.M. at 1537.
67. *Interboro Contractors*, 388 F.2d 495, 500 (2d Cir. 1967).
concerted purpose, activities involving attempts to enforce the provisions of a collective bargaining agreement may be for concerted purposes even in the absence of such interests by fellow employees.”

As formulated, this holding has become known as the Interboro Doctrine or the doctrine of “constructive concerted activities.” The doctrine was predicated on the theory that the assertion of a right in a collective bargaining agreement constituted an extension of the concerted activity that originally gave rise to the agreement. The claim, based on the contract, necessarily affected the rights and interests of all the other employees in the bargaining unit. Under this approach, if an individual employee attempted to implement collectively formulated rights, he retained the protection of section 7 even if acting solely for his personal benefit.

In time, courts restricted the scope of the Interboro Doctrine in order to prevent its overly broad application by the Board. Activity that was considered a mere “personal gripe” was not protected. The touchstone of the doctrine’s application became the existence of a collective bargaining agreement. Moreover, an attempt by employees to enforce the terms of a collective bargaining agreement was protected only where “the employees [had] a reasonable basis for believing that their understanding of the terms was the understanding that had been agreed upon.” It was sufficient that the employee relied upon his or her reasonable understanding of the agreement, even if such understanding was mistaken. The Interboro Doctrine was inapplicable, however, if the employee’s complaint was unrelated to the agreement. This reasonableness requirement limited the scope of a potentially expansive doctrine.

68. Id.
69. See, e.g., Capitol Ornamental Concrete Specialties, Inc., 248 N.L.R.B. 851, 103 L.R.R.M. 1518 (1980). Courts have also embraced this requirement regardless of whether they have adopted the Interboro Doctrine, i.e., personal “gripping” is not protected under § 7. See also Tyler Business Serv., Inc. v. NLRB, 695 F.2d 73 (4th Cir. 1982); Koch Supplies, Inc. v. NLRB, 646 F.2d 1257 (8th Cir. 1981); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973); Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967); Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964).
70. E.g., Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980); NLRB v. Dawson Cabinet, 566 F.2d 1079, 1083 (8th Cir. 1977).
72. See, e.g., NLRB v. H.C. Smith Constr. Co., 439 F.2d 1064 (9th Cir. 1971) (employee does not lose § 7 protection as a matter of law simply because his understanding of the contract is mistaken); John Sexton & Co., 217 N.L.R.B. 80, 88 L.R.R.M. 1502 (1975) (ultimate merit of asserted contract claim is immaterial).
73. See, e.g., NLRB v. C. & I. Air Conditioning, Inc., 486 F.2d 977 (9th Cir. 1973).
V. REJECTION OF THE INTERBORO DOCTRINE

Although Interboro was not universally accepted by the courts, the Seventh and Eighth Circuit Courts of Appeals were among those which upheld the Interboro Doctrine’s validity. The rationale adopted by the Eighth Circuit indicated that rights secured by a collective bargaining agreement, though personal to each employee, were protected rights under section 7 of the Act. The court reasoned that the collective bargaining agreement was executed as the result of concerted activities by the employees for their mutual aid and protection. Thus, approval of the discharge of an employee who asserted his rights under that agreement would thwart the very purpose of the Act—“the promotion of harmony in labor-management relations and the recognition of an individual’s right to organize for mutual [aid and] protection and individual security.”

As recently as 1984, some courts had not yet expressly ruled on Interboro’s validity. Other courts were varied in their reaction. The


The Seventh Circuit expressly adopted the Interboro Doctrine in Ben Pekin Corp., an interesting decision in light of the fact that the employee’s conduct was not based on a collective bargaining agreement, but rather a “relationship” and an “oral agreement” between the union and the employer. Ben Pekin Corp., 452 F.2d at 206. The employee’s allegation that there had been a “payoff” was held to be concerted activity despite the absence of any participation or interest by fellow employees. Id. at 207. The court also adopted the “reasonableness” requirement, finding that the employee had a “reasonable basis” for his belief that he was entitled to a greater wage increase, particularly because “there was no written collective bargaining agreement to which he could refer.” Id. at 207.

The courts, however, have refused to apply Interboro in an overly expansive manner. In NLRB v. Slotkowski Sausage Co., 620 F.2d 642 (7th Cir. 1980), the court held that “constructive concerted activity” will not be found under Interboro where the activity engaged in is by probationary or new employees who were not members of the union, even though a collective bargaining agreement may be in effect. Id. at 646. In addition, the court held that Interboro will not afford protection to those individuals who are engaged in union organizations if there is no collective bargaining agreement and their conduct is motivated by purely personal objectives. Id. Therefore, although the Seventh Circuit expressly adopted Interboro, its interpretation remained narrow and limited.

75. NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217, 221 (8th Cir. 1970). The court in this case held that an employee who was discharged for pressing a grievance based on the collective bargaining agreement is protected from employer retaliation.

In a later case not inconsistent with Interboro, the Eighth Circuit also refused to extend the doctrine where there was no existing collective bargaining agreement. NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977).

76. See, e.g., Kohls v. NLRB, 629 F.2d 173 (D.C. Cir. 1980), cert. denied, 450 U.S. 93 (1981); Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980); Ethan Allen, Inc. v. NLRB, 513 F.2d 706 (1st Cir. 1975).

The First Circuit had not ruled on the Interboro Doctrine, but its posture seemed to favor
First Circuit had given it implied acceptance after recognizing its validity, 77 while in the D.C. Circuit, the court expressed its strong dissatisfaction with the doctrine. 78

Some circuit courts of appeals had expressly rejected Interboro's interpretation of section 7's concerted activities requirement. 79 Their rejection stemmed, at least in part, from a strict reading of the language of section 7. 80

Moreover, the Interboro Doctrine represented a radical departure from the rejecting courts' respective test for interpreting section 7's concerted activities requirement. The Third Circuit, for example, its application. In Ethan Allen, the Board held that where there was no union, the employee was wrongfully discharged for engaging in concerted activity when she requested a financial statement from her employer. Ethan Allen, Inc., 513 F.2d at 707-08. The court granted enforcement, recognizing that an employee's interest in unionization could be achieved only through the involvement of co-workers. As such this constituted concerted activity lying at the heart of § 7. Id. at 708-09.

Similarly, the Fourth Circuit had not expressly decided on the validity of Interboro. In Roadway Express, Inc. v. NLRB, 217 N.L.R.B. 278, 88 L.R.R.M. 1503, enforced, 532 F.2d 751 (4th Cir. 1976), an employee was discharged for his refusal to drive a tractor which he considered unsafe. The Board found the employee's refusal was due to his reliance upon contractual rights in the collective bargaining agreement. The agreement stated that the employer "shall not require" employees to drive any unsafe vehicle, and provided that employees had a right to refuse to drive an unsafe vehicle. Id. at 278-79, 88 L.R.R.M. at 1505. The Fourth Circuit enforced the Board's order, but because it did so without opinion, its basis for enforcement was unclear. Roadway Express, 432 F.2d at 751.

Four years later, in Krispy Kreme, the court was presented with the opportunity to address Interboro's legitimacy. Because there was no collective bargaining agreement, the court considered it unnecessary to determine whether Interboro was to be applied in that circuit. Krispy Kreme Doughnut Corp., 635 F.2d at 309. Thus, it remained an open question whether Interboro would have been followed by the Fourth Circuit.

77. See Ethan Allen, 513 F.2d 706. Although the court did not have to rely on the Interboro Doctrine, it recognized its validity, stating that "the requirement of concertedness relates to the end, not the means." Id. at 708 (citing NLRB v. Interboro Contractors, 388 F.2d 495, 500 (2d Cir. 1967)).

78. See Kohls v. NLRB, 629 F.2d 173 (D.C. Cir. 1980), where, although the District of Columbia Circuit ultimately found the Interboro Doctrine inapplicable, its language reflected its dissatisfaction and misunderstanding of the doctrine. See infra text accompanying notes 84-98.

79. See, e.g., Roadway Express, Inc. v. NLRB, 700 F.2d 687 (11th Cir. 1983); Royal Dev. Co. v. NLRB, 703 F.2d 363 (9th Cir. 1983); Aro, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973). But see Anchortank, Inc. v. NLRB, 618 F.2d 1153 (5th Cir. 1980), NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971).

80. The Third Circuit, for example, in Northern Metal, 440 F.2d at 884, cited a dictionary describing "concerted" in terms of mutual planning or agreement and asserted that the circuit's own gloss on the term, reading it as including not only group action but also "talk looking toward group action" (quoting Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964)), "stretched" its meaning. Nevertheless, it concluded that the Mushroom Transp. gloss was reasonable, while the Interboro Doctrine represented an unacceptable expansion of the plain meaning of the statute.
City Disposal Systems held that the test for concerted activity should consider whether the activity was "engaged in with the object of initiating or inducing or preparing for group action or [whether] it had some relation to group action in the interest of the employees." In addition, the court regarded the Interboro Doctrine as a "clear expansion of the Act's coverage . . . in the face of unambiguous words in the statute" and held that it constituted a "legal fiction . . . in an effort to support a judicial conception of a sound interpretation of the Act." 

81. Mushroom Transp. Co., 330 F.2d at 685 (3d Cir. 1964). The Third Circuit essentially held that only when its "group inducement" test is satisfied will protection be afforded to an individual employee. In reaching this conclusion, the court denied enforcement of the Board's order to reinstate an employee discharged for allegedly preparing to report his employer to the Interstate Commerce Commission for regulatory violations. In addition, the employee had also told his co-worker that "they were not getting what they were entitled to under the union contract." Id. at 684. In holding that the employee was not engaged in protected concerted activity under § 7, the court concluded that:

Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere "griping".

Id. at 685.

82. NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971). In this case, the Board had relied upon the Interboro Doctrine to find that a probationary employee had engaged in concerted activity when he made repeated complaints about holiday pay that he thought he was entitled to under the collective bargaining agreement. The agreement did not preclude holiday pay for probationary employees but the employer had a practice of not paying such employees holiday pay. Id. at 883 n.3. The Third Circuit denied enforcement relying heavily on its previous holding in Mushroom Transp. Id. at 884. In addition, the court's strict interpretation was demonstrated when it quoted the definition of "concert" that is found in Webster's New International Dictionary, see supra note 80. The court was also clear about its position relating to the Interboro Doctrine:

[Interboro] represents a clear expansion of the Act's coverage, in the face of unambiguous words in the statute. The Act surely does not mention "concerted purposes." (Emphasis added.) This is clear from the language of the Act . . . Interboro Contractors appears to create a legal fiction, constructive concerted activity, in an effort to support a judicial conception of a sound interpretation of the Act. We are unwilling to adopt such a fiction.

Id. at 884.

Thus, the Third Circuit left little doubt that it would never find a concerted activity that could satisfy § 7 unless the activity involved more than one employee. Protection will not be afforded to the lone employee who lodges a complaint or engages in some other activity, even if those actions have a basis in the contract. (The dissent, in quoting from the Second Circuit's opinion in Interboro, reasoned that the individual who asserts a right held by all employees is, in effect, representing that group. Therefore, it concluded that the collective nature of the right asserted fulfills the statutory requirement of concerted activity. Id. at 887 (Biggs, J. dissenting)).

The Fifth Circuit had similarly rejected Interboro in NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973), and held that it was not concerted activity when an employee complained in an attempt to gain a more favorable contract with his employer. Rather,
Similarly, the Sixth Circuit flatly rejected the Interboro Doctrine. Instead, the court required that, in order for concerted activity to be found, the individual employee's action must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.**83**

it was deemed to be mere griping and therefore unprotected from employer retaliation under § 7. Id. at 718-19. Although there was no collective bargaining agreement, the Board again relied on the Interboro Doctrine to find that the employee was engaged in concerted activity because his complaint was a matter of vital concern to all of the other employees. Buddies Supermarkets, Inc. 197 N.L.R.B. 407, 417-18, 80 L.R.R.M. 1767 (1972). The court, however, denied enforcement and cited Northern Metal as a persuasive analysis of Interboro's invalidity. 481 F.2d at 719. Although Interboro was ultimately held inapplicable because there was no collective bargaining agreement, the Fifth Circuit was clearly unwilling to adopt the doctrine. 481 F.2d at 719-20.

The court's position, however, appeared to have shifted in Anchortank, Inc. v. NLRB, 618 F.2d 1153 (5th Cir. 1980). Although the case did not directly address the Interboro Doctrine, the court acknowledged that the Supreme Court's decision in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), was a supportive interpretation favoring the Interboro Doctrine and declared that "the mere fact that the employee has acted alone does not preclude treatment of his action as concerted activity for mutual aid or protection under section 7." Anchortank, Inc. v. NLRB, 618 F.2d at 1160.

83. Aro, Inc. v. NLRB, 596 F.2d 713, 718 (6th Cir. 1979). This opinion strongly rejects the Interboro Doctrine. In Aro, a temporary employee repeatedly complained that her employer laid her off before laying off another employee who had less seniority, but who worked full-time. Even though she had no contractual rights under the collective bargaining agreement, the Board relied on the Interboro Doctrine and held that she had engaged in concerted activity because her objections related to the interests of other present and future employees in her job classification. Aro, Inc., 227 N.L.R.B. 243, 244, 94 L.R.R.M. 1010, 1012 (1976). An employee: "will be considered to have engaged in concerted activity irrespective of whether the claim or complaint has merit under the collective bargaining agreement, whether the employee has relied upon the collective bargaining agreement, or whether the employee has any rights under the collective bargaining agreement." Aro, Inc., 596 F.2d at 717. The court held that "this expansive reading of the concerted activity of § 7 goes too far." Id. (emphasis added). This emphatic rejection by the Sixth Circuit had its roots in a previous decision where the court protected an individual employee after he had been dismissed for complaining about the appointment of the manager's inexperienced son-in-law, rather than one of the experienced crew members as foreman of a project. NLRB v. Guernsey-Muskingum Electric Coop., Inc., 285 F.2d 8 (6th Cir. 1960). The crew also shared this resentment and had discussed it among themselves at various times. There, the court held that it would be sufficient to constitute concert of action if it could draw a reasonable inference from all the facts and circumstances that the men involved believed that they had a grievance and had decided among themselves to take it up with management. Id. at 12. The men acted on each other's behalf by discussing the matter among themselves and deciding to take action individually.

When the Sixth Circuit rejected the Interboro Doctrine, it relied on the holding of Guernsey-Muskingum to decide the issue of when individual complaints could amount to concerted action. In Aro, the Sixth Circuit found no basis for an inference that the employee had acted on behalf of other employees. Aro, Inc., 596 F.2d at 716. In addition, the court held that:

[for an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of induc-
These circuit courts’ rejections illustrate the limited acceptance enjoyed by the Interboro Doctrine after its formulation. However, the Interboro Doctrine’s infrequent application was only partly attributable to judicial rejection. The confusion engendered by the courts misunderstanding of the doctrine and the Board’s prior misapplication of the rule also undermined Interboro’s credibility.

VI. MISUNDERSTANDING THE INTERBORO DOCTRINE

The D.C. Circuit Court in Kohls v. NLRB84 demonstrated an almost complete lack of understanding of the Interboro Doctrine. The court’s unfortunate misunderstanding of Interboro, in that case, substantially discredited the concept. A close examination of Kohls reveals how this erroneous view was propounded. The case arose when a United Parcel Service truck driver refused to drive an allegedly unsafe vehicle.85 The employee was discharged and the union filed a grievance under the collective bargaining agreement. On the employee’s initiative the grievance was withdrawn and unfair labor practice charges were filed with the Board. Relying upon Interboro the Board held that United Parcel Service violated the Act. The employee was found to have engaged in protected concerted activity in an effort to enforce his rights under the agreement.86 He was ordered reinstated. The circuit court overturned the Board’s order, however, and, in so doing, misapplied the Interboro Doctrine.

Ultimately, the Kohls court ruled that Interboro was inapplicable to the facts of the case. The court began its legal analysis by noting the rejection of the Interboro Doctrine by several circuits. The Third Circuit’s interpretation of Interboro in Northern Metal87 persuaded the Kohls court to conclude that Interboro created a legal fiction of constructive concerted activity that on its face conflicted with the statutory language of section 7.88

The view enunciated by the Kohls court demonstrated its lack of understanding or preparing for group action and have some arguable basis in the collective bargaining agreement.

Id. at 718.

Thus, Aro clearly demonstrated that the court would not find an individual’s attempt to enforce the provisions of a collective bargaining agreement to be a concerted activity unless it was made on behalf of other employees or to induce or prepare his fellow employees in group action.

85. Id. at 175 n.8.
86. Id. at 176.
87. NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971); see also supra notes 80-82 and accompanying text.
88. Kohls, 629 F.2d at 177.
of understanding of the Interboro Doctrine. The court held that the Board's reliance on Interboro was misplaced because there was "no evidence that Kohls and the union were acting in concert to assert a contractual claim for the protection of other employees." This emphasis on union participation was erroneous. Union involvement in an individual's attempts to enforce his rights under a collective bargaining agreement is not required. Indeed, it would not have been necessary to apply Interboro if there were union participation. The fundamental premise of Interboro is that an individual who asserts rights contained in the agreement is engaged in concerted activity.

The court also refused to enforce the Board's order because the employee did not explicitly assert the interest of other employees. Instead, the court emphasized the employee's personal concern for safety. The orientation to personal concern for safety directly contradicted the earlier view that efforts by individual employees to enforce the provisions of a collective agreement do constitute concerted activity, even in the absence of fellow employees' immediate interest in the expressed complaint.

Unlike the test utilized in Mushroom Transportation, the Interboro Doctrine does not require that the employee assert an interest on behalf of fellow employees. Indeed, if the discharged employee in Kohls had asserted an interest on behalf of the other employees regarding the condition of the truck, then there would be no need to employ the Interboro Doctrine. The complaint would be deemed concerted by virtue of the Mushroom Transportation test. The court ignored Interboro's recognition that the assertion of rights in a collective bargaining agreement, by a single employee is protected by section 7 of the Act.

A third distinction made by the court in Kohls did the most damage to the doctrine's credibility. Although the union had filed a grievance under the collective bargaining agreement, the employee later withdrew it. The court characterized the employee's withdrawal as a direct circumvention of the union's use of the grievance apparatus and ruled that Interboro should not apply because of the Board's policy of deferral to arbitration. The court failed to per-

89. Id.
90. Id.
91. See Interboro Contractors, 388 F.2d 495, supra text accompanying notes 61-68.
92. See supra text accompanying note 81.
93. Kohls, 629 F.2d at 177.
94. Id. at 177-78. United Parcel had argued that the Board should have deferred to the grievance procedure requiring arbitration pursuant to the collective bargaining agreement. Id. at 173.
ceive that Interboro does not require, as a condition precedent, that an employee seek redress through the grievance-arbitration procedure. In addition, the legitimacy of Interboro is based upon the premise that an individual's invocation of the collective rights, contained in the union contract, constitutes protected concerted activity. The Interboro Doctrine would have been rendered meaningless if an individual were required to undergo grievance procedures through the union before he might take any corrective action. The Kohls court view would require the protected activity to be of concerted nature, the type of which exists in cases where Interboro is not needed.

Yet the Kohls Court required the discharged employee to exhaust his remedies by undergoing the grievance procedures under the collective bargaining agreement. If such a requirement were to be universally adopted, the effects of compliance would undercut the Board's power. It is well established that it is in the Board's discretion whether it will defer to the arbitral process.

95. It is reasonable, in the context of the hectic pace of the work day, to view an employee's original complaint to an employer that a provision of a collective bargaining agreement has been violated as a prelude to, and in some cases a substitute for, the filing of a formal grievance. The efficacy of filing a formal grievance will depend upon the reaction of the employer to the complaint and upon the nature of the right in issue. NLRB v. City Disposal Systems, 104 S.Ct. at 1514.

96. In NLRB v. City Disposal Systems, 104 S.Ct. 1505 (1984), the Supreme Court specifically held that the Interboro Doctrine does not undermine the grievance process. In addition it noted that the Board may defer to that process anyway, see infra text accompanying notes 179-185.

97. An extensive discussion of deferral to grievance-arbitration is beyond the scope of this article. Some basic principles, however, are necessary for proper understanding of deferral policy. In the landmark Steelworkers Trilogy decisions, the Supreme Court proclaimed arbitration to be the preferred method for resolving disputes with a minimum of industrial strife. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). In Spielberg Mfg. Co., 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955), the Board developed a deferral policy whereby it would defer to the grievance-arbitration process whenever: (1) the proceedings are "fair and regular;" (2) all parties have "agreed to be bound" by the arbitration; and (3) the arbitration decision is "not clearly repugnant to the purposes and policies of the Act." Id. at 1082, 36 L.R.R.M. at 1153. In Collyer Insulated Wire, 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971), the Board extended its prior deferral policy to an arbitration proceeding prior to the commencement of the proceeding. In Dubo Mfg. Corp. 142 N.L.R.B. 431, 53 L.R.R.M. 1158 (1963), the Board deferred to arbitration proceedings that had been initiated but not yet completed. Most recently, the "Reagan Board" strongly confirmed this deferral policy. United Technologies Corp., 268 N.L.R.B. 557, 115 L.R.R.M. 1049 (1984). The Board also expressly overruled General American Transp. Corp., 228 N.L.R.B. 808, 94 L.R.R.M. 1483 (1977), and applied its deferral policy to cases in which violations of §§ 8(c)(1) and (3) of the Act are alleged. The Board granted arbitrators much greater authority in considering unfair labor practice issues in that decision. The court is no longer bound by rigorous standards in determining whether the arbi-
discretion would be undermined if the employee were to be required to first seek redress through grievance-arbitration. Hence the rigid arbitration requirement imposed by the District of Columbia Circuit Court flies in the face of well established Board policy. Although the court stated that it was distinguishing the Interboro Doctrine and not rejecting it, its rationale did Interboro great injustice, and ignored established precedents.

VII. MISAPPLICATION BY THE BOARD

In addition to the misunderstanding of the Interboro doctrine expressed in Kohls v. NLRB, the Board had itself undermined the viability of the doctrine. The Supreme Court regularly defers to the Board on issues that implicate its expertise in labor relations. Unfortunately, the Board had indiscriminately applied the Interboro Doctrine to fact situations where it was inapposite. By declining to limit itself to a principled application of Interboro, the Board squandered much of its credibility with the courts on that issue.

In Northern Metal, for example, the Board had utilized Interboro to reach a desired result where in fact there was no basis for its application. There, the Board had made no finding that the employee based his protest upon provisions within the collective bargaining agreement which he reasonably believed entitled him to relief. The facts of Northern Metal were that the complainant was a probationary employee and the negotiated agreement in question was silent on the issue of holiday pay. Nevertheless, the Board reasoned that Interboro applied because the employee's complaints concerning holiday pay related to a common concern of his fellow probationary employees and because there was a collective bargaining agreement in force. The Board, by utilizing this rationale, ignored two important requirements warranting Interboro's application: the aggrieved arbitrator sufficiently considered the unfair labor practice issues. Under Olin Corp., 268 N.L.R.B. 573, 115 L.R.R.M. 1056 (1984), the Board held that an arbitrator will be deemed to have adequately considered an unfair labor practice issue if: "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice". Id. at 574, 115 L.R.R.M. at 1058; see also Propoco, Inc., 263 N.L.R.B. 136, 110 L.R.R.M. 1496 (1982)(requiring an arbitration award to be totally consistent with Board precedent).

98. See infra text accompanying notes 179-185.
100. 440 F.2d 881 (3d Cir. 1971); see supra note 82.
101. 440 F.2d at 885.
102. Id. at 884.
employee must be covered by the collective agreement,103 and there must be a reasonable basis for reliance on such agreement.104

Similarly, in Aro,105 the Board found Interboro to be applicable simply because there was an existing collective bargaining agreement. Accordingly, it found that the individual employee was engaged in protected concerted activity. But the Board ignored the fact that the discharge involved a probationary employee who had no contractual right of recall. Also, the employee's repeated complaints to her employer about her dismissal were purely personal ones unsupported by the collective bargaining agreement.106

Prior to its holding in Meyers Industries, Inc.,107 the Board had also expansively extended the Interboro Doctrine to apply to an employee in a nonunion setting, where there was no collective bargaining agreement from which to infer a concerted purpose. In Alleluia Cushion,108 the Board ordered the reinstatement of an employee who had acted alone in filing a complaint with the Occupational Safety and Health Administration (OSHA). It held that "where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted."109

103. See supra text accompanying note 70.
104. See supra text accompanying notes 70-73.
105. Aro, Inc. v. NLRB, 596 F.2d 713, 716 (6th Cir. 1979); See supra text accompanying note 83.
106. Aro, Inc., 596 F.2d at 717.
109. Id. at 1000, 91 L.R.R.M. at 1133 (emphasis added). In reaching this conclusion, the Board reasoned that "since minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent [of fellow employees] and concert of action emanates from the mere assertion of such statutory rights." Id. Thus, under this approach, the existence of relevant legislation and its invocation by a solitary employee became sufficient to constitute concerted activity. See, e.g., Krispy Kreme Doughnut Corp., 245 N.L.R.B. 1053, 102 L.R.R.M. 1492 (1979); Self Cycle & Marine Distrib. Co., 237 N.L.R.B. 75, 98 L.R.R.M. 1517 (1978)(application of Alleluia Cushion to protect individual employee's filing of unemployment compensation claims); Pink Moody, Inc., 237 N.L.R.B. 39, 98 L.R.R.M. 1463 (1978) (application of Alleluia Cushion to motor vehicle laws).

Alleluia Cushion's rationale was extended further in subsequent cases, where although the statutory requirement was not present, the Board nevertheless deemed individual conduct to be concerted on the theory that it involved a matter of common concern to other employees. For example, in Hansen Chevrolet, 237 N.L.R.B. 584, 99 L.R.R.M. 1066 (1978), the Board held that an individual's demand for a pay increase was concerted since other employees would be affected through the employer's uniform pay system. Similarly, in Steere Dairy, Inc., 237
Although protection for such activity is undoubtedly warranted, the Board's misuse of the Interboro Doctrine significantly ignored the underlying premise that gives the doctrine legitimacy. Interboro rests upon the concept that an individual employee's attempted implementation or enforcement of the provisions in a collective agreement is deemed to be of a concerted nature and is therefore protected because the agreement is the result of concerted employee activity of their mutual aid and protection. Hence, the attempted enforcement of an existing collective bargaining agreement is necessary for its application. When no such agreement exists, protection should not be afforded through application of the Interboro Doctrine. This implied concert analysis, as applied previously by the Board, significantly diminished Interboro's credibility. The Board only recently reversed its position.

N.L.R.B. 1350, 99 L.R.R.M. 1434 (1978), the Board held that individual protests constituted protected concerted activity if the protests involved a group concern. See also Morton Rosen, 264 N.L.R.B. 1342, 111 L.R.R.M. 1422 (1982)(individual's complaint over dirty working conditions protected); Ontario Knife Co., 247 N.L.R.B. 1288, 103 L.R.R.M. 1309 (1980) (employee's decision to walk off the job to protest her foreman's refusal to seriously discuss a work grievance was protected); Triangle Tool & Eng'g, Inc., 226 N.L.R.B. 1354, 94 L.R.R.M. 1108 (1976) (employee's solicitation of aid from U.S. Dept. of Labor protected).

However, the circuit courts of appeals that have reviewed the post-Alleluia cases have consistently rejected the Board's standard of concerted activity under Alleluia Cushion. See Ontario Knife Co. v. NLRB, 637 F.2d 840 (2d Cir. 1980); Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980); Jim Causey Pontiac v. NLRB, 620 F.2d 122 (6th Cir. 1980); NLRB v. Bighorn Beverage, 614 F.2d 1238 (9th Cir. 1980); NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977).


In Meyers Indus., Inc., 268 N.L.R.B. 493, 115 L.R.R.M. 1025 (1984), rev'd sub. nom. Prill v. NLRB, 755 F.2d 943 (D.C. Cir. 1985), the Board reexamined the holding and rationale behind Alleluia Cushion and concluded that it was inconsistent with the Act. In reversing Alleluia Cushion, the Board stated:

[H]e are persuaded that the Alleluia per se standard of concerted activity . . . is at odds with the Act. The Board and courts always considered, first, whether the activity is [actually] concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7.

Meyers Indus., 268 N.L.R.B. at 496, 115 L.R.R.M. at 1028.

Accordingly, the Board declared its "objective" standard for concerted activity by a solitary employee: "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Id. at 497, 115 L.R.R.M. at 1029. Thus, under the Board's current test, an individual employee's activity must be engaged either "with or on the authority" of other employees in order to be deemed concerted activity. See JMC Transp., Inc., 272
Those courts which rejected the Interboro Doctrine did so by denying enforcement of Board orders that interpreted Interboro in


It is important to note, however, that the holding of Meyers Industries does not abrogate the application or the validity of the Interboro Doctrine. Indeed, in reconciling its holding with the doctrine's applicability, the Board explained: "The focal point of Interboro was, and must be, the attempted implementation of a collective bargaining agreement. By contrast, in the Alleluia situation, there is no bargaining agreement, much less any attempt to enforce one, and we distinguish the two cases on that basis." Meyers Indus., 268 N.L.R.B. at 496, 115 L.R.R.M. at 1028. Thus, a single employee's revocation of rights contained in a collective bargaining agreement will still be deemed protected concerted activity under the Interboro Doctrine despite the holding of Meyers Industries.

The Board's objective standard for concerted activities, however, has encountered judicial belligerence. This result is hardly surprising in view of the controversial holding of Meyers Industries, a decision which epitomizes the liberal overrulings of prior Board precedents in numerous areas of labor law jurisprudence. See Gregory & Mak, Significant Decisions of the NLRA 1984—The Reagan Board "Celebrates" the 50th Anniversary of the NLRA, 18 CONN. L. Rev. 6 (1985). In Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), the United States Court of Appeals for the District of Columbia Circuit reviewed the Meyers Industries decision. In an opinion which sharply criticizes the Board's analysis, the court concluded that the Board's newly adopted objective standard was a result of unjustified interpretations of established law relating to concerted activities. Id. at 947-56. Moreover, the court reasoned that in view of the Supreme Court's decision in City Disposal Systems, there was no reason why the Board should so narrowly define "concerted activities" by a standard which in reality, was even more restrictive than pre-Alleluia standards. Id. at 953-56. The court, however, was reluctant to announce a "correct test" for concerted activities, and remanded the case to the Board for reconsideration. Id. at 957. The dissent vigorously argued that the Board's interpretation in Meyers Industries was reasonable and should be upheld without hesitation since it was clearly compelled by § 7 of the Act. Id. at 957-66 (Bork, J., dissenting).

The Second Circuit Court of Appeals also has recently denounced the objective standard of Meyers Industries as "mistaken" and "mystifying" in Ewing v. NLRB, ___ F.2d ___, 119 L.R.R.M. 3273 (2d Cir. 1985). In concluding that the Supreme Court's decision in City Disposal Systems mandates that a literal reading of the term "concerted activities" is not required, the court remanded the case to the Board with directions to provide a "sustainable basis" for its definition of concerted activities. Ewing, 119 L.R.R.M. at 3277. Like the D.C. Circuit, however, the court stopped short of expressing its own view on the "correct" interpretation of the term. Id.
an overly expansive manner. In neither *Northern Metal*,\textsuperscript{113} *Buddies Supermarkets*,\textsuperscript{114} nor *Aro*,\textsuperscript{115} was the court’s decision premised on a contract provision that provided a basis for the employee to reasonably believe that he was entitled to engage in this particular conduct. The Board had strained to twist *Interboro’s* underlying policies to reach its desired result and had caused confusion regarding *Interboro’s* applicability while doing so. This unfair treatment of the doctrine was compounded by the courts’ failure to recognize that it was the Board’s misapplication of the Interboro Doctrine that was faulty, and not the doctrine itself.

\section*{VIII. \textit{NLRB v. City Disposal Systems}: The Supreme Court Speaks Out}

An authoritative statement of the policies underlying *Interboro* and an ultimate resolution of the conflict among the circuit courts in its application were necessary. \textit{NLRB v. City Disposal Systems},\textsuperscript{116} a long-awaited decision, was important because it provided guidance for the proper application of the Interboro Doctrine to the Act.\textsuperscript{117} Ironically, the Supreme Court had twice previously denied certiorari on the issue.\textsuperscript{118}

\subsection*{A. The History of City Disposal Systems}

*City Disposal Systems* arose as a result of a complaint by a company employee that the steering mechanism in a company truck had malfunctioned. When the driver returned to his employer’s garage, a supervisor asked him to drive a different truck. The employee refused because he believed that the second truck had defective brakes.\textsuperscript{119} He was then discharged. The collective bargaining agree-

\begin{footnotes}
113. \textit{NLRB v. Northern Metal Co.}, 440 F.2d 881 (3d Cir. 1971); \textit{see also supra} text accompanying note 82.
114. \textit{NLRB v. Buddies Supermarkets, Inc.}, 481 F.2d 714 (5th Cir. 1973); \textit{see also supra} note 82.
115. \textit{Aro, Inc. v. NLRB}, 596 F.2d 713 (6th Cir. 1979); \textit{see also supra} text accompanying note 82.
117. \textit{See supra note 18}.
119. The employee had observed, only two days prior to the incident, that a fellow driver had difficulties with the brakes of that particular truck. In addition, because of the brake problem, that truck nearly collided into the one that the employee was driving. \textit{City Disposal Systems}, 104 S.Ct. at 1508. When that truck was brought into the employer’s garage for brake repairs both employees were told, in effect, that repairs would require at least two days. \textit{Id.}
\end{footnotes}
ment provided that employees had the right to refuse to drive any vehicle that was not in safe operating condition. At the time he refused to drive the second vehicle, however, the employee did not explicitly refer to the collective bargaining agreement. After he was discharged, a written grievance was filed by the employee pursuant to the collective bargaining agreement. The union found no merit in the employee's grievance and refused to invoke the contractual grievance procedure. The employee then filed an unfair labor practice charge.

After a hearing, the Administrative Law Judge (A.L.J.) found that the employee had not voluntarily quit his job, but that he was discharged for refusing to operate the truck. The A.L.J. held that the employee's refusal was protected by section 7 of the Act. In deciding the case, the A.L.J. quoted the Board in Roadway Express, which discussed the question of whether an employee, acting alone in asserting a contractual right, was engaged in concerted activity under section 7. In Roadway Express the Board stated:

[W]hen an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be a violation of section 8(a)(1).

Therefore, the Administrative Law Judge ruled that the employee's refusal came within the protection of section 7. The employee, on the basis of a reasonable and honest belief that the brakes

120. The relevant provisions of the governing collective bargaining agreement provided: "[t]he [e]mployer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified."

Id. at 1507-08.

Another provision in the Agreement provided that: [t]he [e]mployer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department.

Id. at 1508 n.1.

121. Id. at 1509. In his written grievance, the employee alleged that the truck was defective, that it was inappropriate for the employer to require him to drive it, and that his discharge by the employer was unfounded. Id.


124. Id. at 279, 88 L.R.R.M. at 1505.
on the truck were inadequate, had made a good faith assertion of the contractual right to refuse to drive unsafe equipment.\textsuperscript{126}

The Board adopted the A.L.J.’s decision, noting that in \textit{Aro}\textsuperscript{126} in which the facts were similar, the Sixth Circuit had declined to enforce the Board’s order because it did not consider the employee’s protest concerted activity. Nevertheless, in \textit{City Disposal Systems} the Board adhered to its position that the individual employee’s conduct, which was supported by the collective bargaining agreement, did constitute concerted activity.\textsuperscript{127} Consequently, it ordered reinstatement of the employee with back pay.

Upon review, the Sixth Circuit denied enforcement.\textsuperscript{128} In so ruling, the court did not disturb the Board’s findings that the employer discharged the employee because he had declined to drive a truck he asserted was unsafe. Rather, the court considered the employee’s refusal not to be “concerted” activity within the meaning of section 7.\textsuperscript{129} The Sixth Circuit expressly declined to follow the Interboro Doctrine, as relied upon by the Board.\textsuperscript{130} It noted that the other courts have recognized the tension between the Interboro Doctrine and the meaning of section 7 and concluded that the “concerted activities” requirement of section 7 meant that an individual cannot act in concert with himself.\textsuperscript{131}

The court therefore applied the test enunciated in \textit{Aro}\textsuperscript{132} to find that the employee’s action in refusing to drive the truck was not concerted because:

\begin{quote}
[t]here [was] no evidence in the record that [James] Brown acted or asserted an interest on behalf of anyone other than himself. Brown did not attempt to warn other employees not to drive the truck he believed to be unsafe . . . . Likewise, [he] did not go to his union representative in an effort to avoid driving the truck he considered unsafe.\textsuperscript{133}
\end{quote}

\textsuperscript{125} City Disposal Systems, 256 N.L.R.B. at 454, 107 L.R.R.M. at 1267. “That another driver subsequently drove truck 244 without incident or that Respondent’s record showed that truck 244 may have been in good repair are not material to the outcome of this case.” \textit{Id.}

\textsuperscript{126} Operation of the Board’s policy as set forth in \textit{Roadway Express} is not dependent on the merits of the asserted contract claim [but only on whether] the claimed belief [is] ‘honestly held.’” \textit{Id.}

\textsuperscript{127} 596 F.2d 713, 718 (6th Cir. 1979). \textit{See also supra} text accompanying note 83.

\textsuperscript{128} 256 N.L.R.B. at 454, 107 L.R.R.M. at 1267.

\textsuperscript{129} \textit{City Disposal Systems} v. NLRB, 683 F.2d 1005 (6th Cir. 1982).

\textsuperscript{130} \textit{Id.} at 1007.

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} 683 F.2d at 1007.
Enforcement of the Board’s order for reinstatement and backpay was therefore denied.

Finally, at the highest level of appeal, in a 5-4 opinion, the Supreme Court reversed the Sixth Circuit ruling. Ultimately, the Court reaffirmed its practice of giving considerable deference to the Board’s view on labor relations issues, thus upholding the principle of the Board’s authority to define the scope of section 7 of the Act. In City Disposal Systems, the sole issue decided was whether the Board properly applied the Interboro Doctrine to the discharged employee’s refusal to drive the defective truck. In reaching its decision, the Court noted the long standing disagreement which had divided the circuit courts regarding the validity of the Interboro Doctrine. In an opinion written by Justice Brennan, the Court then observed that, although the term “concerted activities . . . embraces the activities of employees who have joined together in order to achieve common goals” and neither the Act nor the legislative history of section 7 provides for a definition of the term, the Interboro Doctrine properly defines the scope of protection afforded individual employee actions. In upholding the Board’s view, the Supreme Court declared the Interboro Doctrine to be a reasonable interpretation of the Act.

Important to the Court’s ultimate holding was its view that an individual employee’s invocation of a right, embedded in a collective

134. City Disposal Systems, 104 S.Ct. 1505 (1984). The case was also remanded for the determination of whether the employee’s conduct was unprotected activity, although concerted. See infra text accompanying note 161.

In a vigorous dissent written by Justice O’Connor, however, it was argued that the Interboro Doctrine gave to the Board the exercise of undelegated legislative power because it, in effect, allows for Board adjudication of all contract claims over which it otherwise has no jurisdiction. City Disposal Systems, 104 S.Ct. at 1517 (citing NLRB v. C & C Plywood, 385 U.S. 412, 427-28 (1967)) (O’Connor, J., dissenting); See Dowd Box Co. v. Courtney, 368 U.S. 502, 509-13 (1962).

The scope of the Interboro Doctrine, however, is not so broad. First the employee’s invocation of a provision in the contract must be based upon a reasonable and honest belief that there is a perceived violation of the contract. City Disposal Systems, 104 S.Ct. at 1514. Second, even if the Board finds the existence of such a belief, it merely protects the employee from employer retaliation solely because that conduct is deemed concerted activity, and not as the result of any Board interpretation or adjudication of any contract claims.

137. Id. at 1511.
138. Id. at 1511-12.
139. Id. at 1511.
140. Id. at 1511.
141. Id. at 1512.
bargaining agreement comprises a "single collective activity" together with the original negotiation of the contract. An employee, by engaging in such action, does not stand alone. In effect, he is reassembling his fellow workers to ensure the enforcement of a promise in the agreement. Thus, the Court concluded:

When, for instance James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective bargaining agreement is, therefore, a concerted activity in a very real sense.

Consequently, the Interboro Doctrine was viewed by the Supreme Court in City Disposal Systems as entirely consistent with the Act's policies to encourage collective bargaining and other "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." City Disposal Systems expands the coverage of the Act in a way that reinforces Congress' original intent. The general history of section 7 which illustrates that Congress sought to equalize the bargaining power of the employee with that of his employer provides additional support for the Court's conclusion. By allowing employees to band together to negotiate with an employer over the terms and conditions of their employment, this goal is achieved. The Court found no inconsistency between the Interboro Doctrine and that Congressional intent. Indeed, at no time has Congress expressed

142. Id. at 1511.
143. Id. at 1511. The Court also noted that "[c]ollective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract." Id. at 1511 n.9 (quoting Conley v. Gibson, 335 U.S. 41, 46 (1957)) (emphasis added).
144. Id. at 1511.
145. Id. at 1511-12.
147. City Disposal Systems, 104 S.Ct. at 1513.
an intention to limit section 7's application only to situations where a combination of an individual's actions and those of fellow workers is present. Thus the Court concluded that the mitigating impact of Interboro not only is fully consistent with the goals of section 7, but also that it preserves the integrity of the entire collective bargaining process. The Court upheld the Interboro Doctrine as a viable interpretation of both the legislative history of section 7 and of the Act.

B. The Interboro Doctrine Today

The Supreme Court's declaration of Interboro's legitimacy does not provide automatic protection to an employee who engages in any individual activity designed to affect the terms and conditions of employment covered by a negotiated contract. Certain qualifications upon the doctrine's application remain in place, to curb the potential for its abuse and to ensure that its use will conform to its intended purpose. First, the threshold requirement that the actions of the employee constitute concerted activity must be satisfied. For example, if the individual's actions are too remotely related to the interests of his fellow employees, it will not be considered a concerted activity. An employer does not violate section 8(a)(1) for discharging an employee because of the employee's purely personal "griping." In addition, the employee's actions must be a result of his reliance upon a right provided for in an existing collective bargaining agreement. The Interboro Doctrine provides section 7 protection only when the employee's action is based on a reasonable and honest belief that he was asked to perform a task not required under his collective bar-

148. Id. at 1513.
149. See supra text accompanying notes 99-115 (discussing the Board's previous expansive application of the Interboro Doctrine).
150. See supra text accompanying notes 69-73.
151. In City Disposal Systems, the Supreme Court recognized that "at some point an individual employee's actions may become too remotely related to the activities of fellow employees that it cannot reasonably be said that that employee is engaged in concerted activity." City Disposal Systems, 104 S.Ct. at 1512 n.10; see also supra text accompanying note 6.
152. The Court also noted that an employee's purely personal "griping" is not protected by § 7 of the Act. Id. (citing Capital Ornamental Concrete Specialties, Inc., 248 N.L.R.B. 851, 103 L.R.R.M. 1518 (1980)); see also supra notes 5, 69.
153. See, e.g., NLRB v. ESCO Elevators, Inc., 736 F.2d 295 (5th Cir. 1984). There, an employee was discharged for making several safety-related complaints. The employee did not rely on the collective bargaining agreement since it had expired. Consequently, the Fifth Circuit found that the employee was not engaged in concerted activity.
gaining agreement.\textsuperscript{154} The employee need not make an explicit reference to his rights in that agreement as long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated.\textsuperscript{155} This employee complaint must refer to a reasonably perceived violation of the collective bargaining agreement.\textsuperscript{156}

Additionally, the method by which the employee attempts to enforce his rights must not have been limited or taken away by negotiation.\textsuperscript{157} Where the employee's activity persists in the face of such limitations the protest may be unprotected even though it is concerted.\textsuperscript{158} Although \textit{Interboro} holds that an individual employee's invocation of a right contained in the collective agreement is concerted activity, this fact alone does not \textit{per se} grant the employee protection from employer retaliation. Indeed, "the fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity,"\textsuperscript{159} because not all concerted activities are granted the protection of section 7.\textsuperscript{160}

Nowhere is this point better illustrated than by the Supreme Court's ultimate disposition of the City Disposal System employee's claim. The Court upheld the validity of the Interboro Doctrine and affirmed the Board's conclusion that the employee was engaged in concerted activity when he refused to drive the truck he considered unsafe. Nevertheless it remanded the case for a determination of whether the employee's refusal was unprotected, even if deemed concerted.\textsuperscript{161}

\textsuperscript{154} For example, in ABF Freight Systems, 271 N.L.R.B. No. 6, 116 L.R.R.M. 1330 (1984), the collective bargaining agreement provided that no employee would be required to drive an unsafe vehicle. An employee later refused to drive a tractor-trailer which he believed had faulty brakes. He was then discharged. The Board held that the Interboro Doctrine did not apply to grant the employee the protection of § 7 because the employee did not reasonably or honestly invoke the rights contained in the collective bargaining agreement.

\textsuperscript{155} The Court found reasonable the Board's practice of not requiring an employee to make explicit reference to his collective bargaining agreement to be covered by the Interboro Doctrine. City Disposal Systems, 104 S.Ct. at 1515.

\textsuperscript{156} \textit{Id.} at 1515.

\textsuperscript{157} This is a significant limitation upon the applicability of the Interboro Doctrine. The Court stated that "if an employer does not wish to tolerate certain methods by which employees invoke their collectively-bargained rights, he is free to negotiate a provision in his collective bargaining agreement that limits the availability of such methods." \textit{Id.} at 1514.

\textsuperscript{158} The Court cited Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), for the proposition that the use of a no-strike clause is such a limitation, and that if an employee violates such a provision, his activity is unprotected regardless of whether it is concerted activity or not. City Disposal Systems, 104 S.Ct. at 1514.

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{See supra} text accompanying notes 29-34.

\textsuperscript{161} City Disposal Systems, 104 S.Ct. at 1516. On remand, the Sixth Circuit Court of Appeals applied \textit{City Disposal Systems} and concluded that the employee's refusal to drive the truck he believed to be unsafe was protected concerted activity. City Disposal Systems v.
IX. SIGNIFICANT RAMIFICATIONS OF THE CITY DISPOSAL SYSTEMS
HOLDING

The Supreme Court's view of the Interboro Doctrine, as a reasonable interpretation of the phrase "concerted activities," diminishes the harshness of a literal reading of section 7's language and softens the approach which relied on the "inducement" of fellow employee activity for protection. There were significant flaws in both these approaches. As the Supreme Court concluded, an analysis of the history and purposes of the Act presents no reason to interpret the requirement of concerted action literally. In the same vein, the Mushroom Transportation test had expanded the Act's protection beyond the requirement of literal concert, and left a great deal of discretion to the court. Its test inherently required the court to decide whether the action of the particular employee tended to induce group action. An overemphasis was placed upon the court's characterization of the action as either mere personal griping or intending to induce group action—depending upon the court's desired end result. Indeed, the lack of consistency was evidenced by various cases containing similar facts but ending up with different results. The Third Circuit's approach provided little guidance as to what constituted concerted activity.

Importantly, the Interboro Doctrine removes the concertedness issue from case-by-case factual analysis without having to determine

NLRB, __ F.2d ___, 119 L.R.R.M. 3200 (6th Cir. 1985). The court concluded that substantial evidence supported the finding that the employee reasonably and honestly believed that his employer was violating rights contained in the collective bargaining agreement, and consequently a refusal to drive the truck was neither unjustified nor abusive. Id. at ___, 119 L.R.R.M. at 3203. The court enforced the Board's order finding that the employee's discharge because of his concerted protected activity was in violation of § 8(a)(1) of the Act. Id.

162. See supra text accompanying notes 80-83.
163. City Disposal Systems, 104 S.Ct. at 1512.
164. See supra text accompanying notes 81-82.
165. Compare Jeannette Corp. v. NLRB, 532 F.2d 916, 918 (3d Cir. 1976) (discharged employee who discussed wages with other employees was engaged in protected concerted activity) with Mushroom Transp. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (upholding discharge of employee who told other employees that they were not getting everything they were entitled to under their collective bargaining agreement) and with NLRB v. Meinholdt Mfg., 451 F.2d 737, 739 (10th Cir. 1971) (employee who had discussed higher wages and better working conditions with fellow employees and with management was "bugging" management and was not engaged in protected concerted activity).

This piecemeal approach reflects the same dilemma that confronted the Third Circuit in Mushroom Transp. which gave no indication of how courts were to determine whether action "looked forward to group action." The dissent emphasized the fact that "there was no evidence that [the employee] discussed the truck's alleged safety problem with the other employees, sought their support in remediing the problem, or requested their or his union's assistance in protesting to his employer. . . ." City Disposal Systems, 104 S.Ct. at 1519 (emphasis added).
whether the activity looks toward group action. Instead, an individual employee's invocation of a right, due to his reasonable and honest belief of a perceived violation in the collective bargaining agreement, constitutes concerted activity as a matter of law.

Upon first blush, it may appear that the Interboro Doctrine is an unrestrained expansion of all employees' section 7 rights to engage in concerted activities. However, such is not the case. The limitations imposed upon its application serve to ensure its use only in the narrow circumstance for which it was intended. Requirements that there be an existing collective bargaining agreement,\textsuperscript{166} that the employee's reasonable and honest\textsuperscript{167} invocation of the right in that agreement be not too remotely related\textsuperscript{168} to the interests of his fellow employees, and that the nature or method of the employee's activity not fall outside the realm of protected concerted activities\textsuperscript{169} all serve to prevent an overly-expansive application of a legitimate doctrine.\textsuperscript{170}

The underlying rationale of \textit{Interboro}\textsuperscript{171} necessarily mandates that it should not be extended to apply in a non-union setting where there is no collective bargaining agreement from which to infer a concerted purpose, merely because the right asserted by the employee happens to be a common interest with fellow employees.\textsuperscript{172} Nor should \textit{Interboro} be applicable where the employee's actions merely involve personal complaints unsupported by the collective bargaining agreement.\textsuperscript{173} Such unjustified application would fly in the face of the underlying policies on which the \textit{Interboro} foundation rests. These imposed limitations serve to restrict the doctrine's application only to the narrow situation for which it was intended.

On the other hand, the Interboro Doctrine would be rendered meaningless if an unduly restrictive approach were required. \textit{Interboro} cannot be subject to a draconian application if the underlying rationale and purpose of the Doctrine is to be properly served. The Board may exercise flexibility in applying \textit{Interboro} because there is a recognition of the importance of "the Board's special function of applying the general provisions of the Act to the com-

\begin{itemize}
\item \textsuperscript{166} See supra text accompanying note 70.
\item \textsuperscript{167} See supra text accompanying note 154.
\item \textsuperscript{168} See supra text accompanying notes 6, 151.
\item \textsuperscript{169} See supra text accompanying notes 29-34, 157-59.
\item \textsuperscript{170} For a discussion of the Board's expansive interpretation of the Interboro Doctrine, see supra text accompanying notes 98-115.
\item \textsuperscript{171} See supra text accompanying notes 57-75.
\item \textsuperscript{172} See supra text accompanying notes 108-09.
\item \textsuperscript{173} See supra text accompanying notes 69, 73, 113-15.
\end{itemize}
plexities of industrial life." For example, the individual employee need not explicitly refer to the collective bargaining agreement as a basis for his actions as long as his complaint refers to a reasonably perceived violation of the agreement and is reasonably clear to the person to whom it is communicated. These actions should be sufficient to constitute an enforcement of that agreement.

In addition, the rationale of *Interboro* requires a finding of concerted activity when the employee's invocation of a collectively bargained right is reasonable and honest, regardless of whether the employee's belief is shown ultimately to be mistaken. These "extensions" of *Interboro* reflect the necessary degree of flexibility to ensure that the doctrine's purpose will not be diluted. However, the element of flexibility, may go only so far. The Court's standard that reliance must be reasonable provides assurance that the doctrine will not be expanded beyond the limit or purpose of its intent.

Finally, the Interboro Doctrine has found a place in national labor policy without disturbing any established precedents in labor-management relations. First, *Interboro* merely states that an individual's assertion of a right rooted in the collective bargaining agreement constitutes concerted activity within the meaning of section 7 of the Act. The doctrine does not protect individual employees from discharge. Although an activity may be deemed concerted, it is ultimately the nature of the activity which determines whether it will be granted protection or not. The Supreme Court reinforced what other courts and the Board have always held—that resort to an abusive manner by an employee to enforce a contract right will deprive him of the protection of section 7, even if his actions constitute concerted activity. Where requirements are met to trigger *Interboro*’s applicability, a determination by the Board, that the employee’s activity is of an unprotected nature, will nevertheless deny him section 7 protection. Section 7’s protection ultimately applies to the nature of the activity and not the mere fact of an individual employee's invocation of a right in the collective bargaining agreement.

Again, the Interboro Doctrine is faithful to the integrity of the

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175. City Disposal Systems, 104 S.Ct. at 1515.
176. See supra text accompanying note 72.
177. City Disposal Systems, 104 S.Ct. at 1514.
178. See supra text accompanying notes 29-34, 157-59.
established grievance-arbitration procedures. An employee who purposefully seeks to circumvent those procedures by provoking a discharge and then filing a section 8(a)(1) unfair labor practice charge will inherently risk a Board determination that his concerted actions are unprotected.

The Supreme Court noted that the process of dispute resolution is identical whether or not it involves two employees, a single employee inducing group action, or a single employee's assertion of a collectively bargained right by himself. The grievance-arbitration process is available to employees in each of those situations. The application of the Interboro Doctrine in no way undermines the grievance-arbitration process. In addition, employees must sometimes present their complaints directly to management because not all employees are entitled to union representation. Hence, the grievance procedure is futile, as where an immediate complaint is necessary to ensure job safety. To require an employee to exhaust grievance procedures would be impractical where the only real choice is to refuse to work because of the unsafe or dangerous condition of the equipment. Therefore, the employee may decide to pursue the Board's adjudication process by filing unfair labor practice charges and declining to pursue the prescribed grievance-arbitration procedure.

Another criticism of the Interboro Doctrine is that it may permit employees to subject their employer to an abundance of unwar-
ranted and *de minimus* complaints. Indeed, the validity of this concern is rooted in the Board’s policy that the merits of an employee’s complaint is ultimately irrelevant to the issue of whether an individual is engaged in concerted activity. The concern, however, has been addressed in several contexts. Interboro had always required that the employee’s belief must have a reasonable basis in the collective bargaining agreement. Only when the employee’s invocation of a collectively bargained right is reasonable and honest will it constitute concerted activity. Moreover, personal gripes and complaints which are merely malicious are unprotected. Even the language in Interboro implicitly states that grievances fabricated for personal reasons will be unprotected. Again, the qualifications imposed upon Interboro’s applicability serves a two-fold purpose: to restrict the potential for its abuse and to maintain a proper perspective of its intended scope.

Another potential concern is that the Interboro Doctrine may be detrimental to the strength of unions. Protection of employee activity subject to a collective bargaining agreement may create a problem regarding the union’s status as the exclusive representative. However, the Interboro Doctrine does not raise such a problem. The employee would be merely attempting to enforce a provision in the agreement which has been negotiated already by the employer and the union. The aggrieved employee would not be requesting the employer to bargain with anyone other than the union, nor to do anything more than to comply with the negotiated agreement. The activity protected by the Interboro Doctrine does not constitute a demand to bargain and does not tend to undermine the union’s status as exclusive representative.

An examination of the Interboro Doctrine reveals that it is not

187. *See supra* text accompanying note 68.
188. *See supra* text accompanying notes 71-73.
189. City Disposal Systems, 104 S.Ct. at 1514.
190. *See supra* text accompanying note 69.
191. NLRB v. Interboro Contractors, 388 F.2d 495, 500 (2d Cir. 1967).
192. Section 9(a) of the NLRA provides 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. . . .” 29 U.S.C. § 159(a) (1976) (emphasis added).
193. *Compare* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975). In that case, the Supreme Court refused to protect the activity of a group of minority employees who attempted to bargain with their employer on issues of employment discrimination on the ground that such activity conflicted with the principle of exclusive representation. *Id.* at 57. In contrast, the activity protected by the Interboro Doctrine does not tend to undermine the union’s status as exclusive representative.
as liberal an interpretation of the meaning of section 7 as it might at first appear. It is not an unjustified legal doctrine. As the Supreme Court stated: “A lone employee’s invocation of a right grounded in his collective bargaining agreement is . . . concerted activity in a very real sense.”

X. Conclusion

The Interboro Doctrine provides section 7 protection to individual employees for legitimate grievances which might otherwise go unexpressed. The general legislative history and central purpose of section 7 is to encourage and protect employee activity designed to improve the terms and conditions of employment. Protection of an individual employee’s protest reinforces that purpose. Interboro supplies a concept that is entirely consistent with the requirement of concerted activities contained in section 7.

Why should the number of employees participating in an activity be the focus in determining if section 7 protection applies? Adherence to a strict construction of the phrase “concerted activities” stifles legitimate expression of job dissatisfaction which may stimulate worker organization. Further, allowing retaliatory dismissal against an individual employee, for the very activity that would be protected if engaged in by two employees, presents a result contrary to any objective contemplated by the Act.

While the group inducement to act test announced by the Third Circuit in Mushroom Transportation had appeared to be fair measure of which individual activities should be protected, it was applied in a way that obtained inconsistent results. Such a standard had inherently called for the difficult evidentiary determinations of whether the employee’s actions tended to induce or prepare for group action or whether it was mere personal griping. However, the application of the Interboro Doctrine avoids such problems.

The Interboro Doctrine has come far to attain its present recognition and should be hailed as a beneficial doctrine which enhances national labor policies.

194. City Disposal Systems, 104 S.Ct. at 1512.