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THE POLITICIZED WORKER UNDER THE NATIONAL LABOR RELATIONS ACT

Barry Sautman*

I. INTRODUCTION

The American workplace has a long history of organizing by politicized workers. These are employees who not only have an abiding interest in politics, but who also analyze their grievances and those of fellow workers in political terms, viewing their problems as systemic and not merely local. Often the politicized worker has exceptional insight and commitment to organizing. These qualities are a function of the high emphasis that the organization to which the activist belongs places on selflessness and education of their members, stressing a range of both historical and contemporary experiences. These qualities distinguish the politicized worker from his typical, less politically aware counterpart.

While there have been peaks and valleys in its level of intensity, the process of politicized organizing has been a continuous one. Much of that organizing is focused around the dissemination of the ideas that account for the politicized worker's distinctiveness through the media of leaflets and newspapers. It has only been in the 1970s

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and 1980s, however, that the National Labor Relations Board (NLRB) and the courts have begun to focus on the degree to which the National Labor Relations Act (NLRA) affords protection to the exposition of political ideas in the workplace.

The most interesting cases have involved the discharge of workers whose politicization of employee grievances caused their dismissal. The issue can be narrowly framed: whether it is proper for an employer to use the “legitimate business justification” to discipline an employee for espousal of political ideas while the employee is engaged in otherwise protected concerted activity.

In Fun Striders, Inc. v. NLRB, a Ninth Circuit panel, over a dissent, answered in the affirmative. In NLRB v. New York University Medical Center, a Second Circuit panel answered in the negative. This article will examine those decisions and others that involve concepts that lie at the heart of an employee right to politicize grievances.

II. Fun Striders at the Administrative Level

In Fun Striders, four employees in a Los Angeles plant of a shoe and handbag manufacturer were fired for political activities. In 1978, the plant employed about 750 workers, most of whom were paid on a piece-rate basis. Teamsters Local 986 had been attempting to organize this plant for several months, and had progressed so far as to have prepared and distributed authorization cards.

On August 24, 1978, workers in the stitching and cementing departments of the factory sent representatives, including Carranza, Castro and Marin, to dispute with various management officials over the piece-rate on a new shoe. While meetings with management were being conducted, most of the plant’s cementers and some of its stitchers stopped working. At the conclusion of these meetings, the plant’s director of operations, Atkins, told the employees to return to work or leave the plant. The workers refused, and Atkins had the plant’s power turned off, announcing “that everybody is stopped work at 10 o’clock.” The employees remained in the plant until their next break, remained outside the plant until the end of the first

4. 686 F.2d 659 (9th Cir. 1981) (The majority consisted of Circuit Judge Farris and former Nevada District Court Judge Claiborne. Circuit Judge Hug dissented).
shift and then, many went to the office of Teamsters Local 986 to obtain authorization cards.⁸

During that afternoon, members of the Progressive Labor Party (PLP)⁹ sold copies of their newspaper outside the plant. In discussions with the strikers, they offered to assist them in preparation of leaflets. Carranza was a member of the Committee Against Racism (CAR)¹⁰ which shared offices with the PLP. The CAR had arranged meetings of Fun Strider employees at these offices that had led to a decision to contact the Teamsters union and distribute its authorization cards.¹¹

On that evening, Carranza helped prepare leaflets at the PLP/CAR offices, which he distributed the following morning. The leaflet explained the nature and goals of the PLP. In addition, the leaflet discussed two previous discharges at the plant and two strikes that had occurred there, including the current one. The leaflet also recited management’s threats to discharge employees who protested wages and working conditions. The leaflet concluded:

Fellow workers, it is time to convert these struggles of resistance into offensive struggles directed toward the destruction of the causes of the problems that we, the workers, are suffering, that is, to [smash] the bosses and their capitalist system, by means of an armed revolution of all the working class.

A means of beginning this is to declare a complete strike of the factory in order to demand unionization, which will aid us in obtaining better economic benefits and also in order to fight against whatever form of divisiveness that the bosses use, like racism. Fight for unconditional amnesty for the undocumented workers and the crushing of fascist groups like the KKK and the Nazis. Support our brother workers who are on strike—everybody strike—long live the strike.

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⁸. Id. at 522.
⁹. The PLP has been characterized as “a revolutionary communist organization which advocates the overthrow, by violent means, of the capitalist system, and the establishment of socialism.” Id. at 521 n.3.
¹⁰. In Carey v. Brown, 447 U.S. 455, 457 (1980), the Court, per Justice Brennan, described the Committee Against Racism as “a civil rights organization.” However, the organization, now known as the International Committee Against Racism (“INCAR”), is both more militant and multiracial than most conventional civil rights organizations. See Wilkinson v. Forst, 832 F.2d 1330, 1332-33 (2d Cir. 1987) (INCAR attacks on Ku Klux Klan rallies). It is a national organization functioning through local chapters; see Cohen v. Cook, 677 F. Supp. 547, 548 (N.D. Ill. 1988) (describing INCAR as “a group of [Cook County Hospital] employees concerned about hospital conditions”) and is affiliated with the Progressive Labor Party. See Phillips v. Lenox Hill Hosp., 673 F. Supp. 1207, 1208 (S.D.N.Y. 1987) (several union members at workplace associated with PLP and INCAR).
¹¹. 250 N.L.R.B. at 521.
Unite with the communist faction in the factory Fun Striders, Inc.12

Two additional leaflets were distributed at Fun Striders, one on August 28, and one on August 29. These leaflets “contained inflammatory rhetoric directed against capitalism, bosses, racism and fascist organizations, and talk of unspecified revolutionary activity.”13 The leaflets also encouraged fighting for better pay, better working conditions and unionization. Carranza and Castro passed out the leaflets. Ruiz “was seen holding a stack of unidentified papers. Marin evidently did not leaflet at all.”14

On the morning of August 30, all employees were permitted to return to work, except Carranza, Castro, Ruiz and Marin. Atkins had “made the decision they should not return because of his antipathy for communism and since he believed the four had distributed communistic literature and were therefore communists.”15 Teamster officials quickly appeared at the plant and spoke with Atkins, but reported to the employees that they had not been politely received.

The NLRB’s General Counsel charged that the firing of the four employees had violated Section 8(a)(1) of the National Labor Relations Act.16 The Counsel maintained that the work stoppage was a concerted activity.17 The employer argued that the objectives of the work stoppage were to control the factory and production, not to change wages, hours or working conditions and were thus unprotected.18 The employer further claimed that the four workers were terminated because they had passed out “politically inflammatory leaflets,” and this distribution was also not protected concerted activity.

The Administrative Law Judge (ALJ) found that the strikes were over wages, as evidenced by the leaflets themselves. The ALJ however found no evidence that the four employees were terminated

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12. *Id.* at 523; accord, 686 F.2d at 661.
14. *Id.*
15. *Id.; accord,* 686 F.2d at 661.
16. Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” Section 7 “Rights of Employees” include “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 and protection. . . .” 29 U.S.C. §§ 158(a)(1) & 157 (1982).
17. 250 N.L.R.B. at 524. (concerning the employees’ displeasure over the new piece rate; the employees were fired for meeting with the management, getting strikers to sign authorization cards or, alternatively, for passing out leaflets.)
18. *Id.*
because of their leadership role in meeting with management since other employees had met with management and not been disciplined. Additionally, the ALJ found no anti-union animus. Apparently, the employer was not aware of the union organizing campaign at the time that the four were fired.

In deciding the issue of the "inflammatory" leaflets, the ALJ quoted from Firestone Steel Products Company, A Division of Firestone Tire and Rubber Company:\(^{19}\)

The distribution of literature by employees in an employer's plant during nonworking times and in nonworking areas has long been recognized as a protected concerted activity provided that the literature sought to be distributed falls within the scope of the "mutual aid or protection" clause of Section 7 of the Act. It is also clear that the "mutual aid or protection" clause is to be interpreted with regard to the relationship of the employees' working conditions. In its decision in Eastex, Inc., the Supreme Court noted, however, that "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity," stating that it was the task of the Board initially to delineate the boundaries of the "mutual aid or protection" clause on a case-by-case basis, and cited with approval our decision in Ford Motor Company, wherein we held that "purely political tract(s)" were sufficiently removed from the employees' interests as employees so as to remove such distribution from protection under the "mutual aid or protection" clause.\(^{20}\)

Examining the leaflets to determine whether they were "sufficiently removed from the employees' interests as employees,"\(^{21}\) the ALJ found that, aside from political content, the leaflets also referred to

20. 250 N.L.R.B. at 525, (quoting Firestone Steel Products Co., 244 N.L.R.B. 826 (1979)) and (citing Eastex, Inc v. NLRB, 437 U.S. 556, 567, 568 n.18 (1978) and Ford Motor Co., 221 N.L.R.B. 663 (1975) enf'd., 546 F.2d 418 (3d Cir. 1976)). Firestone Steel Products involved distribution by a union local of "purely political tract(s)" supporting the candidates of various individuals running for election to the Michigan Supreme Court, the Governorship of Michigan and for U.S. Senator from that state. The employer had refused to allow distribution of this leaflet and its refusal was upheld by the Board. The D.C. Circuit enforced, sub. nom. Local 174, Int'l Union, UAW v. NLRB, 645 F.2d 1151 (D.C. Cir. 1981). Judge Ginsburg stated that "We cannot disagree with the Board's conclusion that the principal thrust of the leaflet was to induce employees to vote for specific candidates, not to educate them on political issues relevant to their employment conditions." Id. at 1154. See also Union Carbide Corp., 259 N.L.R.B. 974 (1981), enforced in pertinent part, 714 F.2d 657, 663 (6th Cir. 1983), where the Board upheld a company's confiscation of a "Taxpayer's Petition" which objected to alleged use by the company of workers' "tax dollars" to promote anti-union activity. The Company claimed that the petition was wholly political material.
21. 250 N.L.R.B. at 525.
eight other items:

(1) the unjust firing of an employee because of rebellion against maltreatment, bad pay, and other impositions; (2) the firing of an employee for refusing to work mandatory overtime; (3) low piece-work rates; (4) the strike in support of a higher piecework rate; (5) formation of a union to represent the employees; (6) a minimum hourly wage and an end to piecework; (7) 30 hours work for 40 hours pay in order to create more jobs for unemployed workers; and (8) better pay and benefits.

The ALJ concluded that all of these items were “related to employment” and “properly the subject of negotiations and grievances” and, therefore, the distribution of leaflets was concerted activity protected under the NLRA. To support this conclusion, the ALJ referred to Veeder-Root Company, A Division of Western Pacific Industries, Inc. In Veeder-Root, the employer suspended employee Fortune and gave a written warning to employee Bates after they had passed out a leaflet before working hours in front of the Connecticut plant’s main gate. The leaflet’s principal appeal was for its readers to attend a May Day Rally in Boston.

The ALJ, in Veeder-Root characterized the contents of the leaflet as also being “related to such items as piecework rates, layoffs, production quotas, and safety, all of which, in turn, related to employment and all of which are properly the subject of negotiations and grievances.” The ALJ found that the employer’s agent had taken action against the employees not “because of the political message of the flyer, but because of what he considered inaccurate and offensive references to the Company.” Therefore, the ALJ concluded that Bates and Fortune had engaged in protected concerted...
activity.²⁸

The employer in *Veeder-Root* argued that the paragraph in question was sufficiently “defamatory” to rendered distribution of the leaflet to be without the protection of the NLRA. The ALJ considered this argument in light of a number of cases that have dealt with alleged employee libel of the employer’s product.²⁹ In addition, it was viewed in light of *American Motors Corporation*, a case with “curious similarities” to that before him.³¹ In *American Motors Corp.* it was held that sections 8(a)(1) and 8(a)(3) were violated when employees were discharged for distributing literature which company officials viewed as “political” because of its phraseology, but which dealt with wages, hours and working conditions. The ALJ in *Veeder-Root Company* found that:

There is no question but that the literature distributed by Bates and Fortune was harsh and intemperate in tone, but there are no statements in that literature which urge anyone to do anything which would be disruptive of Company discipline or would disturb

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²⁸. *Id.*
²⁹. NLRB v. Local 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard Broadcasting Co.), 346 U.S. 464 (1953) (upholding discharge of broadcast technicians who, instead of striking over contract dispute, made public a disparaging attack on quality of employer’s television broadcasts unrelated to labor controversy); Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967) (discharge of employee who could not show that his preparation and posting of sarcastic cartoons ridiculing employer’s president and wage increase was part of employee group action upheld); NLRB v. Blue Bell, Inc., 291 F.2d 796, 798 (5th Cir. 1955) (upholding discharge of employee who, in letter to employer’s vice president during unionization campaign, repeatedly called latter a liar); Maryland Drydock Co. v. NLRB, 183 F.2d 538 (4th Cir. 1950) (not an unfair labor practice for employer to prohibit distribution of union literature lampooning company president); United Parcel Service, Inc., 230 N.L.R.B. 1147 (1977) (while employer could prevent all distribution, it could not bar distribution by particular union faction); Southwestern Bell Telephone Company, 200 N.L.R.B. 667, 670 (1972) (employer could demand employees remove t-shirts with slogan insulting company or leave plant); El Mundo Broadcasting Corp., 108 N.L.R.B. 1270, 1278-79 (1954) (discharge of employee whose statements concerning employer’s policies not shown to be malicious found violative of Act). See also Montefiore Hospital & Medical Center v. NLRB, 621 F.2d 510 (2d Cir. 1980) (striking physicians telling patients that they would not receive property medical care during strike was in reckless disregard of truth and thus unprotected); Timpte, Inc. v. NLRB, 590 F.2d 871 (10th Cir. 1979) (employee refusal to not use profanity in campaign literature against other employees and company not protected); Furr’s Cafeteria, Inc., 251 N.L.R.B. 879 (1981) aff’d, 108 L.R.R.M. (BNA) 2816 (5th Cir. 1980) (occasional disparagement during strike of food served by employer cafeteria retains protection of Act); Florida Ambulance Service, 255 N.L.R.B. 286 (1981) (leaflet charging company’s ambulances unsafe protected); Allied Aviation Services, 248 N.L.R.B. 229, 231 (1980) (letters to employer’s customers re safety protected); Richboro Community Mental Health Council, 242 N.L.R.B. 1267 (1979) (employee letter to the employer’s funding source protesting firing protected); 18A T. KHEEL, BUSINESS ORGANIZATIONS ¶ 9A.04[2](1984)(collecting cases).
the right of the Company to enjoy an orderly workplace.\textsuperscript{32}

The ALJ concluded that the two employees had engaged in protected concerted activity.\textsuperscript{33}

Basing his ruling on \textit{Veeder-Root Company}, the \textit{Fun Striders}' ALJ concluded that "by refusing reinstatement to Carranza, Castro, Marin and Ruiz on August 30, . . . because they distributed the inflammatory leaflets . . ." Respondent violated section 8(a)(1) of the Act.\textsuperscript{34}

Fun Striders had also been charged in the complaint issued by the Board's regional director with a violation of section 8(a)(3) of the Act.\textsuperscript{35} The ALJ determined that there had not been a violation of that section since the four employees' termination was not due to their union activities. Section 8(a)(3), which outlaws "such discrimination as encourages or discourages membership in a labor organization,"\textsuperscript{36} requires a showing of anti-union purpose,\textsuperscript{37} except where conduct by the employer is "so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive."\textsuperscript{38} In a section 8(a)(3) violation where the conduct is so inherently destructive of employee interests, the Board and the courts presume that an unlawful motive exists, even where the employer introduces evidence of a legitimate business purpose.\textsuperscript{39} In \textit{Fun Striders}, the majority stated that the ALJ's "specific finding of a lack of anti-union animus resolved the motive issue

\begin{itemize}
\item \textsuperscript{32} 237 N.L.R.B. at 1177 (citations omitted).
\item \textsuperscript{33} Id.
\item \textsuperscript{34} 250 N.L.R.B. at 525.
\item \textsuperscript{35} Section 8(a)(3) of the Act reads, in pertinent part, "it shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . ." The term "membership" refers to all types of indicia of union support. 29 U.S.C. § 158(a)(3) (1982). \textit{1 THE DEVELOPING LABOR LAW} 188 (BNA) (2d ed.) (C.J. Morris ed. 1983) [hereinafter \textit{DEVELOPING LABOR LAW}].
\item \textsuperscript{36} Radio Officers Union v. NLRB, 347 U.S. 17, 42-43 (1954) (employer discrimination in wages solely on basis of union status violates § 8(a)(3)).
\item \textsuperscript{37} NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967) (substantial evidence that employer's refusal to pay vacation benefits was discriminatory and violated § 8(a)(3)); American Ship Building Co. v. NLRB, 380 U.S. 300, 309 (1965) (employer shutdown of plant to aid negotiating position not a violation of §§ 8(a)(1) and (3)).
\item \textsuperscript{38} NLRB v. Great Dane Trailers, Inc., 388 U.S. at 33 (quoting NLRB v. Brown, 380 U.S. 278, 282 (1965)) (lockout and operation during whipsaw strike does not, in itself, violate § 8(a)(3)). \textit{See also} NLRB v. Erie Resistor Corp., 373 U.S. 221, 223 (1963) (superseniority for strikebreakers violates § 8(a)(3)).
\item \textsuperscript{39} Radio Officers v. NLRB, 347 U.S. at 44-45.
\end{itemize}
in favor of the employer.”

III. THE NINTH CIRCUIT MAJORITY’S APPROACH TO FUN STRIDERS

In considering whether to enforce the Board's order adopting the ALJ's decision, the Fun Striders court began its analysis with an attempt to distinguish between derivative and independent 8(a)(1) violations. It noted that derivative violations of 8(a)(1) are premised on a violation of sections 8(a)(2)-(5) of the Act. The court further noted, that generally a violation of one of these sections will support a finding that section 8(a)(1) has been derivatively violated. Independent violations of 8(a)(1) are established by showing that employees are engaged in protected activities, that the employer's conduct tends to interfere with, restrain, or coerce employees engaged in those activities, and that the employer's conduct is not justified by a legitimate and substantial business reason.

The Board failed to find a section 8(a)(3) violation and no

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40. 686 F.2d at 661 n.1.
41. 250 N.L.R.B. at 526.
42. Section 8(a)(2) makes it an unfair labor practice for an employer to “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” Section 8(a)(4) forbids an employer to “discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act” and section 8(a)(5) makes it unlawful for an employer to “refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(2),(4),(5) (1982).
43. 686 F.2d at 661, citing to dictum in NLRB v. Swedish Hosp. medical Center, 619 F.2d 33, 35 (9th Cir. 1980). It was long ago established that “a violation by an employer of any of the four subdivisions of Section 8, other than subdivision one, is also a violation of subdivision one.” 1938 NLRB Ann. Rep. 52, 52 (1939) quoted in DEVELOPING LABOR LAW, supra note 35, at 75.
44. 686 F.2d at 661 (citing American Shipbuilding Co. v. NLRB, 380 U.S. at 308).
45. Id., (citing Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1080 (9th Cir. 1977)) (finding that discharge of two employees due to anti-union animus not supported by substantial evidence).
46. Id. at 662 (citing Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965)) (closing part of business is § 8(a)(3) violation if purpose is to discourage unionism in remaining part) and see generally 18 B.T. HEEL, BUSINESS ORGANIZATIONS (1981). See also DEVELOPING LABOR LAW, supra note 35, at 76, which notes that while in Textile Workers, at 269, Justice Harlan stated that “a violation of Section 8(a)(1) alone... presupposes an act which is unlawful even absent a discriminatory motive.” The clear picture “presented on the question of motive in 8(a)(1) cases in Darlington has been somewhat blurred by succeeding cases.” DEVELOPING LABOR LAW at 76. After examining some of those cases, Morris concludes that “scienter would not seem to be essential in Section 8(a)(1) cases.” Id. at 77. He also cites to Oberer, The Scienter Factor in Section 8(a)(1) and (3) of the Labor Act: of Balancing Hostile Motives, Dogs and Tails, 52 CORNELL L.Q. 491, 517 n.17 (1967), who asserts that where 8(a)(1) and 8(a)(3) violations may overlap, there should be a hostile motive requirement, but where there is an independent 8(a)(1) violation, there should not be a hostile motive requirement, rather motive should be “presumptively irrelevant.”
charge of violation of any other section of the Act had been brought. It follows then, that any finding of an 8(a)(1) violation must be independent and not derivative.\(^47\)

The majority took up Fun Striders’ argument that the ALJ should have considered the political content of the leaflets distributed by the dismissed employees. The court cited *Firestone Steel Products Co.*\(^{48}\) and *Ford Motor Co. (Rouge Complex)*\(^{49}\) for the proposition that distribution of purely political literature is an unprotected activity.

*Rouge Complex* involved disciplinary actions taken against four members of a caucus opposed to the leadership of United Autoworkers Local 600 at Ford's River Rouge plant during 1976. One caucus member’s lunch bag was seized by the employer's labor relations agent and found to contain caucus literature and literature published by the Revolutionary Communist Party (RCP). The employer claimed that its absolute bar to distribution of literature within the plant prohibited the employee from possessing the literature. He was disciplined on that account. All four members of the caucus who distributed its literature in Ford’s parking lot during non-working hours were also disciplined. The ALJ in this instance concluded that because the Union had waived its right to distribute literature on Ford’s property, under the rule in *NLRB v. Magnavox Company of Tennessee*,\(^{50}\) the rights of employees generally to distribute literature had been waived.\(^{51}\)

The Board in *Ford Motor Co. (Rouge Complex)* disagreed, stating that it has “consistently held that an incumbent union may silence its own voice by waiving the right to distribute its own institutional literature, but that it is powerless to waive the employees’ right to distribute literature pertaining to matters concerning their working conditions and the other conditions of employment.”\(^{52}\) The Board cited a number of cases in which it had held that an incumbent union cannot waive the rights of employees to distribute literature.\(^{53}\) In the case before it, the caucus literature, at least, involved

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47. 686 F.2d at 661.
50. 415 U.S. 322 (1974) (union cannot waive its members' right to distribute literature, that deals with protected, concerted, and/or union activity, within employer's premises).
51. 233 N.L.R.B. at 706.
52. Id. at 699.
53. Id. at 700. See Yellow Cab, Inc., 210 N.L.R.B. 568 (literature advertising demonstration by employees not sponsored by union). McDonnell Douglas Corp., 210 N.L.R.B. 280
"the employees' concerns over the possibility of layoffs and the Union's efforts to avert that possibility." The Board held that this right was therefore protected, and that the Union could not effectively waive the employees' rights to engage in that protected activity. Hence, the employer violated 8(a)(1) and 8(a)(3) of the Act by disciplining the caucus members for possessing and maintaining the literature.

In a footnote, the Board noted "the General Counsel's concession at the hearing that the publications of the Revolutionary Communist Party contained in [the disciplined employee's] lunchbag did not constitute protected literature." However, the Board declined to pass on the issue of whether the RCP literature in itself was protected, finding instead that Ford's suspension of the employee for mere possession of the protected literature in his lunchbag was unlawful. It was therefore, not the Board's position, but rather the General Counsel's position in Ford Motor Co. (Rouge Complex), that politicized literature was unprotected.

Interestingly, the Board in Ford Motor Co. (Rouge Complex) did not cite Ford Motor Co. In Ford Motor Co., the Board considered the case of a member of the "Militant Solidarity Caucus of UAW Local 906" who was refused permission by labor relations agents at Ford's former Mahwah, New Jersey plant to distribute the caucus' newsletter on company property on two occasions. On the first occasion, the caucus member wanted to distribute a newsletter whose first sheet concentrated, to a large extent, on the issue of over-
time and other Mahwah issues. The second sheet dealt with the state of the U.S. economy and the role of union leaders in the economy, the denial of a visa to an Australian Communist union leader and the caucus' "mixed bag" program of "union and employee objectives, political goals such as a workers' party and a workers' government, and a call for the expropriation of basic industry." On the second occasion, the caucus member desired to distribute an "Election Supplement" which:

generally attacks the policies of labor unions to endorse candidates from either the Democratic or Republican parties and favors the establishment of an independent party of labor. References are made to Watergate, the coverup, inflation, and recession. It casti-gates union chiefs who lead the unions and their members to en-dorsement of the traditional parties and ends with a call for an independent workers' party and for a workers' government.

The ALJ found the distribution of the first newsletter to be protected activity, despite the second page of the newsletter dealing "to some extent" with political matters. The ALJ noted that "Section 7 extends beyond the particular plant to assistance to employees of other employers" and that "mixed letters" have been held to be protected under the Act.

The second newsletter, however, was held

59. 221 N.L.R.B. at 664.
60. Id.
61. Id. at 666 (citing NLRB v. Peter Cailler Kohler Swiss Chocolate Co., 130 F.2d 503 (2d Cir. 1942)) (union resolution protesting company action in milk strike was concerted activity). See also DEVELOPING LABOR LAW, supra note 35, at 74 n.9, 142 n.392 and cases cited therein.
62. 221 N.L.R.B. at 666 (citing Samsonite Corp., 206 N.L.R.B. 343 (1973)). Samsonite involved the discharge of a member of a dissident caucus of United Rubber Workers Local 724 who had distributed two issues of the caucus' newsletter, the contents of which the ALJ described as follows:

The first edition of the "New Morning" was published in early May and was distributed to Respondent's employees at the plant on May 9. It consisted of articles stating: that the Union's contract gave the highest-paid workers the largest increases and the lowest-paid workers the least increases, and that "The only thing left for the straight-time workers is to organize and fight for their just demands!"; that the employees had the right to refuse to work on unsafe machines and that if that right was used the Company would be forced to start cleaning up unsafe machinery and noxious fumes; that the employees received practically nothing in the new contract and that the Union had supplied poor leadership to them; and that Respondent might not be an equal opportunity employer and might be discriminating against women, blacks, and Chicanos. The newsletter also contained: a suggestion that the employees read the book "Bury My Heart At Wounded Knee"; a quote from Abraham Lincoln to the effect that capitalists generally act in concert to fleece the people; an article stating that the employees should speak up without being afraid of being fired; a request for employees to help with the newsletter; and a cartoon com-
by the Board in *Ford Motor Co.* to be

purely a political tract exhorting employees not to support the traditional parties and their candidates in the 1974 congressional elections, but to seek an independent workers' party. This is wholly political propaganda which does not relate to employees' problems and concerns *qua* employees . . . While it may be argued that the election of any political candidate may have an ultimate effect on employment conditions, I believe that to be sufficiently removed so as to warrant an employer to prohibit distribution on its property of matter solely concerned with a political election.\(^6\)

The ALJ held that the newsletter was not protected and thus, the prohibition on its distribution did not violate the Act.\(^6^4\)

While the Board does seem to have a rule that denies protection to "purely political" literature, "political" seems to have been defined only in terms of electoral politics. In fact, in *Local 174, International Union, UAW v. NLRB*,\(^6^5\) the District of Columbia Circuit

plaining about the heat in the plant.

The second copy of the "New Morning" was published in June and was distributed to Respondent's employees at the plant on June 14. It contained articles stating: that Respondent should do something about temperatures in the plant that reached over a hundred degrees in the summer; that the employees should be at the June 18 union meeting and tell the Union what they thought about a proposed dues increase; and that a new way of running things was needed so that power in the Union was returned to the shop floor, and that the office of union president and other full-time offices should be abolished so that their duties could be taken over by an in-plant committee. In addition, there was an article complimenting departmental representatives for abolishing payments to union stewards and another article complaining that copies of the contract had not been printed for the employees. It also contained a quote from Helen Keller to the effect that the country is governed for the well-to-do and for the exploiters of labor. There was also an article complaining that the president of the Union was well paid and remote from the conditions under which employees worked; an article stating that the employees should speak out without fear; and another article asking for help in the publication of the newsletter.

*Id.* at 344.

Recognizing that concerted activity need not be union activity, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (non-union employees' walkout to protest working in cold was protected concerted activity), and that attempts by union members to change the union's attitude about particular collective bargaining contracts are concerted activity, *NLRB v. New-Car Carriers, Inc.*, 189 F.2d 756, 760 (3d Cir. 1951) (certain owner operator truckers were employees within meaning of NLRA), the ALJ in *Samsonite* stated that "The fact that some of the articles in the newsletter contained gratuitous remarks or 'social comment' matters does not detract from the conclusion that the distribution of the 'New Morning' was a concerted activity for the purpose of seeking improvements in wages and conditions of employment." 206 N.L.R.B. at 346.

63. 221 N.L.R.B. at 666.
64. *Id.*
Court recounted that:

In its brief to this court the Board states that it is attempting to range union 'political' communication along a continuum, placing at one end literature dominantly aimed at inducing votes for specific candidates, and at the other, literature designed principally to educate employees on political issues that may impinge on their employment conditions.\(^6\)

The Board has not ruled, as the Fun Striders majority implied, that radical newspapers and the like are “purely political,” rather than “mixed” pieces of literature protected under the NLRA.

**IV. THE FUN STRIDERS MAJORITY AND EASTEX**

The Fun Striders majority recognized that in *Eastex, Inc. v. NLRB*,\(^67\) the Supreme Court essentially adopted the same rule that the Board had fashioned five years earlier in *Samsonite Corporation*:\(^68\) the distribution of literature containing non-political as well as political matters related to employee interests is protected.\(^69\) In *Eastex*, employee-members of the United Paperworkers sought to distribute a four-page union newsletter in non-working areas of Eastex’s Texas plant during non-working hours. The first and fourth of the newsletter’s four sections dealt with the union. The second and third sections urged employees to write their legislators to prompt them to oppose the incorporation of the state’s “right-to-work” statute into a revised state constitution, criticized a Presidential veto of an increase in the minimum wage, and urged employees to register to vote to “‘defeat our enemies and elect our friends.’”\(^70\)

When the employer refused to allow distribution, the union filed 8(a)(1) charges with the NLRB. The NLRB determined that the second and third sections were protected. The NLRB recognized that because the Eastex workers had been urged to support an increase in the minimum wage, those workers earning wages below the newly-proposed minimum might later support the Eastex employees. The court of appeals enforced: holding “‘whatever is reasonably related to the employees’ jobs or to their status or condition as employees in the plant may be the subject of such handouts as we treat of here, distributed on the plant premises in such a manner as to not

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66. *Id.* at 1155.
69. 686 F.2d at 662.
70. 437 U.S. at 559-60.

http://scholarlycommons.law.hofstra.edu/hlelj/vol5/iss1/3
interfere with the work..."

The Supreme Court affirmed. The Court first discussed the long-established rule that employees are protected when they engage in otherwise proper concerted activity in support of employees of employers other than their own. This support constitutes mutual aid and protection under section 7 of the Act.\(^7\) The Court noted that "mutual aid and protection" also encompasses employees seeking improved working conditions through resort to administrative and judicial forums\(^7\) or through appeals to legislators.\(^8\) The Court recognized that some concerted activity involves more immediate employee interests than does other concerted activity. At some point the relationship between concerted activity and employees' interests as employee becomes too attenuated, so as to be excluded from the "mutual aid and protection" clause. The Court declined to define that point, deferring to the Board for that determination.\(^9\)

The Court held that those sections of the union newsletter urging employees to write legislators concerning the "right-to-work" statute were protected for the reasons enunciated by the Board and the court of appeals. It also held that those sections of the newsletter treating the veto of the proposed minimum wage increase were protected because wages are a major concern of all employees. The call for employer voter registration was seen as support for those who would raise the minimum wage and in effect, raise wages generally.\(^10\)

Summarizing the holding in *Republic Aviation v. NLRB,\(^7\) a

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\(^7\) *Id.* at 562, (quoting NLRB v. Eastex, 550 F.2d 198, 203 (5th Cir. 1977) (emphasis in original)). The Board's discussion appears at 215 N.L.R.B. 271 (1974).

\(^8\) 437 U.S. at 564-65.

\(^9\) *Id.* at 566 n.15 and cases cited therein.

\(^10\) *Id.* at 566 n.16 and cases cited therein.

\(^11\) *Id.* at 567-68 (citations omitted). Footnote 18 therein cites to both Ford Motor Co. and Ford Motor Co. (Rouge Complex), supra. It states that "The Board has not yet made clear whether it considers distribution like those in the above cited cases to be unprotected altogether or only on the employer's premises." *Id.* at 568. This footnote raises the idea that the Board might take the position that "purely political" or, at least strongly political, distributions might be protected when not made on the employer's premises. This is, to be sure, an interesting concept, but not one that the Board has treated.

\(^12\) *Id.* at 569-70.

\(^13\) 324 U.S. at 797-98. In *Republic Aviation* the Court upheld the Board's ruling that an employer may not prohibit its employees from distributing union organizational literature in nonworking areas of its industrial property during nonworking time, absent a showing by the employer that a ban is necessary to maintain plant discipline or production. This ruling obtained even though the employees had not shown that distribution off the employer's property would be ineffective. In the Court's view, the Board had reached an acceptable "adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments."
case that bore a striking resemblance to the matter in *Eastex*, the Court went on to discuss the employer's argument that content determines whether distribution of literature is protected.\(^7\)

We hold that the Board was not required to adopt this view in the case at hand. In the first place, petitioner's reliance on its property right is largely misplaced. . . . Even if the mere distribution by employees of material protected by §7 can be said to intrude on petitioner's property rights in any meaningful sense, the degree of intrusion does not vary with the content of the material. Petitioner's only cognizable property right in this respect is in preventing employees from bringing literature onto its property and distributing it there—not in choosing which distributions protected by §7 it wishes to suppress.\(^7\)

The Court cited *Proctor & Gamble Mfg. Co.*,\(^8\) for the proposition that a temporary ban on the distribution of literature if necessary to maintain discipline within the plant was a valid bar to distribution.

The *Eastex* court concluded that requiring the Board to determine not only whether certain broad classes of literature are protected but also whether certain sub-categories of otherwise protected materials are legitimate under section 7 would create excessive confusion and difficulty. The court added that the Board may consider whether the workplace is the appropriate point for distribution of section 7 material.

The Supreme Court held that "in the absence of a countervailing interest" being shown by the employer, the union's distribution of the "mixed" newsletter on company property, during non-working hours, in non-working areas was protected.\(^8\) On several occasions since *Eastex*, other circuits have applied the rule that employers may not interfere with the right to distribute literature, except to the extent necessary to maintain production and discipline.\(^8\)

\(^7\) 437 U.S. at 572. Petitioner contends that the Board must distinguish among distributions of protected matter by employees on an employer's property on the basis of the content of each distribution. Echoing its earlier argument petitioner urges that the Republic Aviation Rule should not be applied if a distribution "does not involve a request for any action on the part of the employer, or does not concern a matter over which the employer has any degree of control . . . ." *Id.* In petitioner's view, distribution of any other matter protected by §7 would be an "unnecessary intrusion[n] on the employer's property rights," in the absence of a showing by employees that no alternative channels of communication with fellow employees are available. *Id.*

\(^8\) See, e.g. NLRB v. Vought Corp.—MLRS Systems Div., 788 F.2d 1378, 1381 (8th Cir. 1986) (employer's no distribution rule, unlawfully broad even though employee not disci-
It is thus firmly established that "[r]estrictions on employees' exercise of section 7 rights during authorized nonwork time or in nonwork areas are presumptively invalid." To rebut this presumption, an employer must show that the literature's distribution would prevent the employer from maintaining production or discipline.

In Fun Striders, the employer claimed that the "violent, destructive nature of the material . . . provided a legitimate business reason for its actions." The majority decided that the employer's motive for the dismissal, arguably a "legitimate, substantial business reason" must be considered in determining whether the action violated section 8(a)(1). The majority held that if an employer, in such a case, demonstrated a "legitimate, substantial business reason" for a dismissal, the burden would then shift to the Board to establish that the employer's primary motivation for the discharge was to penalize the employee for engaging in protected activity. The majority cited cases from several circuits, the most recent of which was decided in 1978, purportedly in support of their position.

V. THE FUN STRIDERS MAJORITY AND WRIGHT LINE

The cases cited by the Fun Striders majority were decided well before the Board developed its unfair labor practice causation stan-

plined); United Parcel Service v. NLRB, 706 F.2d 972, 979 (3d Cir. 1983) (employer's statement that he would "rather not" have employee literature distribution violated § 8(a)(1)); NLRB v. Lummus Indus. 679 F.2d 229, 233 (11th Cir. 1982) (employer rule permitting discipline based on literature distribution was unlawfully broad).

83. National Vendors v. NLRB, 630 F.2d 1265, 1268 (8th Cir. 1980) (employer prohibition of disruptive employee meetings not a violation).

84. See Eastex, Inc. v. NLRB, 437 U.S. at 570-75. However, Eastex "did not decide at what point the relationship between a political issue and 'employees' interests as employees . . . becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection clause,' leaving that question for the Board and the courts of appeals." S. Kupferberg, Political Strikes, Labor Law and Democratic Rights, 71 Va. L. Rev. 685, 690 (1985).

85. 686 F.2d at 662.
86. Id. The cases cited are:
NLRB v. William S. Carroll, Inc., 578 F.2d 1, 4 (1st Cir. 1978) (once employer demonstrated legitimate business reason for dismissal of employee, burden shifts to Board to show primary motivation for discharge was employee's protected activity);
Litton Dental Products v. NLRB, 543 F.2d 1085, 1087-88 (4th Cir. 1976) (Board must show employer's corrective acts were effort to stop unionization); NLRB v. Elias Bros. Restaurants, Inc., 496 F.2d 1165, 1167 (6th Cir. 1974) (per curiam) ("Motiv[ation] in part"); NLRB v. Fairview Hosp., 443 F.2d 1217, 1219 (7th Cir. 1971) (motive must be solely legitimate); NLRB v. Alamo Express, Inc., 430 F.2d 1032, 1035-36 (5th Cir. 1970) (Board showed anti-union discrimination was a motivating factor), cert. denied, 400 U.S. 1021 (1971); NLRB v. Crosby Chem., Inc., 274 F.2d 72, 74 & n.5 (5th Cir. 1960) (burden of proof rests on Board).
dard in the *Wright Line* case.\(^7\) Prior to 1980, the Board had, as its test for "dual motive" or "mixed motive" section 8(a)(3) discharge cases, the "in part" or "partial motive" causation test. The Board's theory was that "if a discharge is motivated 'in part' by the protected activities of the employee, the discharge violates the NLRA even if a legitimate reason was also relied on.\(^8\) The Board used this test to ascertain the "substantial, contributing factor"\(^9\) for an employer's discharge or refusal to hire an employee.

While the Sixth, Seventh and Tenth circuits agreed with the Board,\(^8\) the First and Fourth Circuits had a "but for" test that required showing that the employer's "dominant motive" was to discourage union activity through discrimination.\(^9\) The District of Co-

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\*In *Wright Line*, a case involving a union activist discharged for allegedly falsifying production time reports, application of this analysis meant that once the General Counsel made a prima facie showing that protected activity was a motivating factor in the discharge, the burden shifted to the employer to show that it would have taken the same action even in the absence of protected activity. The Board refused to "quantitatively analyze the effect of the unlawful cause once it has been found", stating that "whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the prescription of the Act." 251 N.L.R.B. at 1089, 1089 n.14., 1094.

When *Wright Line* reached the First Circuit on a petition for enforcement, NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), that court changed the Board's burden of proof analysis by denying that the Board could place the burden of persuasion on the employer to rebut the General Counsel's case. The Board could only place on the employer "the burden of coming forward with credible evidence to rebut or meet" that case. 662 F.2d at 904. The First Circuit largely relied on *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), where the Supreme Court held that in a Title VII case, once the employee establishes a prima facie case that raises an inference of discrimination, an employer must only articulate a legitimate, non-discriminatory reason for the action and, if this be done, the employee must then show that the justification is merely pretextual. While the burden of production shifts to the employer in the second stage of this three-stage process, the burden of persuasion always remains with the employee. 450 U.S. at 255-56.


90. NLRB v. West Side Carpet Cleaning Co., 329 F.2d 758, 761 (6th Cir. 1964); NLRB v. Gogin, 575 F.2d 596, 601-602 (7th Cir. 1978); M.S.P. Indus. v. NLRB, 568 F.2d 166, 173-74 (10th Cir. 1977).

91. NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1312 n.1, 1315 (1st Cir. 1971); Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337 (4th Cir. 1976).
lumbia and Ninth Circuits waffled on the question, while the Second, Third, Fifth and Eighth Circuits "rejected the established nomenclature and utilized their own causation tests to analyze dual motive cases."

In *Wright Line*, the Board applied the Supreme Court's analysis in *Mt. Healthy City School District Board of Education v. Doyle*. *Mt. Healthy* involved a public school teacher who claimed to have been dismissed for engaging in the constitutionally protected activity of calling a radio station to discuss the school board's adoption of a new teacher dress code. The Court stated that the teacher had to show that this conduct was a "motivating factor" in the School Board's decision not to rehire him. Once that was shown, the School Board would have to show by a preponderance of evidence that it would have reached the same decision as to the teacher's reemployment, even in the absence of the protected conduct. The *Wright Line* court held that while the Board may place the burden of production on an employer to disprove "but for" causation, the burden of persuading the trier of fact that a discharge would not have taken place "but for the employee's engaging in protected activity" remains always with the General Counsel.

Three other circuits also shifted the burden of persuasion to the employee. In *Behrig International v. NLRB*, the Third Circuit heavily relied on *Texas Department of Community Affairs v. Burdine* to conclude that only the burden of production could be shifted to an employer after the employee had established a prima facie case in a "mixed motive" matter. The Seventh Circuit agreed in *NLRB v. Webb Ford, Inc.*, as did the Second Circuit in *NLRB v. New York University Medical Center*. Four circuits backed the Board's

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97. NLRB v. Webb Ford Inc., 689 F.2d 733, 739 (7th Cir. 1982).


analysis in *Wright Line*. The Fourth and District of Columbia Circuits "implicitly rejected" the *Wright Line* Board standard.\(^{100}\)

The dispute concerning *Wright Line* came to a head in *NLRB v. Transportation Management Co.*,\(^{101}\) wherein the First Circuit addressed whether the burden placed on the employer in *Wright Line* is consistent with Sections 8(a)(1) and (3), as well as with Section 10(c) of the Act,\(^{102}\) insofar as the last section requires the Board to find unfair labor practices "upon the preponderance of the testimony taken."\(^{103}\)

In *Transportation Management*,\(^{104}\) a bus driver active in organizing a Teamsters local was allegedly fired for leaving his keys in a bus and for taking unauthorized breaks.\(^{105}\) A supervisor had vowed to other drivers that he would "get even" with the activist for the driver's union activities and the same supervisor discharged that driver, who subsequently filed a complaint with the Board, alleging Section 8(a)(1) and 8(a)(3) violations. The Administrative Law Judge determined that the supervisor had a clear anti-union animus.

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102. 29 U.S.C. §160(c) reads, in pertinent part:

   If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . . If upon a preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

103. *Id.*


105. *Id.* at 101, 105.
The Judge found that the proffered reasons for the firing were pretextual, since it was common for drivers to leave their keys in the bus and the employer had not, in this instance, followed its practice of giving warnings before discharging an employee for unauthorized breaks. The Board affirmed, applying *Wright Line*, but the First Circuit refused enforcement because it deemed that the burden shift in *Wright Line* was beyond the Board's statutory authority. The court remanded for consideration of whether the General Counsel had proved by a preponderance of the evidence that the driver would not have been fired had it not been for his union activities. The Supreme Court reversed.

The Court cited two early Board decisions, *Consumers Research, Inc.* and *Dow Chemical Co.* for the proposition "that to establish an unfair labor practice the General Counsel need only show by a preponderance of the evidence that a discharge is in any way motivated by a desire to frustrate union activity." The Court stated that this Board practice was "plainly rational and acceptable." The Court noted that in the case before it, the Board had not purported to shift the burden of persuasion on the question of whether the discharge was at least in part based on a "mixed motive." The Court held that the employee had met his burden. Therefore, the Court stated, *Texas Department of Community Affairs v. Burdine* was inapposite; the shifting burden in *Wright Line* did nothing more than require the employer to make out, by a preponderance of the evidence, an affirmative defense that the discharge rested at least in part on the employee's unprotected conduct and that the employee would have lost his job in any event. The shifting burden, the Court continued, did not "change or add to the elements of the unfair labor practice that the General Counsel has the burden to prove."
of proving under section 10(c).”

The Court declared itself “quite sure . . . that the Court of Appeals erred in holding that Section 10(c) forbids placing the burden on the employer to prove that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons.”

The Court, however, was unprepared to hold that the Board’s placement of the burden of persuasion on the employer once the employee has established a prima facie case was not permissible under the NLRA.

The Court also characterized the Board’s analogy in Wright Line to Mount Healthy City Board of Education v. Doyle as a fair one. It, therefore, concluded that the Court of Appeals erred in refusing to enforce Board orders which rested on Wright Line.

Transportation Management involved a case where the General Counsel had brought both 8(a)(1) and 8(a)(3) charges even though Wright Line determinations of motive have generally been thought of as being conducted in the context of 8(a)(3) charges alone. It

115. 462 U.S. at 401 (footnote omitted).
116. Id. at 401.
117. Id. at 403. The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

Id.

119. Transportation Management, 462 U.S. at 403.
120. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) has had a considerable impact on discharge cases in the circuits. See, e.g. NLRB v. Horizon Air Servs. 761 F.2d 22 (1st Cir. 1985) (employer’s claim that discharged union activist was “disruptive” held pretextual); Sanchez v. NLRB, 785 F.2d 409 (2d Cir. 1986) (applying Transportation Management to reverse Board dismissal of §8(a)(3) charge on ground that employer had not shown business justification). Hanlon & Wilson Co. v. NLRB, 738 F.2d 606 (3d Cir. 1984) (enforcing, in large measure, Board order on basis that employer had failed to carry burden of showing legitimate business justification for discharges); ARA Leisure Servs. v. NLRB, 782 F.2d 456 (4th Cir. 1986) (enforcing Board order because no substantial evidence of antiunion animus and employer’s failure to carry burden of showing employees would have been discharged even if they had not joined union); NLRB v. Associated Milk Producers, Inc., 711 F.2d 627 (5th Cir. 1983) (rejecting “business reason” for discharge); Birch Run Welding of Fabricating, Inc. v. NLRB, 761 F.2d 1175 (6th Cir. 1985) (same); Lemon Drop Inn, Inc. v. NLRB, 752 F.2d 323 (8th Cir. 1985) (employer’s affirmative defense pretextual); NLRB v. Searle Auto Glass, Inc., 762 F.2d 769 (9th Cir. 1984) (employer’s economic defense for layoffs lacked credibility); NLRB v. Southern Florida Hotel, 751 F.2d 1571 (11th Cir. 1985) (employer’s claim that it had “unqualified” contractual right to layoff returning strikers held pretextual); Passaic Daily News v. NLRB, 736 F.2d 1543 (D.C. Cir. 1984) (employer effectively conceded pretext in claiming First Amendment justified its retaliation against union activist by pulling his column from newspaper).
121. See the discussion of Wright Line in Developing Labor Law, supra note 35, at
has been pointed out that when conduct is challenged under both Sections 8(a)(1) and 8(a)(3):

the Supreme Court sometimes uses a dichotomous approach that analyzes conduct independently under each section . . . [sometimes] uses a selective approach that focuses on one or the other section . . . [sometimes] fails to indicate whether its motive analysis encompassed both statutory provisions or applied only to the Section 8(a)(3) charge [and sometimes] analyzes the 8(a)(1) claim similarly to the Section 8(a)(3) claim."

The same commentators have pointed out, however, that motive is not to be considered in straight 8(a)(1) cases, except in very specific circumstances. There is no consideration of motive under section 8(a)(1) because requiring proof of an illicit motive would not serve the purposes of section 8(a)(1).

While a number of courts have used Wright Line analysis in Section 8(a)(1) cases, this application has been criticized. It has

191-92, 208-10.
123. Id. at 761-62, (quoting International Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 739 (1961) and 29 U.S.C. § 158(a)(1)). The proposition that motive analysis has no role in section 8(a)(1) cases, at least in the absence of any allegation of a section 8(a)(3) violation, is recognized by the commentators, accepted by the Board and courts and amply supported by Supreme Court precedent. During the 1960's, the Supreme Court established in several decisions that 'nothing in the statutory language of section 8(a)(1) prescribe[s] scienter as an element of [an] unfair labor practice.' This comports with the impact/effect language of section 8(a)(1) that prohibits 'interfer[ence] . . . with restrain[t] or coerc[ion]' in the exercise of employee section 7 rights. Indeed, Congress intended section 8(a)(1) to proscribe employer actions even if they merely tend to interfere with the exercise of protected employee activities. Thus, Congress utilized language that would receive a broad interpretation and, effectively would subject employer conduct to scrutiny even if such conduct did not violate the more specific motive oriented provisions of section 8(a)(3).
124. See, e.g., NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964). See also Honolulu Sporting Goods Co., 239 N.L.R.B. 1277, 1280 (1979), enforced, 105 L.R.R.M. 2896 (9th Cir.), cert. denied, 449 U.S. 1034 (1980); Tonkawa Refining Co., 175 N.L.R.B. 619, 619-20 (1969), enforced 434 F.2d 1041 (10th Cir. 1970) (per curiam). To be sure, motive is considered when an 8(a)(1) charge has been leveled because of an employer's grant of employee benefits in the period immediately preceding a Board representation election. 375 U.S. at 409. Instances of this kind, however, are not clearly employer responses to protected activity.
126. See, e.g., NLRB v. New York Univ. Medical Center, 702 F.2d 284 (2d Cir.), va-
been shown that the specific cases cited by the majority in *Fun Striders*, with one exception, do not "support the presumption that antiunion motive is a necessary element of an independent 8(a)(1) violation in the *Fun Striders* type of situation where it is undisputed that a discharge is a direct response to activity which is labeled protected."  

The *Fun Striders* majority wrongly postulated that motive is relevant in an independent 8(a)(1) situation.  

There, the activity was concededly protected and there was no dispute that the employer's motive in firing the employee was that he had distributed "communist" literature. The question should have been whether the employer could offer a legitimate and substantial business justification for interfering with the protected activity. Contrary to the *Fun Strider's* majority, the Board has no burden to prove that the employer's "true motive" was to interfere with protected activity, because "true motive" is irrelevant. Thus, R. Gorman restates section 8(a)(1) as follows:

It shall be an unfair labor practice for an employer to take action which, regardless of the absence of antiunion bias, tends to interfere with, restrain or coerce a reasonable employee in the exercise of the rights guaranteed in section 7, provided the action lacks a legitimate and substantial justification such as plant safety, effi-

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127. See Jackson & Heller, supra note 122, at 764 n.126; Note, supra note 125, at 514.  
128. Note, supra note 125, at 514 n.39. See also R. Gorman and M. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 353 (1981) ("the key to a violation of [section 8(a)(1)] is not the employer's illicit motive but rather the coercive effect upon the exercise of section 7 rights"); 18B T. KHEEL, BUSINESS ORGANIZATIONS, Labor Law § 10.02[2] at 10-15 (1981) ("It appears that the Supreme Court generally supports the NLRB's position that motivation or intent is not usually a necessary element in the proof of employer interference, restraint or coercion") and Note, *A Uniform Analysis for Dual Motive Discharges NLRB v. Transportation Management Corp.*, 49 Mo. L. REV. 623, 624 n.13 (1984) ("cases considered solely under 8(a)(1) rarely turn on motivation, scienter not being a requirement in such cases.")  
129. See Note, supra note 125, at 515-16, which concludes that the majority wrongly posited a motive requirement for §§8(a)(1) violations to reach a correct result that could be reached by arguing "legitimate business justification" alone.  
While the Note's author is correct in criticizing the majority for misconstruing the elements of §8(a)(1), the author misses the mark with regard to the "legitimacy" of the employer's "business justification". The Note was written before the republication of *Fun Striders* with Judge Hug's dissent.
ciency or discipline.\footnote{130}

Once it was established that the activity was protected, the whole burden of proving the legitimate business justification rested on the employer. The ALJ's finding of no anti-union animus was not pertinent to the 8(a)(1) determination, whereas it is relevant in the \textit{Wright Line} 8(a)(3) context of claimed mixed motive. Unlike a mixed motive case, it was not possible for the employer to have established that the workers would have been discharged even if they had not distributed the literature, since it was the literature's distribution itself that alerted the employer to the worker's political sympathies and caused their discharge. Unlike most 8(a)(3) cases, once it was established that the literature distributed by the employees was sufficiently related to employee concerns \textit{qua} employee, there was no question in \textit{Fun Striders} that the employee discharge was based on their participation in protected activities.\footnote{131} The only question was whether the employees could be discharged despite the fact that their activity was a protected one.

Even if a \textit{Wright Line} analysis is applied to an instance where only an 8(a)(1) violation is charged, the Board is fully entitled to shift the burden to the employer to prove that an employee disciplined for engaging in protected activity would have been disciplined even if the employee had not been associated with the protected activity. It certainly is not the Board's burden to show that the employer was primarily motivated by a desire to penalize the employee for engaging in protected activity. All the Board must show is that retaliation for engaging in protected activity was a motive in the discipline. The burden then shifts to the employer to prove its legitimate business justification. The First Circuit itself recently reiterated the employer's burden.\footnote{132}

\footnote{130}{R. Gorman, Basic Text on Labor Law at 133 (1976) (emphasis added).}

\footnote{131}{See Note, supra note 128, at 623 (Section (8(a)(3) cases involve an employee allegation that he was fired for participating in protected union activities and, usually, an employer allegation of a business justification for the dismissal). Note, however, that "Section 8(a)(1) forbids discrimination against employees because of concerted activity—regardless of the presence or absence of a union." S. Schlossberg & J. Scott, Organizing and the Law 70 (3d ed. 1983).}

\footnote{132}{[T]he company must do more than merely produce some evidence of a legitimate motive to escape liability. Rather, the employer must prove by a preponderance of the evidence that, although the employee’s protected conduct may have been an additional causative factor for the discharge, the company was motivated principally by the employee’s unprotected conduct to such an extent that it would have dismissed the worker in any event whether or not he/she had engaged in sacrosanct activities. [citation omitted] This effectively imposes an affirmative obligation upon the employer, who must convince the trier of fact that the legitimate motive for}
The Fun Striders majority, perceiving that the leaflets distributed had "urged the employees to engage in a violent struggle against management," held this to be a valid ban on distribution.133

This, the majority asserted, forced the Board to prove that Fun Striders' motive was to interfere with protected activity and, since it had not done so, the ALJ found that Fun Striders had no anti-union animus. The majority thus concluded that since the employer's motives were "clearly legitimate" (the "business need to preserve peace"), the record did not support the Board's determination that section 8(a)(1) had been violated by the company's refusal to reinstate "employees advocating violence."135

VI. THE FUN STRIDERS DISSENT

Judge Hug, in dissent, posed as "the essential question . . . whether the Board was correct in determining that passing out the leaflet was a protected activity." Noting that First Amendment free speech issues are not involved in unfair labor practice cases under Hudgens v. NLRB,136 the dissent concluded that Fun Striders could have fired the employees for distributing communist literature or, in fact, for "a good reason, a bad reason or no reason so long as it is discharge existed and was sufficiently compelling.

NLRB v. Horizon Air Servs., 761 F.2d 22, 27 (1st Cir. 1985).

133. Fun Striders v. NLRB, 686 F.2d at 662. There is no indication that the leaflets urged violence against the company's management. Rather, workers were urged to organize for "armed socialist revolution" which, as will be discussed below, is an abstract concept that refers to a presumed inevitable mechanism for affecting macro-economic and social change and not a concept for changing social relations in a single company. Even anarcho-syndicalists—long-standing opponents of communism who advocate working class power by "industrial action"—do not advocate violent struggle against individual companies as a political strategy.

134. Id. Fun Striders reasonably believed that this advocacy threatened to inject violent confrontation into the plant . . . [i]t had a legitimate and substantial business reason to keep those it believed had distributed the offending leaflets out of the plant by refusing to reinstate them.

135. Id. at 662-63.

136. 424 U.S. 507, 513 (1976). Hudgens is the latest in the line of "shopping center" cases which began with Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968). The latter case held that a state trespass law could not be applied to enjoin peaceful union picketing of a supermarket in a privately owned shopping center. In Lloyd v. Tanner, 407 U.S. 551 (1972), the Court upheld as constitutional the application to anti-war leafletters of a shopping center ban on the distribution of hand-bills, distinguishing the union picketing in Logan Valley as related to the shopping center's operations. Hudgens, which involved union picketing, announced that Lloyd had effectively overruled Logan Valley. While obviously of some relevance here, the issues such as the interface of the First Amendment's free speech values and the NLRA and whether non-union employees have a right to be discharged only for cause under certain circumstances are generally beyond the scope of this article.
The distribution of a leaflet that expresses employee dissatisfaction is protected although it contains some political statements, the dissent averred. Judge Hug also recognized that "considerable latitude in language in the expression of employer complaints has traditionally been allowed in the midst of a labor dispute." He further concluded from cited precedent that "protected activity" should be more broadly construed when a finding of unprotected activity would result in the discharge of an employer.

The dissent agreed with the ALJ, the Board and, indeed, the majority in finding the leafleting protected, but disagreed that the employer had proved a legitimate business reason for the discharge. While acknowledging that plant superintendent Atkins, who had discharged the four employees, was "a sincere and avowed anticommunist, and thus was enraged by the distribution of this literature," Judge Hug perceived no evidence that Atkins actually believed that the leaflet's content would result in violence in the plant.

The dissent noted that Atkins' statement regarding his refusal}

137. Fun Striders v. NLRB, 686 F.2d at 663. Of course, where there is a collective bargaining agreement, an employee can generally only be discharged for cause. There was no such agreement at Fun Striders.

138. Id. at 664.

139. Id. (citing Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 61-63 (1966)). In Linn, the Supreme Court considered an action by a company manager against the union for defamation. The union had circulated leaflets during the course of its campaign to organize the company's managers. The Court considered what latitude the union might have to criticize the company in light of Section 8(c) of the Act, which provides, in pertinent part that the "expressing of any views, argument or opinions . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

We acknowledge that the enactment of Section 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered against the background of a profound . . . commitment to the principal that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometime unpleasantly sharp attacks. Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. Linn at 62-63. See also NLRB v. Cement Transport, Inc., 490 F.2d 1024, 1029-30 (6th Cir.), cert. denied, 419 U.S. 828 (1974) (substantial evidence supported finding of discriminatory discharge of employee leading union organizational drive despite employee's threat to "tear the company down" and alleged circulation of baseless rumor that employer had been bribing union official.)

140. 686 F.2d at 664 (citing Linn and Cement Transport).

141. Id. "It seems that more latitude should be allowed in finding protected activity when the consequences are the discharge of an employee for expressions of views during a labor dispute than would be the case when the issue is the prospective application of an employer rule."
to reinstate, *i.e.* that the distribution of the literature had indicated to him that the four employees were communists, would be relevant to a mixed motive determination in that “[i]t would bear on the question whether the four employees were denied reinstatement because of protected or unprotected activity.”\(^{142}\) However, since all the bodies that had passed on the matter agreed that the motive for the denial of reinstatement was the distribution and this was protected activity, such a mixed motive analysis was unnecessary.\(^{143}\)

Judge Hug’s essential point is a sound one: that after an employer has shown that his participation in protected activity was a factor in an employer action against him, the employer must *prove* and not merely articulate a legitimate business reason for the action. Under most circumstances, the political affiliation of the employee could not serve as such a legitimate business reason if the employee expresses his political ideas in the context of engaging in protected activity.\(^{144}\) In *Fun Striders*, the employer argued that the advocacy

\(^{142}\) *Id.* at 665 n.1. The dissent quoted the following excerpt from Atkins testimony:

Q. Okay. And at the time you denied reinstatement to Mr. Ruiz and Mr. Marín, you based your decision on good faith belief that these people had distributed literature?
A. Yes.
Q. So you fired the four people because of your belief that they were communists at the time?
A. I object to that word “fired.” They were not welcome back to work.
Q. You didn’t welcome them back because of your belief that they were communists at that time?
A. That’s right.
Q. You never interviewed these particular people at that time to obtain their explanations regarding these events; is that correct?
A. You mean did I have conversation with the four people who were not welcome back?
Q. Yes.
A. Other than telling them on that August—
Q. Did you ever ask them for their particular side of the story with respect to the leaflets?
A. No.
Q. In fact, you never had a conversation with them after the walk-out commenced, is that correct?
A. Uh-huh.

*Id.* at 664 n.1. The dissent further stated that Atkins’s testimony:

only indicated his displeasure with the contents of the leaflets and his belief that the four were communists. He did not notify his supervisors of any such potential violence. He did not indicate that the past conduct of these employees justified such a conclusion. I find nothing in Atkin’s testimony to indicate that this action was necessary to preserve the peace at this factory, nor that he even believed it was necessary.

*Id.* at 664-65.

\(^{143}\) *Id.* at 665.
\(^{144}\) *Id.*
of "violent revolution" created a potential for violence in the factory, but as the dissent pointed out, the employer did nothing to prove this. In fact, there is no indication that the advocacy of "violent revolution" in the leaflet was anything but a "mere abstract teaching . . . of the moral propriety or necessity for a resort to force and violence" that is distinct from "preparing a group for violent action and steering it to such action."¹⁴⁵

Evidently, the Fun Striders majority was either unaware of this long-standing distinction or chose to believe the employer's wholly unsupported assertion that he feared "violence" in the plant as a result of the leaflets, even though there was no evidence that any non-management employee acted upon or reacted adversely to the passage in the leaflet concerning "violent revolution." While it may well be that Atkins detested communism, the employer's failure to show that its purported fears might become real mandated finding that the refusal to reinstate employees militantly active on behalf of the plant's workers was pretextual.¹⁴⁶

¹⁴⁵. In Picker Corp., 222 NLRB Dec. (CCH) ¶ 17,138 (1976), the Board considered the discharge of Dr. Alan Strelzoff from his employment as a technical writer at Picker. Strelzoff was a union activist and, more importantly, a member of the Progressive Labor Party. Strelzoff was helping in the formation of a union at his workplace but, as in Fun Striders, the ALJ found that there was no direct evidence that the employer knew of any union activity among its employees and, particularly, that the employer knew of no union activity by Strelzoff. Id. at 299. However, the employer did learn, through another employee and through Strelzoff's past employer, that Strelzoff was a declared communist and had worked against what he perceived to be a racist research project conducted by his former employer. As in Fun Striders, the employer's agent who terminated Strelzoff was a hardened anti-communist who, the ALJ concluded, carried out the termination because of Strelzoff's political affiliation. Id. at 300. While the ALJ found no section 8(a)(1) violation as to Strelzoff on that account and the Board affirmed, in terminating Strelzoff, the employer's agent did not state that he was firing him because of politics, but because Strelzoff's presence in his department was "disruptive" and there had been an observable increase in the militancy of the work force since Strelzoff arrived. The ALJ concluded that the employer's agent would consider any communist to be disruptive and had fired Strelzoff soon after he learned the latter was a communist. See also Whittaker Knitting Mills, Inc. Div. Whittaker Corp., 207 NLRB Dec. (CCH) ¶ 26,066 (1973) (discharge solely for being a Communist not a violation of NLRA).


Even if Atkins' action was a "political statement" and not an effort to rid the employer of its antagonists, the courts should balk at allowing the employer to curb associational rights of employees by conditioning their employment on the employees' abjuring an ideology not approved by the employer, particularly when the ideology is one so intertwined with the concept of "labor struggle." See NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) ("Any assess-
VII. THE NEW YORK UNIVERSITY MEDICAL CENTER CONTRACT

_NLRB v. New York University Medical Center_\(^{147}\) involved employees whose ideology was similar to those of the Fun Striders shoeworkers who were refused reinstatement, but who carried out their union and political activities in a unionized workplace. Faustino Vargas, Leigh Benin and Laszlow Berkovits all worked at N.Y.U. Medical Center as technicians. Benin and Vargas were “delegates” or shop stewards of District 1199, National Union of Hospital and Health Care Employees (NUHHCE). All three were members of the Committee Against Racism (CAR),\(^{148}\) a national organization allied with the Progressive Labor Party.

In September, 1979, elections were to be held for District 1199’s delegates to the national convention. Members of CAR and PLP formed an electoral slate (“Slate 2”) of twelve persons to run against District 1199’s incumbent officers. Balloting for convention delegates was to take place on September 18 for the union’s guild division and on September 25 for the union’s hospital division. On the first date, Slate 2 received sixty percent of the vote.\(^{149}\) Leigh Benin distributed two leaflets on September 21, 24 and 25. Faustino Vargas participated in the second distribution.\(^{150}\)

\(^{147}\) 702 F.2d 284 (2d Cir. 1983), vacated and remanded on other grounds, 464 U.S. 805 (1983).

\(^{148}\) See _supra_ note 10.

\(^{149}\) 702 F.2d at 287.

\(^{150}\) New York Univ. Medical Center, 261 N.L.R.B. 822, 823 (1982). The first leaflet stated, in pertinent part: “Vote Slate 2, the Anti-Racist Slate. We urge 1199 Hospital Division Workers to Vote Slate 2 on Tuesday, September 25 . . . Join the Committee Against Racism.” (General Counsel’s Exhibit 4) The second leaflet stated:

The bosses are making it harder for us everyday! Every pay check buys less food and other necessities! 26 hospitals have closed, costing thousands of jobs. At NYU harassment (for calling in sick, etc.) and arbitrary firings have increased tenfold. And the NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them.

The bosses inflation, hospital closings, layoffs, harassment, and firings have hit lower paid, mainly black and latin workers hardest. At the same time the bosses are building up Klan and Nazi ‘white power’, punks to further divide us. All of this builds fascism, which will put all workers in chains. We must fight racism to unite workers against the bosses’ growing fascism.
N.Y.U. informed Benin and Vargas on September 28, 1979 that the distribution of the second leaflet "‘constitute[d] grounds for disciplinary action’" and that "‘any repetition of this or similar misconduct will result in appropriate disciplinary action, including suspension or discharge.’"15 The two employees filed grievances. During the period October 5 through October 9, 1979, these two employees, with a third employee Lazslow Berkovits, distributed another leaflet.162

In all of this, the leadership of 1199 from Davis down to Punk dis-organizer Roger Hayes have allowed the bosses to walk all over us. By refusing to fight and blocking those of us who are willing to fight the bosses, Davis and Co. are helping the bosses to build fascism.

Moreover, while CAR has been organizing workers, on a multi-racial basis, to bear up the segregationist Klan all over the country, Davis has built segregation into 1199 by setting up Divisions that separate nurses aides, building service, kitchen, central service, etc.—(Hosp. Div.) who are almost 100% black and latin, from technicians, social workers, etc.—(Guild) half of whom are white. The lower paid Hospital Div. of workers are discriminated against by the 1199 contract. They work 37 1/2 hours and get 2 weeks vacation, while 3/5 of the Guild work 35 hours and get 4 weeks vacation. 1199’s percentage raises also give less to lower paid workers. We are organizing a campaign to abolish these racist divisions in order to unite 1199ers.

On Tuesday, Sept. 18th NYU Guild Div. 1199ers voted for the CAR-PLP slate (#2) by a 60% majority! WE URGE HOSPITAL DIVISION MEMBERS TO VOTE SLATE 2 AT THE 1199 MEETING on Tuesday, Sept. 25th at 7:30 AM, 2:PM, 4:PM in I.R.M. Room 610A (take the elevator in IRM to the sixth floor and walk like you are going to First Ave.)

Turn 1199 into an anti-fascist union led by the anti-racist rank and file.” (General Counsel’s Exhibit 5)

In the past two weeks three important things have happened at N.Y.U. On Sept. 18 Committee Against Racism’s (CAR) Slate 2 won the election in the Guild Division (the election for delegates to the 1199 constitutional Convention). On Sept. 25 the union misleadership organizer, Roger Hayes, stuffed the ballot box in the Hospital Division election with 44 extra votes. On Sept. 28 the N.Y.U. management gave correction notices to the two main leaders at N.Y.U. of the International Committee Against Racism, Leigh Benin and Sam Vargas, Slate 2 candidates.

Why is the N.Y.U. Management trying to harass us? It is to try to intimidate N.Y.U. workers and fire Sam Vargas, Committee Against Racism member, and Leigh Benin, CAR and PLP member. It is because N.Y.U. workers led by CAR have shown that we can take the bosses head on: we fought and won against some racist firings and we are making headway in turning 1199 into a militant, anti-racist union by destroying all the racist divisions in the union to unite us into a powerful multi-racial union.

We reaffirm our charge that the N.Y.U. management is using the security guards for fascist Gestapo tactics to intimidate black and Spanish workers. (Some security guards are opposed to this.) For example, Thurs., Sept. 27, a Spanish kitchen worker was taken from the door beside the Emergency Room exit and taken to the Security guard’s office and searched thoroughly. They found nothing!
On October 5, Benin was suspended without pay for having distributed this leaflet. On October 8, Benin, Vargas and thirteen others picketed in front of the home of an N.Y.U. Medical Center assistant administrator, Keith Safian. Neither Benin or Vargas entered Safian's property, but another picketer left two signs next to Safian's mailbox. One read "Safian, You Fascist, We'll Burn You into Ashes"; the other read "Safian Uses Fascist Tactics Against Workers". Benin's picket sign accused Safian of committing unfair labor practices, while Vargas' announced a CAR rally.

On October 11, N.Y.U. discharged Benin, suspended Vargas and sent a written warning to Berkovits. The employer's telegram to Benin read:

> You are hereby terminated from your employment at New York University Medical Center for threatening a Medical Center Administrator and his family and engaging in intimidating behavior outside his house on October 8, 1979.

> Your recent activity in distributing leaflets containing inflammatory and baseless charges which incited employees and disparaged the good name and reputation of the Medical Center was also considered in reaching the decision to discharge you.

The reasons given for Vargas' suspension were the same, while Berkovits was warned for his distribution of this third leaflet.

Benin and Vargas' grievances went to an arbitrator, but Vargas withdrew from the arbitration after the second day of hearings. The arbitrator ruled on May 20, 1980 that Benin had been discharged for good cause and that the contents of the leaflets were "inflammatory, irresponsible, and hence unprotected under the Act." The General Counsel filed an 8(a)(1) complaint.

The Administrative Law Judge found that the language contained in the leaflets did not render their distribution unprotected under the Act. The ALJ noted that employee literature, if otherwise protected, loses that status in certain instances, i.e. when it disparages the employer's product or services, is material so disruptive

If the N.Y.U. management feels threatened, it has reason to be because we mean business!

702 F.2d at 287.

153. Id. at 288.

154. Id.

155. Id.

as to threaten discipline,\textsuperscript{157} or contains malicious falsehoods.\textsuperscript{158} The ALJ pointed out that the leaflets did not attack the employer’s service (health care) and did not incite disruption. Whether they could be said to contain “malicious falsehoods” turned on whether the employees who were disciplined for distributing them knew that statements contained in the leaflets were false or were published with reckless disregard for the truth.\textsuperscript{159} The ALJ found that they did not know that any statements made in the leaflets were false, nor did they publish any statements with reckless disregard for whether they were true or not. The ALJ further noted that use of terms such as “fascist” and “racist” have been held to be protected.\textsuperscript{160} Since the literature was protected, the ALJ found that the disciplinary warnings issued to the three employees and the suspension of Benin violated Section 8(a)(1) of the Act.

The ALJ did not reach the question of whether the picketing of Safian’s home was also protected, finding that the distribution of leaflets was “a motivating factor in Benin’s discharge and Vargas’ suspension.” The ALJ applied \textit{Wright Line}. He quoted the telegram to Benin that indicated that the latter’s leafleting was a motivating factor in the employer’s decision and also quoted a statement of Safian’s at Benin’s unemployment compensation hearing that indicated that the leaflet was a factor in Benin’s discharge. The employer failed to show that Benin would not have been discharged and Vargas would not have been suspended but for the picketing.\textsuperscript{161} Safian had testified as to the existence of a three-step disciplinary

\textsuperscript{157} 261 N.L.R.B. at 824 (citing Southwestern Bell Tel. Co., 200 N.L.R.B. 667 (1972)) (employees wore T-shirts bearing legend “Ma Bell is a Cheap Mother”).

\textsuperscript{158} 261 N.L.R.B. at 824 (citing Great Lakes Steel, Div. of Nat’l Steel Corp., 236 N.L.R.B. 1033 (1978)) (distribution of leaflet terming employer’s safety policy “murderous” protected). Examples of instances of loss of protection for employee speech are cited in Judge Garth’s concurrence in Pacemaker Yacht Co. v. NLRB, 663 F.2d 455 (3d Cir. 1981), i.e., when done in connection with an attempt to establish minority bargaining despite the existence of an exclusive collective bargaining representative, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975); when “obscene” language accompanied by “disruptive behavior” occurs, Sullair P.T.O., Inc. v. NLRB, 641 F.2d 500 (7th Cir. 1981); when confidential wage information is disseminated, Texas Instruments v. NLRB, 637 F.2d 822 (1st Cir. 1981) and when employee meetings are disruptive, National Vendors v. NLRB, 630 F.2d 1265, 1268 (8th Cir. 1980).


\textsuperscript{160} 261 N.L.R.B. at 824, n.4 (citing Cafeteria Employees Union Local 302 v. Angelos, 320 U.S. 293, 295 (1943)) (“fascist”); Owners Maintenance Corp., 232 NLRB 100, 102 (1977), enf’d. 581 F.2d 44 (2d Cir. 1978) (“racist”). \textit{See also} National Ass’n of Letter Carriers v. Austin, 418 U.S. at 283 (“scab”).

\textsuperscript{161} 261 N.L.R.B. at 824-25.
procedure at N.Y.U., and that N.Y.U. had failed to follow that procedure. The ALJ, therefore, found Benin's discharge and Vargas' suspension to violate section 8(a)(1). 162

The Second Circuit163 considered the propriety of the Board's Section 8(a)(1) determination by taking up the employer's arguments that the leaflets "contained provocative language which was disruptive of discipline . . . falsehoods published in reckless disregard of the truth . . . and . . . manifested disloyalty to the employer and hence lost all protection under the Act."164 While acknowledging that the leaflets were provocative the Second Circuit held that they were protected and also noted related cases with similar holdings.165

The Court concluded that the words used in the leaflets could not, by themselves jeopardize plant discipline and, indeed, N.Y.U. had not produced any evidence that it had a reasonable expectation that any misconduct would ensue from the leaflets. The New York University Medical Center court quoted166 from the Supreme Court's opinion in National Association of Letter Carriers v. Austin167 to the effect that a union has "license to use intemperate, abusive or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point."168 The Second Circuit then discussed the question of the leaflet's advocacy of "violence." Its discussion is worth quoting in full:

The Center insists that the leaflets advocates violence. From its perspective, the first leaflet's call for "beat[ing] up the segregation-

162. NLRB v. New York Univ. Medical Center, 702 F.2d 284 (2d Cir. 1983). The unanimous panel consisted of JJ. Timbers, Kearse and Pierce, with Timbers, J. writing.
163. Id. at 289.
164. Id.
165. The court cited: Southwestern Bell Tel. Co., 200 N.L.R.B. 667 (1972) ("Ma Bell is a Cheap Mother"); Borman's, Inc. v. NLRB, 676 F.2d 1138 (6th Cir. 1982) (employer's prohibition on employee's wearing T-shirt lettered "I'm tired of bustin' my ass" upheld; wearing of T-shirt not a section 7 right); Boaz Spinning Co. v. NLRB, 395 F.2d 512 (5th Cir. 1968) (employee's discharge for publicly accusing plant manager of being "no different from Castro" upheld). Id. at 289. Each involved a slogan or statement that "could reasonably be perceived as a threat to plant discipline," Id. at 290 (quoting Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320, 329 (7th Cir. 1976)) (employee's leafleting to garner co-worker support for his grievance protected by NLRA) to the effect that approbrious language uttered during otherwise protected activities is "likewise protected unless found to be 'so violent or of such serious character as to render the employee unfit for further service.'" Id. The court's query thus became whether "the language in the leaflets was likely to produce misconduct or generally disrupt discipline." Id.
166. 702 F.2d at 290.
168. N.Y.U. Medical Center, 702 F.2d at 290 (quoting Austin, 418 U.S. at 283).
The Politicized Worker

The Politicized Worker

Fairly viewed, we believe that the leaflets taken as a whole simply did not exhort the employees to violence. The reference to beating up the Klan does not suggest that the administration would be an appropriate target for retributive rage, and the statement “we mean business” in context seemingly refers to the prior discussion of the need for defending employee rights vigorously. Indeed, the leaflets employ rhetoric unexceptional for a splinter political group. Testimony was presented at the hearing that the group had passed out similar leaflets earlier with no adverse administrative reaction.

Moreover, the Center’s argument takes the leaflets completely out of context. The principal aim of the first leaflet was not to provoke other employees against management, but to curry favor among potential voters for the dissident slate. The CAR faction wished to appear as militant as possible, hoping eventually to wrest leadership of the Union from the incumbents. The leaflet did identify issues pertinent to employees’ working conditions— inflation and the alleged searches of minority workers. The second leaflet similarly sought to garner support for the dissident faction. It protested the Center’s decision to mete out discipline in the wake of the first leaflet, and reasserted the charge that the Center’s security guards had carried out illegal searches. Challenges to the incumbent union’s performance as collective bargaining representative fall within the ambit of § 7 protected activities.

Both leaflets, therefore, primarily attempted to rally employees to the dissident side and not to incite employees against the Center. There had been no history of violence at the Center and no showing of incipient labor-management strife. The leaflets did not pose a continual challenge to the administration’s authority in the same sense as did the slogan “Ma Bell is a Cheap Mother” emblazoned across the employees’ sweatshirts in Southwestern Bell. Nor was there the same potential for friction as with shirts advertising “I’m tired of bustin’ my ass” in Borman’s. Unlike the situations in these two cases, the alleged incendiary language in the leaflets in the instant case was directed at fellow employees and the presence of the leaflets did not serve as a constant irritant in the same way as the clothes worn in Borman’s and Southwestern Bell. The leafleting was an essential means to enable the dissident faction to communicate with the rest of the rank-and-file. We hold that substantial evidence supports the Board’s determination that the objectionable language in the leaflets posed no danger of breach of employee
The analysis of the leaflets' language here stands in marked contrast to that of the majority in *Fun Striders*. The *New York University Medical Center* court recognized that the discussion of the use of force in the leaflets was not directed toward the N.Y.U. management, that the leaflets employed language not atypical for a non-conforming political organization and that the group had distributed similar leaflets before, with no response from N.Y.U.'s management. The Second Circuit evinces a political prejudice by concluding that the leaflets' authors were mainly attempting to "rally employees to the dissident side" in the union election, rather than to organize to stop the practices of which the leaflet complained. The court, however, based its conclusion on the actual content and effect of the leaflet. In contrast, the *Fun Striders* majority based its conclusion on little more than the fear of one management figure that the workers at his factory would translate an abstract call to revolution into strife at the workplace.

In *District Lodge 91, International Association of Machinists and Aerospace Workers v. NLRB*, an employee of the United Technologies Corporation parked a van in the company parking lot that displayed a 4' x 6' sign endorsing a candidate for president of the union local. The company had a rule banning the display of large signs and disciplined the employee. The Board issued a complaint alleging that the sign rule violated § 8(a)(1) of the Act and the NLRB, in a 2-1 decision, ruled that while the employee's conduct was protected, the company rule represented a permissible balancing of managerial interests and employee rights. The dissent responded that the majority had wrongly relied upon cases implicating employer property rights and not managerial concerns; moreover, the employer had failed to assert any recognized managerial justification for its rule.

The Second Circuit, also by a 2-1 margin, agreed with the

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169. 702 F.2d at 290-91 (citations omitted).
170. The court itself recognized that N.Y.U. produced no witnesses to rebut the testimony of Benin, Vargas and Berkovits that they had received reports from specified individuals about the searches, including from some who claimed to have been searched. Yet, the court concluded that the charges in the leaflets "merely manifested the rhetoric characteristic of other parts of the leaflets," *id.* at 291-92, instead of admitting the possibility that, given the failure of management to rebut the three employees' testimony, the charges of improper searches may have been supportable.
171. 814 F.2d 876 (2d Cir. 1987).
172. *Id.* at 878-79.
Board dissenter. The majority distinguished cases balancing Section 7 rights against employer property rights and those involving managerial concerns. Citing *Eastex* and other cases, the court noted that once an employer brings an employee onto his property, he no longer has a property rights argument. Managerial rights cases presume unreasonableness when an employer restricts employees' on-premises communications in non-working areas during non-working hours and burden employers with proving that the restriction is necessary to maintain production or discipline. In the case before it, the employer had not identified any legitimate business need for restricting clearly protected speech.

The *New York University Medical Center* court, in contrast to the *Fun Striders* court, treated the political statements in the leaflets in question in their labor context. In *Fun Striders*, the court treated the portions of the leaflets that dealt with revolutionary politics as something apart from the ongoing disputes at the plant.

There was no evidence that the employees who distributed the leaflets at *Fun Striders* were anything but workers who proceeded in a rational fashion to organize around ordinary grievances. All that distinguished them from their fellow workers was that they viewed these grievances in a political context and expressed themselves accordingly.

The Second Circuit, of course, did not deal with leaflets that expressed the employees' perceived grievances in precisely revolutionary terms, although the court recognized that the language used was "provocative."

The Second Circuit recognized, however, that such militancy was not necessarily something apart from the predictable course of industrial dispute. It quoted the Supreme Court in *Linn v. United Plant Guard Workers, Local 114*:

Labor disputes are ordinarily heated affairs . . . characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embalming their respective positions with imprecatory

173. Altimari, J., writing, and Kaufman, J.
175. Dist. Lodge 91, 814 F.2d at 880.
176. Id. at 881-82.
177. 702 F.2d at 289-90.
language.\textsuperscript{179}

Concluding that the leaflets were not defamatory and agreeing with the Board that they showed no "disloyalty" under the applicable case law, the Second Circuit held that the leaflets were protected and that "[a]ny discipline that stemmed directly from this concerted protected activity violated Section 8(a)(1) of the Act."\textsuperscript{180}

\textsuperscript{179} 702 F.2d at 292 (quoting \textit{Linn}, 383 U.S. at 58).

\textsuperscript{180} \textit{NLRB v. New York Univ. Medical Center}, 702 F.2d at 292. Although enforcing that part of the Board order which required N.Y.U. to rescind the warning letters and to compensate Benin for his suspension because "the leafleting was the acknowledged predicate" for these disciplinary measures, the court disputed the Board's application of \textit{Wright Line} to the question of whether Benin was discharged and Vargas suspended because of their participation in the leafleting. \textit{Id.} The court discussed the merits and demerits of \textit{Wright Line} at great length, \textit{id.} at 292-98, and noted that the case at bar "clearly illustrate[s] what we regard as the critical distinction between placing the burden of production upon the employer as opposed to the burden of persuasion." The court reasoned that the final disciplining of Benin and Vargas was an example of a mixed motive case, since the distribution of the leaflets was clearly protected, while the picketing may or may not have been protected. Under \textit{Wright Line}, the employer, if able to establish that the picketing was unprotected, would have to prove that it would have disciplined the employees for picketing even if they had not participated in the leafleting. The Second Circuit's rejection of \textit{Wright Line} meant that before the Board "concludes that an unfair labor practice was committed, it must be satisfied that the General Counsel has proven by a preponderance of the evidence that the unlawful motive engendered the disciplinary measure." \textit{Id.} at 298.

The court was unpersuaded that had the Board only placed a burden of production on N.Y.U., rather than a burden of proof, it would have arrived at the same result, i.e. concluded that the protected leafleting was the "but for" cause of the firing of Benin and the suspension of Vargas. The Supreme Court's vacating and remanding of the decision in \textit{Transportation Management Corporation} meant that the Second Circuit would have to view the Board's application of \textit{Wright Line} as permitted and examine whether there was substantial evidence in the record as a whole to support the Board's conclusion that the employer failed to prove that it would have carried out the firing and suspension of the two employees absent their participation in the leafleting. On remand the Second Circuit enforced the Board order. \textit{See} \textit{NLRB v. New York Univ. Medical Center}, No. 82-4137, \textit{Order on Remand From Supreme Court} (2d Cir. Sept. 5, 1984), reproduced at 1aa, 2aa in New York University Medical Center, Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, filed with the United States Supreme Court, December 3, 1984 in New York Univ. Medical Center v. \textit{NLRB}, No. 84-919. In its petition for certiorari, the N.Y.U. Medical Center argued that the Second Circuit should have based its ruling on \textit{Fun Striders}, Petition at 28-33, based on the Supreme Court's recognition in \textit{Eastex}, 437 U.S. at 573 n.22 that material that is inflammatory to the point of threatening disorder to the functioning of the business loses its section 7 protection. The Medical Center maintained that statements in the leaflets passed out there had a much greater inflammatory potential than did the slogans on t-shirts that were held unprotected in \textit{Borman's inc. v. NLRB}, 676 F.2d 1138 (6th Cir. 1982) ("I'm tired of bustin' my ass") and \textit{Southwestern Bell Tel. Co.}, 200 N.L.R.B. 667 (1972) ("Ma Bell is a Cheap Mother."). Petition at 33-34. The Medical Center also claimed that the disciplined employee's statement that the employer had carried out illegal searches of workers amounted to an assertion that the employer had committed assaults and batteries and hence was disloyal. \textit{Id.} at 39-93. Finally, the Medical Center maintained that the Board was required to defer to the arbitrator's award that upheld the discharge of one of the employees, Leigh Benin. \textit{Id.} at 47-52.
The Second Circuit has reaffirmed this approach in *N.L.R.B. v. Pratt & Whitney Air Craft Div.*\(^{181}\) In the first of these cases and in District Lodge 91,\(^{182}\) the union distributed leaflets containing Jack London's renowned definition of a "scab,"\(^{183}\) and then published lists of non-union workers in the employer's plant. The employer responded by banning further distribution of such literature on its premises and threatening disciplinary action against any employee who disregarded the prohibition. The ALJ found an 8(a)(1) violation, which was upheld by the Board.\(^{184}\) The Second Circuit also agreed that this prohibition as an 8(a)(1) violation, disagreeing with the employer's purported business justification that the language of the leaflets violated a company/union collective bargaining agreement structure that workers be free to choose whether or not to join the union.\(^{185}\)

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181. 789 F.2d 121, 128 (2d Cir. 1986).
182. 814 F.2d 876 (2d Cir. 1987).
183. The definition, which describes a scab as "lower than a rattlesnake," etc., one who sells his "birthright, country, wife, children" etc., is quoted in full in National Ass'n. of Letter Carriers v. Austin, 418 U.S. at 268.
185. *Pratt & Whitney*, 789 F.2d at 128. The court explained that:

Section 8(a)(1) prohibits employers from interfering with the exercise of § 7 rights, and an employer cannot, for example, arbitrarily issue a blanket rule forbidding distribution. Although distribution and posting of union literature may not be prevented during non-working time in non-working areas, such a restriction is enforceable when special circumstances are shown. Such special circumstances exist when the leaflet is on its face inflammatory or potentially inflammatory. "[T]he critical question is not merely whether the leaflets are provocative, but whether the provocation could be expected to threaten plant discipline." Special circumstances must be proved by the employer. In evaluating such a claim, deference is granted to the Board's findings.

Language in union distributions can threaten plant discipline in two possible ways. First, the words chosen could themselves be so offensive on their face as to create a reasonable expectation that plant discipline will be disrupted. Neither the use of the scab terminology nor the London definition fall in this per se category. The Supreme Court has noted that "the Board has concluded that epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in these struggles and not so indefensible
VIII. CONCLUSION

The pertinent case law indicates that protection of politicized communications is broad. In both *Fun Striders* and *New York University Medical Center*, the courts held that the distribution of the leaflets was protected, but in *Fun Striders* the court decided—wrongly—that a word in the leaflets removed that protection. Had the leaflet used a word other than "violence" in connection with its discussion of the need for revolutionary organization, it is doubtful that the *Fun Striders* majority would have had anything on which to base its decision that the employer's fears that violence might erupt in the factory presented a "legitimate business reason" which would put the leafleting outside the Act's protection.  

Given what amounts to an endorsement of the *Wright Line* analysis by the Supreme Court in *NLRB v. Transportation Management Corporation* and its progenies, it is doubtful that any court could reach the same result as the *Fun Striders* majority since the employer clearly did nothing to prove a legitimate business reason. *Fun Striders* therefore has little precedential value. On the other hand, the analysis of the Second Circuit, at least with regard to the protectability of the leafleting, can and should continue to be followed. That approach and analysis in earlier cases leads to the conclusions that all employee literature that incorporates references to employee grievances qua employees either at the place of the literature's distribution or at other locations, no matter how politicized, is protected, provided only that the literature does not have an ascertainable effect of impairing the order and discipline of the workplace.

Concomitantly, "wholly political" literature is protected, provided that it is not principally concerned with electoral politics. In *Ford Motor Co. (Rouge Complex)*, the Board declined to pass on

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186. *Fun Striders v. NLRB*, 686 F.2d at 662; *NLRB v. New York Univ. Medical Center*, 702 F.2d at 292.
189. *Id.*
the question of whether the "revolutionary" literature, characterized by the ALJ as "wholly political", was entitled to protection. In Local 174, International Union, UAW v. NLRB,\(^\text{190}\) it was noted that the Board gave little protection to "political literature" designed to induce voting for specific candidates implying that some modicum of protection is given to "political literature" that does not focus exclusively on persuading voters.

Literature designed to educate employees as to political issues that affect their employment conditions was entitled to the most protection. This would mean that employees should be entitled to distribute literature fitting the latter definition on company property, in non-working areas and during non-working hours. Particularly, the distribution of this type of dissident or "radical" literature by employees is protected by the NLRA [(including newsletters and newspapers)], where this literature is devoted in large part to accounts of "labor struggles." In fact, the very precepts endorsed by some of the distributors of such literature mandate that their literature serve as an "organizing tool" of labor.\(^\text{191}\)

This is not to say, of course, that no distribution of "politicized literature" can be prohibited. For example, there can be little doubt that the distribution by employees of racist literature would create great potential for strife within a workforce and such a distribution would most clearly not be protected by the Act.\(^\text{192}\) However, under most other circumstances, employers are now required to accommodate the political choices of employees and permit the distribution of literature which speaks to "employee" concerns, whether particular to the employer's place of business or more generally concerning labor. With few exceptions, an employer may not use its unsupported estimate of the possible effect of political views enunciated by employees in the course of carrying out otherwise protected concerted activities as a "legitimate business justification" for disciplining the employees.

\(^\text{190}\) 645 F.2d 1151 (D.C. Cir. 1981).

\(^\text{191}\) See V. LENIN, What Is to Be Done?, in 2 SELECTED WORKS 19 (1969) ("a newspaper is not only a collective propagandist and collective agitator, but also a collective organizer").

\(^\text{192}\) See, e.g., Nelson v. Entrex, 110 L.R.R.M. (BNA) 2312 (1981) (union did not breach its duty of fair representation when it withdrew, prior to arbitration, grievance of former employee discharged for mailing racial, anti-Semitic literature to the homes of employer officials and employees).