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Labor Law - National Labor Relations Act - Section 7 - Concentrated Activity

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Recent Decisions

LABOR LAW—NATIONAL LABOR RELATIONS ACT—SECTION 7—CONCERTED ACTIVITY—The United States Supreme Court has held that an individual employee who asserts a right contained in his collective-bargaining agreement is engaged in “concerted activity” within the meaning of section 7 of the National Labor Relations Act.


On Saturday, May 12, 1979, James Brown, a truck driver for City Disposal Systems, Inc. (the company), was involved in a near collision at the company’s landfill due to the faulty brakes in the truck (No. 244) assigned to a coemployee.¹ Brown accompanied his coemployee to the company’s mechanical department, where they were told that the brakes would be repaired over the weekend or on Monday morning.²

On Monday morning, when problems developed with Brown’s truck (No. 245), he returned to the mechanical department. Brown reported the problem to his supervisor who first told him to “punch out” and go home, but then asked him to drive truck No. 244. Brown refused to drive this truck, citing its brake problems. An argument followed and another supervisor became involved. Brown referred at one point to the “safety of the men,”³ but did

1. NLRB v. City Disposal Systems, Inc., 104 S. Ct. 1505, 1508 (1984). City Disposal Systems, Inc., is a contract garbage hauler for the City of Detroit. Its drivers haul garbage to a landfill approximately thirty-seven miles from the city. Each driver is assigned a truck which he or she drives each day, provided there are no mechanical problems with that particular vehicle. Id.
2. Id. at 1508. The Administrative Law Judge indicated that Brown and his coworker were told that truck No. 244 would be fixed “over the weekend.” City Disposal Systems, Inc., 256 N.L.R.B. 451, 452 (1982). In the restatement of the facts by the Court of Appeals, however, the Monday morning alternative was inexplicably added. City Disposal Systems Inc. v. NLRB, 683 F.2d 1005, 1006 (6th Cir. 1982), rev’d, 104 S. Ct. 1505 (1984). While this point is not an issue in the present case, its significance lies in the fact that the Supreme Court based its decision in part on the finding that Brown was expressing a “reasonable belief” that truck No. 244 was in disrepair. 104 S. Ct. at 1516.
3. 104 S. Ct. at 1509. It is of interest, if not of relevance, that the ALJ discounted all of Brown’s uncorroborated testimony due to his prior conviction (approximately ten years
not refer specifically to his rights under the collective-bargaining agreement or even to the existence of the agreement which covered him. The argument finally ended with the supervisors returning to their offices and Brown going home. Later in the day, Brown was notified that he had been discharged. His subsequent attempts to regain his employment were not successful.

The next day, Brown filed a written grievance with the union in accordance with the collective-bargaining agreement. The union, however, refused to process the grievance since it found no objective merit to Brown's complaint. There was no evidence that Brown sought to involve other employees in his claim, or to warn them of the potential danger of operating truck No. 244.

Brown filed an unfair labor practice charge with the National Labor Relations Board (the Board) on September 7, 1979. The Administrative Law Judge (ALJ) held that Brown was discharged for refusing to drive truck No. 244, that his conduct was "concerted activity" within the meaning of section 7 of the National Labor Relations Act (the Act) and that the company's discharge of

before) for the crime of uttering and publishing. 256 N.L.R.B. at 452.

4. 104 S. Ct. at 1509. The relevant provisions of Article XXI of the collective-bargaining agreement between City Disposal Systems, Inc. and Local 247 of the International Brotherhood of Teamsters are as follows:

The Employer shall not require employees to take out on the streets and highways any vehicle that is not in safe operating condition or equipped with safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

The Employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department. Id. at 1508 n.1.

5. Id. at 1509. The company's alleged reasons for the dismissal were that Brown had voluntarily quit and that he had disobeyed orders in refusing to drive truck No. 244. 256 N.L.R.B. at 453.

6. 104 S. Ct. at 1509. Brown charged that truck No. 244 was defective and that therefore the order to drive that truck and the subsequent dismissal for failure to follow the order were improper according to the terms of the collective-bargaining agreement. Id.

7. Id. The union applied an objective standard to the issue of whether Brown's refusal to drive truck No. 244 was "unjustified" based on its interpretation of the collective bargaining agreement. Id.

8. 104 S. Ct. at 1519 (O'Connor, J., dissenting). The company maintained a bulletin board for the employees to warn each other about equipment problems. 683 F.2d at 1007.

9. 104 S. Ct. at 1509. Section 7 of the National Labor Relations Act (the Act) provides in pertinent part:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 157 (1982).
Brown was, therefore, an unfair labor practice under section 8(a)(1) of the Act. The Board adopted the findings of fact and conclusions of law of the ALJ and ordered that Brown be reinstated with back pay. On petition for enforcement of the Board's order, the Sixth Circuit Court of Appeals refused enforcement on the grounds that Brown's conduct was not "concerted activity" and thus was not protected by section 7 of the Act.

The Supreme Court granted certiorari to resolve the conflict which had arisen among several courts of appeals over the scope of the concept of "concerted activity." The Court was thus confronted with the issue of whether an individual employee's honest and reasonable assertion of his rights under a collective bargaining agreement constitutes "concerted activity" within the meaning of section 7 of the Act. Justice Brennan's majority opinion answered this question in the affirmative, thereby reversing the holding of the Sixth Circuit. The case was remanded, however, to consider whether Brown's conduct was also "protected" by the Act.

Before the Court for the first time, then, was the specific issue of whether the Interboro doctrine, which deems an individual's reasonable and honest invocation of his rights under a collective-bargaining agreement to be "concerted activity" within the meaning of section 7 of the Act, was a reasonable interpretation of the

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10. 104 S. Ct. at 1509. Section 8(a)(1) of the Act provides:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7].


12. 683 F.2d at 1008. The court found no substantial evidence of "concerted activity" relying on the test established in the Sixth Circuit—whether the individual's claim was made "on behalf of other employees or at least . . . with the object of inducing or preparing for group action and [had] some arguable basis in the collective bargaining agreement." Id. at 1007 (quoting ARO, Inc. v. NLRB, 596 F.2d 713, 718 (6th Cir. 1979)).

13. 104 S. Ct. at 1508. Those decisions accepting the principle that the concept of "concerted activity" includes the claims of individuals invoking rights under their collective-bargaining agreements on their own behalf include: NLRB v. Ben Pekin Corp., 452 F.2d 205 (7th Cir. 1971); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217 (8th Cir. 1970); NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967). Those decisions rejecting the principle include: Royal Development Co. v. NLRB, 703 F.2d 363 (9th Cir. 1983); Roadway Express, Inc. v. NLRB, 700 F.2d 687 (11th Cir. 1983); NLRB v. Northern Metal Corp., 440 F.2d 881 (3d Cir. 1971). See also Kohls v. NLRB, 629 F.2d 173 (D.C. Cir. 1980), cert. denied, 450 U.S. 931 (1981) (expressing doubt about the validity of the Interboro doctrine); NLRB v. Buddies Super Markets, Inc., 481 F.2d 714 (5th Cir. 1973) (dictum).

14. 104 S. Ct. at 1516.

15. The court in NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967), stated that "while interest on the part of fellow employees would indicate a concerted pur-
Justice Brennan cited two rationales employed by the courts to form the basis of what has become known as the Interboro doctrine. First, the assertion of a right provided for in a collective-bargaining agreement is an extension of the concerted activity which gave rise to the agreement. Second, every employee covered by a collective-bargaining agreement is indirectly benefited by one employee's invocation of a right contained in the agreement.

Justice Brennan suggested that the conflict among the courts over the Interboro doctrine related simply to a disagreement regarding the nature of the relationship that must exist between the action of the individual and the actions of the group. No court, in fact, followed a strict interpretation of section 7 "concerted activity," which would limit application of the section's protections solely to situations where more than one employee act together. Rather, according to Justice Brennan, the focus had been on whether the individual was acting on his own behalf or on behalf of his coworkers.

Reviewing the legislative history of the Act, Justice Brennan found the Interboro doctrine entirely consistent with the Act's purpose, which he identified as reflecting a desire to equalize bargaining power between a company's management and its employees, to encourage collective bargaining and to promote labor stability. The Interboro doctrine, for example, recognizes that the bargaining inequality between employer and employee may con-
tinue even after the collective-bargaining agreement is in place, and thus attempts to mitigate the inequality by affording further protections to the individual employee. Furthermore, the reasonable statements or complaints of the individual employee may act as an effective alternative to the formal grievance process and become an independent means of enforcing and strengthening the collective-bargaining agreement.\textsuperscript{22}

The Court then considered the two primary arguments against the \textit{Interboro} doctrine: that the employer is unfairly disadvantaged and that the grievance/arbitration process is undermined. Rejecting first the argument that the employer is disadvantaged, Justice Brennan pointed out that the individual employee's conduct must be "protected" within the meaning of the Act. Furthermore, as with any contract, the employer is free to negotiate a provision in the collective-bargaining agreement which prevents this type of informal grievance procedure.\textsuperscript{23} Justice Brennan then maintained that the \textit{Interboro} doctrine does not undermine the arbitration process for three reasons: first, employees who take unfair advantage of their ability to circumvent the established grievance procedures risk the finding that their conduct is not protected by the Act; second, since the courts already recognize claims outside the grievance process when more than one employee is involved, the increase in claims arising from individual activity is unlikely to be significant; and third, the Board retains the power to defer resolution of the dispute to the grievance arbitration process.\textsuperscript{24}

Addressing the facts of the case at bar, Justice Brennan contended that there was sufficient evidence that Brown's conduct was "concerted activity" within the meaning of section 7 of the Act, as interpreted by the \textit{Interboro} doctrine. Brown's failure to refer explicitly to the collective-bargaining agreement did not invalidate his attempt to invoke his rights under that agreement. Again deferring to the discretion of the Board, the Court concurred that a requirement of explicit reference would be an unnecessary burden on the average working man.\textsuperscript{25} Furthermore, Brown's honest and reasonable belief that the truck was unsafe, rather than the objective standard applied by the union, was sufficient to bring his complaint within the definition of "concerted activity."\textsuperscript{26} In conclusion,

\begin{itemize}
\item \textsuperscript{22} Id. at 1513-14.
\item \textsuperscript{23} Id. at 1514.
\item \textsuperscript{24} Id. at 1514-15.
\item \textsuperscript{25} Id. at 1515.
\item \textsuperscript{26} Id. at 1516.
\end{itemize}
however, Justice Brennan stated that while Brown's conduct was clearly concerted activity, it was protected activity only if the right invoked by Brown was in fact protected by the collective-bargaining agreement. Since the issue of whether the activity was protected was not before the Court, it remanded the case for further consideration of this issue.27

Justice O'Connor's dissenting opinion, which was joined by Chief Justice Burger and Justices Powell and Rehnquist, maintained that the Interboro doctrine is an "exercise in undelegated legislative power by the Board."28 Agreeing with the majority's basic statement that the disagreement among the courts which have considered this issue is actually limited to a disagreement regarding the appropriate nexus between the individual and the group action,29 Justice O'Connor nevertheless suggested that the "concepts of individual action for personal gain and 'concerted activity' are intuitively incompatible."30 A major purpose of the Act, Justice O'Connor asserted, is to encourage employees to act together, since group action tends to reduce the inequality and tensions between employers and employees and provides for more efficient administration of labor-management relations. Given this basic purpose of the Act, then, Justice O'Connor concluded that the Interboro doctrine is not a reasonable interpretation of the Act.31

Justice O'Connor's primary criticism of the majority opinion was her contention that the majority had confused the employee's substantive contract rights with the process by which those rights are enforced. The real issue in the instant case, according to Justice O'Connor, was whether the employee's contract rights were to be enforced by the Board or by the employee's collective bargaining representative, with recourse to the courts in extreme cases. From her review of the legislative history of the Act, Justice O'Connor concluded that Congress had intended to limit the Board's power to enforce collective-bargaining agreements in order to avoid excessive governmental interference with these private agreements. The Board has considerable discretion with respect to unfair labor practices, but possesses limited discretion with respect to contract disputes when the collective-bargaining agreement is in place.32

27. Id.
28. Id. at 1517 (O'Connor, J., dissenting).
29. Id. at 1519 (O'Connor, J., dissenting).
30. Id. at 1517 (O'Connor, J., dissenting).
31. Id. at 1518-19 (O'Connor, J., dissenting).
32. Id. at 1517 (O'Connor, J., dissenting).
Addressing the facts, Justice O'Connor contended that the Interboro doctrine made "little sense" when applied to Brown's dilemma. She pointed out that Brown had not sought the aid of his coworkers, that he had not sought the aid of his union representative and that he had not attempted to warn his fellow employees of the danger of driving truck No. 244. The evidence, Justice O'Connor concluded, suggested that Brown was acting strictly for his own personal benefit.\textsuperscript{33}

The issue raised in City Disposal Systems concerns the proper interpretation of the term "concerted activities." While the organization of labor was an increasingly accepted trend in the early 1900's\textsuperscript{34}, the phrase "concerted activities for the purpose of collective bargaining or other mutual aid or protection" first became part of the federal labor law by its inclusion in the Norris-LaGuardia Act of 1932,\textsuperscript{35} an act designed to protect the growing labor organizations by sharply limiting the availability of the injunction in federal courts in cases involving labor disputes.\textsuperscript{36} The National Industrial Recovery Act, which followed Norris-LaGuardia in 1933,

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\item \textsuperscript{33} \textit{Id.} at 1519 (O'Connor, J., dissenting).
\item \textsuperscript{34} \textit{See, e.g.,} The Clayton Act, § 20, 29 U.S.C. § 52 (1982) (original version at ch. 323, § 20, 38 Stat. 738 (1914)) ("no restraining order or injunction shall prohibit any person or persons, whether singly or in concert . . . from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do"); II NLRB, \textit{LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935} 2431 (quoting the statement attached to the proclamation of President Wilson establishing the National War Labor Board in 1918: "The right of workers to organize in trade unions and to bargain collectively through chosen representatives is recognized and affirmed."); Texas & New Orleans Ry. Co. v. Brotherhood of Railway Clerks, 281 U.S. 548, 570 (1930) ("It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work.").
\item \textsuperscript{35} Pub. L. No. 72-65, 47 Stat. 70 (codified at 29 U.S.C. §§ 101-115 (1982)). Section 2 of the Norris-LaGuardia Act declares the public policy to be as follows:

The individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore . . . he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

\item \textsuperscript{36} Section 4 of the Norris-LaGuardia Act provides that:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts . . . .

\end{itemize}
adopted the phrase in its section 7(a), the antecedent of section 7 of the National Labor Relations Act of 1935. The phrase has survived both the Taft-Hartley amendments of 1947 and the Landrum-Griffin amendments of 1959. Yet, despite its historical inclusion in the federal labor statutes, the term “concerted activities” remains without an authoritative Congressional definition or interpretation.

A review of the early judicial treatment of the concerted activity issue suggests that courts have readily accepted the meaning of the “concerted activity” phrase as requiring some form of group action, but nevertheless have struggled with its application to the great variety of situations which arise in the market place. In NLRB v. Peter Cailler Kohler Swiss Chocolates Co., for example, Judge Learned Hand described one aspect of concerted activity:

When all the workmen in a shop make common cause with a fellow workman over his separate grievance and go on strike in his support, they engage in a “concerted activity” for “mutual aid or protection,” although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they all are helping; and the solidarity so established is “mutual aid” in the most

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37. Pub. L. No. 73-67, § 7(a), 48 Stat. 195 (1933) (codified at 15 U.S.C. § 707 (1982)). The statute was held unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and was amended and modified by Act of June 14, 1935, ch. 246, 49 Stat. 375. Section 7(a) of the National Industrial Recovery Act provided as follows:

That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Id.


42. 130 F.2d 503 (2d Cir. 1942).
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This description, while illustrating the ambiguities which can attach to the concept of concerted activity, pointed to several important elements in its analysis. First, there was clearly group action. Second, there was a lawful and protected labor objective. Third, while an individual's self-interested activity was found in the action, there was an identifiable "purpose of . . . mutual aid or protection" from which the court found "solidarity" among the coworkers.44

Several years later the concept of concerted activity was considered again in Joanna Cotton Mills Co. v. NLRB,45 where a supervisor warned employee Blakely that, among other things, he was spending too much time with one of the women weavers while she was at her work. Blakely reacted furiously and shouted abusively at the supervisor. A short time later, Blakely circulated a petition calling for the supervisor's discharge. When he presented the petition, signed by several of his coworkers, however, Blakely was discharged.46 Noting that the employer could legitimately have fired Blakely for his insubordination in his initial argument with the supervisor,47 the court refused to attach an overly literal interpretation to the "concerted activities" phrase which would accord Blakely protection simply because group action was evidenced by the signatures of his coworkers. The court concluded that Blakely's conduct was nothing more than his effort "to vent his spleen upon a supervisory employee."48 This case, then, is distinguishable from Peter Cailler Kohler Swiss Chocolates Co. because the "purpose"

43. Id. at 505-06. Judge Hand also stated that "the act does not excuse 'concerted activities,' themselves independently unlawful." Id. at 506.

44. The following cases present other fact situations in which the courts have found concerted activity: Salt River Valley Water User's Ass'n v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953) (employee discharged for circulating petition concerning working hours and conditions); NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir. 1948) (two salesmen discharged for drafting a letter suggesting personnel changes in the cashier's department); Root-Carlin, Inc., 92 N.L.R.B. 1313, 1314 (1951) (employee discharged for discussing the need for union organization with his coemployees); Texas Textile Mills, 58 N.L.R.B. 352, 371 (1944) (employee discharged for acting as spokesman for his fellow employees regarding the general dissatisfaction with a change in working hours).

45. 176 F.2d 749 (4th Cir. 1949).

46. Id. at 751.

47. Id. at 752. The court asserted that the Act was not intended to interfere with the employer's right to discharge insubordinate employees when there was no evidence of employer intimidation or coercion with respect to the employee's section 7 rights. Id. at 753.

48. Id. The court further concluded that "it is not the motive of the participants that we are concerned with here but the 'purpose' of the activity." Id.
of the conduct was to express a mere personal gripe rather than a lawful labor objective. Blakely's "gripe" did not rise to the level of a "grievance," within the protection of section 7 of the Act.

On the other hand, a number of early decisions found certain employee conduct outside the protection of the Act because of its violent or unlawful nature. In *Auto Workers, Local 232 v. Wisconsin Employment Relations Board*, the Court held that the Act did not preclude the state's power to enjoin sporadic work stoppages, which were not protected by the Act. While the use of the injunction in federal court to curb "concerted activities" had been strictly limited by the Norris-LaGuardia Act, the Court nevertheless stated that illegal activity is not made legal within the meaning of the Act because it is done in concert. Thus, activity which was technically in concert lost the protection of the Act because of its unlawful quality.

It was into this judicial interpretive framework of section 7 "concerted activities" that the Board interjected the *Interboro* doctrine in the 1960's. The apparent origin of this new doctrine was a 1962 Board decision which found "concerted activity" within the meaning of section 7 of the Act when one employee truck driver was discharged for claiming "show-up" time, a right arguably in-

49. *Id.*

50. *See also* *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 684-85 (3d Cir. 1964) (employee's persistent complaints voiced among his coemployees determined to be "mere talk" which was not "looking toward group action"); *NLRB v. Ryder Tank Lines, Inc.*, 310 F.2d 233, 235 (4th Cir. 1962) (two employees' constant "bickering, backbiting" in an attempt to interfere with the management of the terminal was the sole reason for their discharge); *NLRB v. Office Towel Supply Co.*, 201 F.2d 838, 841 (2d Cir. 1953) (employee's statement to coemployees that "[t]his is a hell of a place to work . . . a girl doesn't get time to go to the ladies' room" was termed "mere griping"); *Continental Mfg. Corp.*, 155 N.L.R.B. 255, 257-58 (1965) (employee's letter handed directly to one of the company's owners citing personal complaints regarding the management was not protected concerted activity).

51. 336 U.S. 245 (1948). This decision was overruled on other grounds in *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 151 (1976).


53. *See supra* note 36.

54. 336 U.S. at 258.

55. *Id. See also* *Mastro Plastic Corp. v. NLRB*, 350 U.S. 270, 280 (1956) (economic strike in violation of no-strike clause in collective-bargaining agreement would be "unprotected" activity even if it were "concerted"); *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 38-39 (1942) (strike by seamen on board their vessel docked in a foreign port in violation of the anti-mutiny statutes of the criminal code); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 344 (1939) (employees repudiated the contract with their employer); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939) (employees forcefully and violently seized their employer's buildings to stage a sit-down strike).

cluded in the collective-bargaining agreement which covered his work. The Board reasoned, without citing any authority, that a single employee's assertion of a right contained in his collective-bargaining agreement was an extension of the concerted activity which gave rise to the agreement. While the Board continued to apply this new rule, it did not receive its first judicial endorsement until 1967 when the Second Circuit enforced the Board's decision in *NLRB v. Interboro Contractors, Inc.* In an alternative holding, the court adopted the Board's reasoning that the individual employee's attempts to enforce a provision of the collective-bargaining agreement were concerted activity because the enforcement of the provision would inure to the benefit of all the employees. Thus, the *Interboro* doctrine, which enables the Board to find concerted activity in the solitary action of an individual, was born of these two Board rationales.

While at least two circuits readily accepted the *Interboro* doctrine, the judicial reaction to the doctrine was generally unfavorable. The opinions adopting the doctrine did not include significant analysis of the issue and seem to have been based primarily on the principle of deference to the Board's reasonable constructions of the Act. On the other hand, those courts which had rejected the *Interboro* doctrine considered it an unwarranted expan-

57. *Id.* at 1519.
59. 388 F.2d 495 (2d Cir. 1967).
61. In *NLRB v. John Langenbacher Co.*, 398 F.2d 459 (2d Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969), the Second Circuit expressly added to the *Interboro* doctrine the requirement that the employee have a reasonable basis for believing that the right he asserts is, in fact, in his collective-bargaining agreement. *Id.* at 463. In *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980), however, the Second Circuit refused to extend the doctrine to apply to employees not covered by a collective-bargaining agreement. *See also* Brief for Petitioner, supra note 41, at 13, 14.
63. *See supra* note 13.
64. *See, e.g.*, *NLRB v. Ben Pekin Corp.*, 452 F.2d at 206 (quoting *Interboro*, "We agree with the Second Circuit"); *NLRB v. Selwyn Shoe Mfg. Corp.*, 428 F.2d at 221 ("We think it obvious that rights secured by such an agreement, though personal to each employee, are protected rights under § 7 of the Act because the collective bargaining agreement is the result of concerted activities by the employees... "). Two notable exceptions, however, are the oft-cited dissenting opinion of Judge Lay in *Illinois Ruan Transp. Corp. v. NLRB*, 404 F.2d 274, 284-90 (8th Cir. 1968) (Lay, J., dissenting), and that of Judge Biggs in *NLRB v. Northern Metal Co.*, 440 F.2d 881, 887-88 (3d Cir. 1971) (Biggs, J., dissenting).
sion by the Board of the plain meaning of the statute. The test for "concerted activity" established by the court in ARO, Inc. v. NLRB is illustrative of the various tests adopted by other courts which rejected the doctrine:

For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

The common threads which held these tests together were the attempts to remove the self-interested complainer from the protection of the Act and to encourage group action. There was also an unwillingness to interfere with management's business discretion.

As discussed above, the courts which have addressed the issue of "concerted activity" have disagreed as to the scope of section 7's protections, yet have agreed that the Act does not cover or reach all types of employee conduct. Although clear lines cannot be drawn to define the area of protected activity, it may be helpful to identify three major conduct-types to elucidate the Board's Interboro doctrine, as adopted by the Court in City Disposal Systems, and determine the doctrine's practical effect in the field of labor law. The sliding scale of competing management and labor interests, operating within the context of the public interest in an efficient and productive economy, is inherent in the analysis.

At the opposite ends of the scale are the personal "gripe" and the unlawful "grab." Both are unprotected by the Act whether the conduct involves the participation of many employees or the solitary action of an individual. The Act, however, identifies for protection certain types of employee complaints and conduct, which therefore are placed in the category of the protected grievance.

The "gripe," which typically affects only the griping employee, is deemed by labor law and public policy to be too insignificant to warrant the invocation of the Board's quasi-judicial machinery. Such claims are considered too remote to establish a legal nexus with the Act or the agreement, even though they may be work-related. The employee, for example, who feels that the employer

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65. See, e.g., Royal Dev. Co. v. NLRB, 703 F.2d 363, 374 (9th Cir. 1983); ARO, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979); NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971).
66. ARO, Inc. v. NLRB, 596 F.2d at 718.
67. Id. But see Brief for Petitioner, supra note 41, at 14-15.
68. 104 S. Ct. at 1512 n.10 ("Of course, at some point an individual employee's actions
is inhibiting his romantic pursuits during working-time cannot call on the Act to adjust his claim. The law applies an implicit cost/benefit analysis to determine that the public is unwilling to bear the expense of providing the employee with a forum for the expression of his idiosyncratic complaints. The Act, therefore, recognizes the employer's discretion to determine when an employee's griping has become too disruptive or too frequent to justify his continued employment.

The "grab," on the other hand, is best identified by its unlawful character. The employee attempts to grab something which the law is not prepared to give him. Thus, when he attempts to grab a right which his collective-bargaining agreement does not provide him, through a violation of the agreement, or when he attempts to grab an abusive or violent solution to his problem, he loses the protection of the Act. The interest of the employee provoked to such drastic action may be relatively high but it is nevertheless outweighed by the employer's interest in a secure collective-bargaining agreement as well as undamaged person and property.

In the middle ground between unprotected "gripes" and "grabs,"
lies the protected grievance. Properly submitted through the established procedural channels, the grievance represents the employee's claim which finds a contractual basis in his collective-bargaining agreement.\textsuperscript{74} In addition, certain types of conduct may constitute an informal grievance.\textsuperscript{75} Section 7 of the Act finds the grievance "concerted" and hence "protected" when it is for the "purpose of collective bargaining or other mutual aid or protection."\textsuperscript{76} Therefore, there has been no significant disagreement that the filing of a formal grievance in accordance with the procedures established in the collective-bargaining agreement is "concerted" since it is consistent with the purpose of collective bargaining.\textsuperscript{77} Likewise, when two or more employees act together in a manner consistent with the Act to invoke a right for their mutual aid or protection, the action is found to be "concerted" even if a formal grievance has not been filed.\textsuperscript{78} Finally, one employee's representation of his fellows or attempts to induce his coemployees' participation in his legitimate claim is "concerted" due to the pragmatic recognition that concerted activity must begin somewhere and that granting the employer the right to terminate all such activity at its inception would be inconsistent with the purposes of the Act.\textsuperscript{79}

\textsuperscript{74} 104 S. Ct. at 1513. See also United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) ("the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government"); Conley v. Gibson, 355 U.S. 41, 46 (1957) ("Collective bargaining is a continuing process. Among other things, it involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.").

\textsuperscript{75} 104 S. Ct. at 1514. See also NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) ("We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer. . . . The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made."); John Sexton & Co., 217 N.L.R.B. 80, 80 (1975) (refusal of an employee with suspended license to drive his truck was an assertion of a right contained in the collective-bargaining agreement and hence constituted a grievance).


\textsuperscript{77} 104 S. Ct. at 1513. See, e.g., NLRB v. Ford Motor Co., 683 F.2d 156, 158 (6th Cir. 1982) (two employees filed a grievance to protest their employer's promotion policies); NLRB v. Adams Delivery Service, Inc., 623 F.2d 96, 100 (9th Cir. 1980) (employee discharged for consulting with his union representative in an attempt to enforce the overtime pay provision in his collective-bargaining agreement).

\textsuperscript{78} 104 S. Ct. at 1511. See, e.g., NLRB v. Washington Aluminum Co., 370 U.S. at 10 (seven of eight nonunion employees walked off job to protest the inadequate heating in their machine shop on an extraordinarily cold winter day); NLRB v. John Langenbacher Co., 398 F.2d 459, 463 (2d Cir. 1968) (several employees approached the company's president in a dispute over seniority pay), cert. denied, 393 1049 (1969).

\textsuperscript{79} 104 S. Ct. at 1511. See, e.g., Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685
each of these scenarios the interests of labor and management come into a relative balance. Furthermore, the result is consistent with an overall objective of the Act: labor peace.\textsuperscript{80}

The \textit{Interboro} doctrine, as adopted by the Court in \textit{City Disposal Systems}, operates within a narrow area of the general category of protected grievances.\textsuperscript{81} It addresses the narrow issue of whether

\begin{quote}
(3d Cir. 1964) ("It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.").
\end{quote}

80. 104 S. Ct. at 1513-14.
81. It must be emphasized that the \textit{Interboro} doctrine applies only to employees who are covered by a collective-bargaining agreement. The concerted activity requirement with respect to employees not covered by collective-bargaining agreements has undergone significant change over the past ten years, the highlights of which may be traced in the following two cases.

In Alleluia Cushion Co., 221 N.L.R.B. 999 (1975), a maintenance employee became disturbed with various health hazards in his employer's plant. Dissatisfied with his employer's responses to his numerous complaints, the employee wrote a letter to the local OSHA office which triggered an OSHA inspection tour of the employer's plant. The employee was subsequently discharged and thus filed an unfair labor practice complaint. Breaking with past precedent, the Board reversed the ALJ dismissal of the complaint and remanded the case for further proceedings. Reasoning that the Act must be administered in light of the overall congressional scheme, the Board ruled that individual activity seeking to invoke a statutory right would be deemed concerted, even in the absence of any outward manifestation of support from the coemployees, due to the overriding public interest in occupational safety. \textit{Id.} at 1000-01.

The Board reversed \textit{Alleluia} in the recent case of Meyers Indus., Inc., 268 N.L.R.B. No. 73, 115 L.R.R.M. (BNA) 1025 (1984). Considering the case of a truck driver discharged for refusing to drive an unsafe truck and filing a report with the Tennessee Public Service Commission, the Board returned to what it termed an "objective standard of concerted activity," measured by the test of whether the employee's activity was "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." \textit{Id.} at 1029. From its review of the language of section 7 and the legislative history of the Act, the Board concluded that this result was mandated by the statute and was consistent with the purposes of the Act, despite the harsh consequences in this case. \textit{Id.} at 1026, 1031. On petition for review, the D.C. Circuit remanded the case to the Board to reconsider in light of the intervening \textit{City Disposal Systems} decision. Prill v. NLRB, No. 84-1064 (D.C. Cir. Feb. 26, 1985). The court held that the Board's determination that a strict construction of section 7's "concerted activities" language was mandated by the Act was erroneous, given the Supreme Court's more liberal reading of the phrase in \textit{City Disposal Systems}.

Thus, before the Board again is the issue of whether an individual, not covered by a collective-bargaining agreement, who invokes a statutory right, is engaged in concerted activity within the meaning of section 7 of the Act. While it may be argued that the individual non-union employee has greater need of the Act's protections than the individual union employee, it should be recognized that the more persuasive of the two rationales supporting the \textit{Interboro} doctrine—that a legal nexus exists between the individual's attempts to enforce a provision of his collective-bargaining agreement and the concerted activity involved in the negotiation of the agreement (\textit{see supra} notes 56-61 and accompanying text)—is not available to support an extension of section 7's protections to the conduct of individuals not
an individual employee with a legitimate complaint which has a basis in his collective-bargaining agreement retains the protection of section 7 of the Act when he engages in conduct which constitutes, in effect, the expression of an informal grievance. For example, should Brown's refusal to drive truck No. 244 have been deemed an informal grievance seeking to enforce his contractual right not to operate unsafe equipment? 82

The practical effect of the Court's adoption of the Interboro doctrine is to provide the individual employee with an additional forum for the resolution of his disputes with his employer. 83 The doctrine, which purports to be based on the desire to strengthen the collective bargaining system, 84 is predicated on the idea that the individual employee should be able to voice his grievance or engage in conduct which constitutes the expression of a grievance without concern for the potential procedural traps of the formal grievance procedure. 85 In this case, for example, Brown's refusal to drive what he believed to be an unsafe truck was considered his informal grievance. 86 His presentation of the grievance was "inartful" 87 in that he chose to become involved in a heated argument with his superiors, he did not refer explicitly to his collective-bargaining agreement, and he stalked off the premises without filing an immediate grievance form, in accordance with the established covered by a collective-bargaining agreement. It is not clear, therefore, that the Board is obligated by the Court's ruling in City Disposal Systems to extend section 7 protection to individual activity in the non-union setting.

82. 104 S. Ct. at 1511.

83. Id. at 1514 ("an employee's initial statement to an employer to the effect that he believes a collectively bargained right is being violated, or the employee's initial refusal to do that which he believes he is not obligated to do, might serve as a natural prelude to, and an efficient substitute for, the filing of a formal grievance.").

84. Id. at 1513. See also Brief for AFL-CIO as Amicus Curiae in Support of Petitioner, NLRB v. City Disposal Systems, Inc., 104 S. Ct. 1505 (1984). The AFL-CIO advanced an argument based on the Bunney Brothers rationale that the individual's activity is an extension of the concerted activity which established the collective-bargaining agreement. The individual's assertion of his collective right enforces and thereby strengthens the agreement. Id. at 8-12. See supra notes 56-57.

85. 104 S. Ct. at 1515. The requirements of the informal grievance are satisfied if "the nature of the employee's complaint is reasonably clear to the person to whom it is communicated and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement." Id. See also Brief for AFL-CIO, supra note 84, at 11, 12. Cf. Love v. Pullman Co., 404 U.S. 522, 527 (1972) (substantial compliance with EEOC statutory filing requirements was sufficient since "[s]uch technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.").

86. 104 S. Ct. at 1515.

87. Brief for AFL-CIO, supra note 84, at 11.
procedure contained in his collective-bargaining agreement. Thus, Brown exposed himself to the charge that when he actually filed his grievance he was protesting a different employer action—his discharge—at a different time.

City Disposal Systems, then, shifts the burden of making the grievance system work from the unschooled or inexperienced worker to his employer. The employee is relieved of the traditional requirement that he "obey now, grieve later." He may openly voice complaints, engage in expressive conduct or refuse assignments to assert a right grounded in the collective-bargaining agreement without encouraging the participation of his peers or warning them of a common danger. He need not expressly refer to the collective-bargaining agreement or even be aware of the extent of his contractual rights. The employee is held only to the standards of rea-

88. The relevant provisions of Article VIII of the collective bargaining agreement ("Arbitration and Grievance Procedure") between City Disposal Systems, Inc. and Local 247 of the International Brotherhood of Teamsters, were as follows:

Section 1. It is mutually agreed that all grievances, disputes or complaints between the Company and the Union, or any employee or employees, arising under the terms of this Agreement shall be settled in accordance with the procedures herein provided and that there shall at no time be any strikes, lock-outs, tie-ups of equipment, slowdowns, walk-outs or any other cessation of work except as specifically agreed to in other superseding sections of this Contract.

Every effort shall be made to adjust controversies and disagreements in an amicable manner between the Employer and the Union. In the event that any grievance cannot be settled in this manner, the question may be submitted by either party for arbitration as hereinafter provided.

Section 2. (a) Should any grievances, disputes or complaints arise, there shall be an earnest effort on the part of the parties to settle such promptly through the following steps:

Step 1. By conference between the aggrieved employee, the shop steward, or both, and the foreman of his department.

Step 1-a. Before proceeding to Step 2 below, it shall be the responsibility of the aggrieved to reduce any grievance to writing on the regular grievance form provided by the Local Union.

Step 2. By conference between an official or officials of the Union and the manager, or representative of the company delegated by the manager, or both.

Step 3. In the event the last step fails to settle the complaint, it shall be referred to the Board of Arbitration upon the request of either party. The President and or Executive Board of the Local Union shall have the right to determine whether or not the grievance is qualified to be submitted for arbitration by the Union.

A majority decision of the Board of Arbitration shall be rendered without undue delay and shall be final and binding on both parties.


sonableness and honesty. It is the employer, and his supervisors, who must be intimately familiar with the collective-bargaining agreement and the rights it confers on the employees. The employer is placed on constructive notice whenever an employee engages in conduct with a reasonable nexus to the agreement. Thus, while poorly articulated complaints or aggressive conduct which asserts contractual rights may be difficult to distinguish from unprotected insubordination, the employer must be prepared to recognize them as the preliminary stage of the contractual grievance process, or face the unfair labor practice sanctions of the Act.

While this extension of the Act's protection of the individual employee is without express statutory authority or particularly convincing judicial precedent, it is well established that the appropriate standard for judicial review of Board doctrines is deference to the Board's reasonable interpretations of the Act which are consistent with federal labor policy. Recognizing the Board's expertise in the labor field, the Court has given the Board the primary responsibility of adapting the Act to the complex and changing market place. Thus, the Court's adoption of the Interboro doctrine must be examined in light of our national labor policy as it has evolved into the 1980's.

An examination of the legislative history of the Wagner Act suggests that this degree of extra protection for the individual worker was not contemplated by the Act's founders. Rather, the Wagner Act was enacted with the primary objectives of reducing the burdens on interstate commerce created by persistent labor strife and of improving the pay scales and working conditions of the average worker to increase his purchasing power, a "demand-side" economic theory for stimulating the depressed economy. The Act,

90. 104 S. Ct. at 1515. See also John Sexton & Co., 217 N.L.R.B. 80, 80 (1975) ("The Board has consistently held that Section 7 of the Act protects employees' attempts . . . to implement the terms of bargaining agreements irrespective of whether the asserted contract claims are ultimately found meritorious and regardless of whether the employees expressly refer to applicable contracts in support of their actions or, indeed, are even aware of the existence of such agreements.").


92. 104 S. Ct. at 1513-14.


therefore, sought to encourage the practice of collective bargaining as the mechanism by which these dual objectives could be achieved. The average worker, without bargaining power by himself, was to assume a collective strength when joined with his peers to reach peaceful and advantageous settlements with his employer. 96

From these original purposes of the Act, two dominant themes have emerged to shape our national labor policy. First, effective collective bargaining assumes a majority rule. 97 The individual worker, whose "helplessness as an individual in bargaining with his employer is recognized," 98 surrenders his individual interests and accepts the exclusive representation of the majority's representative. 99 Since individual contracts tend to weaken the collective bar-
gaining system,\textsuperscript{100} it cannot be expected that each individual will be satisfied at all times.\textsuperscript{101} As Representative Boland pointed out in the 1935 Congressional debates, this principle of majority rule is entirely consistent with our democratic institutions.\textsuperscript{102} Second, the contractual grievance arbitration system is the preferred mechanism by which labor and management reach orderly settlements of their contractual disputes.\textsuperscript{103} Collective bargaining agreements are presumed to be strengthened when all parties have recourse to prompt and effective enforcement of the agreement.\textsuperscript{104} Furthermore, the relative time and cost efficient grievance/arbitration system is preferred to a quasi-judicial Board proceeding.\textsuperscript{105}

While the \textit{Interboro} doctrine does not gain much support from the Act's original policies, it is nevertheless clear that the doctrine

\begin{itemize}
\item individuals or groups might be subordinated to the interest of the majority.
\item Id. \textit{See also} NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. at 180 ("[National labor policy] therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.").
\item 100. Rep. Boland presented the following analysis of the majority rule issue in the congressional debates:
\begin{quote}
A literal construction would permit individual bargaining and the making of separate contracts with various groups. It is the opinion of labor experts that such multiple bargaining results in chaos and precludes effective collective bargaining. Since the statute gives employees, as a class, the right to bargain collectively through their representatives, it must be assumed that Congress intended the right to be exercised effectively.
\end{quote}
\textit{Boland, supra} note 96, at 2441.
\item 101. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) ("The complete satisfaction of all who are represented is hardly to be expected.").
\item 102. \textit{Boland, supra} note 96, at 2442.
\item 103. Section 203(d) of the Act provides in pertinent part: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d) (1982). \textit{See also} H.R. \textit{Rep.} No. 510, \textit{supra} note 39, at 1147 ("Once the parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."); \textit{Republic Steel Corp. v. Maddox}, 379 U.S. 650, 652 (1965) ("federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress.").
\item 104. 104 S. Ct. at 1513. \textit{See, e.g., United Steelworkers of Am. v. Warrior & Gulf Navigation Co.}, 363 U.S. 574, 581 (1960) ("The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement."); \textit{National Labor Relations Act, § 1}, 29 U.S.C. § 151 (1982). \textit{See generally} S. \textit{Rep.} No. 573, \textit{supra} note 95, at 2301; \textit{Brief for AFL-CIO, supra} note 84, at 9, 12.
must likewise be examined in light of the evolution of the law into the 1980's. To say that the individual laborer played a relatively minor role in the labor policy of the Depression era is not conclusive of his role in our current economic, political and social scheme. In fact, the amendments to the Act in 1947 and 1959, with their checks on the growing power of the national unions, the express recognition of the individual's right to refrain from joining a labor organization and the current development of the wrongful discharge action in some states would seem to suggest that the individual plays a much more substantial role in the current scheme of our national labor policy than he played in the midst of the Great Depression when the Act was first passed. The focus throughout this period of an evolving labor law, however, has been on the need to balance the often countervailing interests of labor and management, within the context of the public's interest in labor relations stability and the efficient production of goods and services.

To measure the individual employee's interest, it is necessary to determine the significance of the Interboro doctrine's protection for the individual. Without the Interboro doctrine, the individual employee relies primarily on the grievance arbitration system to resolve his disputes related to the collective bargaining agreement. If the individual is not confident of the union's commitment to his problem, he may file his grievance directly with the employer. If the grievance system breaks down because the

106. See, e.g., NLRB v. Weingarten, Inc., 420 U.S. 251, 266 (1975) ("The Board is responsible for adapting the Act to the "'changing patterns of industrial life.' ").
107. See supra note 39.
108. See supra note 40.
109. Labor Management Relations Act of 1947, § 1, 29 U.S.C. § 151 (1982) ("Experience has further demonstrated that certain practices by some labor organizations . . . have the intent or the necessary effect of burdening or obstructing commerce . . . . The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed."); Labor-Management Reporting and Disclosure Act of 1959, § 2(c), 29 U.S.C. § 401(c) (1982) ("The Congress, therefore, further finds and declares that the enactment of this Chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers . . . .").
112. See supra note 103.
113. Section 9(a) of the Act provides in pertinent part: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances ad-
union has not properly exercised its duty of fair representation, the employee may bring a contract action against the union and the employer. 114 With respect to health and safety issues, the individual has additional protection under section 502 of the Act 115 and several other federal safety statutes. 116 Interboro adds to the indi-

justed, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.


Several commentators have argued that the original proviso to section 9(a), which provided the individual with the right to present his grievances directly to the employer was indicative of the Wagner Act's concern with the protection of the individual employee, and hence supports the Interboro doctrine's extension of section 7 protections to the individual. See Illinois Ruan Transport Corp. v. NLRB, 404 F.2d 274, 286-88 (8th Cir. 1968) (Lay, J., dissenting); Dolin, supra note 95, at 560-62. While the Supreme Court was silent as to this argument, others have rejected it. See ARO, Inc. v. NLRB, 596 F.2d 713, 718-19 (6th Cir. 1979) (§ 9(a) is an exception to the § 7 requirement of concerted activity rather than an expansion of its scope). Furthermore, section 9(a) anticipates the submission of formal grievances in accordance with the contractual procedures; it does not authorize the informal grievance recognized by the Interboro doctrine.

114. Section 301(a) of the Act provides in pertinent part:
Suits for violations of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.


115. Section 502 of the Act provides in pertinent part: "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act." 29 U.S.C. § 143 (1982). This provision expressly applies to individual as well as group activity and, therefore, relieves the employee of the need to meet the "concerted activity" test. In Gateway Coal Co. v. UMWA, 414 U.S. 368 (1974), the Court interpreted this statute as requiring objective evidence of the abnormally dangerous conditions: "Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be." Id. at 386.

116. Section 660(c)(1) of the Occupational Safety and Health Act of 1970, as amended, provides in pertinent part:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

29 U.S.C. § 660(c)(1) (1982). This statute expressly provides for individual action. See also Whirlpool Corp. v. Marshall, 445 U.S. 1, 12-13 (1980) (an employee who refuses to perform an assigned task based on his reasonable apprehension of serious injury and his reasonable belief that he has no alternative is protected by OSHA).

See also section 405(b) of the Surface Transportation Act of 1982, which provides, in
vidual employee's portfolio of protections an extra forum for voicing his grievances and a less rigorous standard of conduct in terms of how those grievances are presented.117 Given, however, the Board's established practice of deferring cases to arbitration when possible,118 and the availability of the other protections for the individual, the questions of how significant and how necessary these additional protections are to the individual naturally arise.119

pertinent part:

No person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal Rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition. 49 U.S.C. § 2305(b) (1982). This provision, likewise, does not require group action to invoke its protections.

117. See supra notes 83-92 and accompanying text. In addition, the Interboro doctrine, as adopted by the Court, arguably gives the individual the right to refuse an assignment based on a subjective "honest and reasonable belief." 104 S. Ct. at 1515. Thus, the doctrine holds the employee to a lower standard of conduct than the other federal safety statutes and, in this case, the collective-bargaining agreement.

In American Freight System v. NLRB, 722 F.2d 828 (D.C. Cir. 1983), the court rejected the Board's position that the Interboro doctrine necessitated a two step analysis of the employee's conduct to determine, first, if it had met the contractual objective standard and, second, if it had met the statutory subjective standard. The court maintained that the contractual waiver doctrine was controlling and that, therefore, the employees waived their statutory right to an easier subjective standard when they accepted an objective standard in their collective-bargaining agreement. 

The City Disposal Systems decision is not conclusive on the issue of whether the Interboro doctrine in fact establishes a subjective standard more relaxed than the objective standard of the collective-bargaining agreement. It appears from the language of Justice Brennan's majority opinion, however, that the Court accepts the reasoning of American Freight System and that the standard negotiated in the collective-bargaining agreement would provide the ultimate test of whether the activity was protected. See 104 S. Ct. at 1515-16.

118. 104 S. Ct. at 1515. See, e.g., American Freight System, Inc. v. NLRB, 722 F.2d at 832-33 (Board abused its discretion when it failed to defer to the decision of the grievance committee); Collyer Insulated Wire, 192 N.L.R.B. 837 (1971); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). In Spielberg, the Board established the standards to govern when it would defer to the grievance arbitration process. Thus, the Board will defer to an arbitration decision if the proceedings were fair and regular, if all parties agreed to be bound, and if the arbitration decision is not clearly violative of the Act. Id. at 1082.

119. As discussed in the amicus brief submitted by the Teamsters for a Democratic Union, the problem of the truck driver facing a potentially dangerous driving assignment may require the partial waiver of the group action requirement. This brief pointed out that,
The employer's interests include the ability to maintain efficient, uninterrupted production or services. This, of course, requires the cooperation of each employee. While the Act protects certain types of employee conduct, it also recognizes the employer's right to discourage the employee's "gripe" or "grab," through discharge if necessary. The problems, of course, arise when the law attempts to establish precise definitions distinguishing protected and unprotected conduct.

"Insubordination" is a relative term which naturally depends on the perspective of the party in question. From the employer's perspective, any employee complaint or conduct which interrupts production or interferes with the business is insubordination. The Act, however, protects some employee conduct which the employer would tend to term 'insubordination.' The individual employee

in addition to the highly dangerous nature of this profession, the truck driver often discovers the defective condition of his vehicle when he is by himself and far from the home base. A telephone call to his supervisor may put him in the difficult position of choosing between "insubordination" and the potential for a serious accident. The argument concluded that the individual truck driver faced with the possibility of endangering himself and others on the public highways should be allowed to refuse his assignment based on his reasonable and honest belief that the vehicle is unsafe. Brief of Teamsters for a Democratic Union as Amicus Curiae in Support of Petitioner at 5-7, NLRB v. City Disposal Systems, 104 S. Ct. 1505 (1984).

In a recent case, presenting a similar fact situation, but without the presence of a collective-bargaining agreement, the Board answered this argument as follows:

Although it might be argued that the solitary over-the-road truckdriver would be hard pressed to enlist the support of co-workers while away from the home terminal, the Board . . . is neither God nor the Department of Transportation. Outraged though we may be by a respondent who—at the expense of its driver and others traveling on the nation's highways—was clearly attempting to squeeze the last drop of life out of a trailer that had just as clearly given up the ghost, we are not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws.

Meyers Indus., Inc., 268 N.L.R.B. No. 73, 115 L.R.R.M. (BNA) 1025, 1031 (1984). The issue, then, is not whether the truck driver is entitled to protection from bodily harm, but rather whether the Board is the proper agency to regulate specialized health and safety hazards in the workplace.

120. Section 10(c) of the Act provides in pertinent part: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause." 29 U.S.C. § 160(c) (1982).

121. See generally Brief for the Chamber of Commerce as Amicus Curiae in Support of Respondent, and Brief of Roadway Express, Inc., as Amicus Curiae in Support of Respondent, NLRB v. City Disposal Systems, 104 S. Ct. 1505 (1984). Both briefs discussed the issue primarily in terms of "insubordination," and tended to confuse the "concerted" and "protected" issues, which the Court was careful to distinguish in its analysis. 104 S. Ct. at 1514. Both amicus briefs, however, present strong arguments from the employer's perspective.
may have an even more relaxed view of what constitutes insubordination. This conflict of perspectives is a natural outgrowth of the inherent tension in the employment relationship and should be recognized in the analysis of the *Interboro* doctrine.

The Act, which fetters both the employer's and the employee's conception of their appropriate standard of conduct, should seek to aid both groups in their attempt to identify the area of protected activity if it is to remain consistent with the critical objective of promoting harmony and cooperation in the employment relationship. Thus, a secondary issue in *City Disposal Systems* should have been whether the *Interboro* doctrine aids or inhibits the employer and the employee in identifying what each can and cannot do within the Act's protection.\(^{122}\)

A legal prerequisite that the employee be engaged in or preparing for some form of group action in order to claim the protection of the Act clearly serves this recognized employer interest in identifying and discouraging the unprotected "gripe" and "grab." The fundamental value of the in concert requirement is that it imposes a passage of time between the individual's initial conception of his idea or complaint and his ability to act under the protection of the Act. Thus, it serves to inhibit rash action, which may stray toward unprotected abusiveness or even violence. It allows the employee time for reflection, even if only momentary, during which he can focus his complaint and then test its validity as he seeks to induce the interested action of his coworkers. In many instances, it will operate to protect the individual from his own ill-considered action. Furthermore, it provides the employer, caught between the duty to comply with the labor laws and the need to maintain an efficient production schedule, with an objective test for evaluating the validity of employee complaints and conduct which appear to be insubordination, but may, in fact, be protected by the Act.\(^{123}\)

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\(^{122}\) Since the issue of whether Brown's conduct was protected was not before the Court, Justice Brennan did not establish useful guidelines for determining the boundaries of protected activity. See *supra* notes 68 & 73.

\(^{123}\) See Brief of Amicus Curiae, The Legal Foundation of America, Urging Affirmance, NLRB v. *City Disposal Systems*, 104 S. Ct. 1505 (1984). This Brief identifies nine policy reasons for retaining the "in concert" requirement's *pre-Interboro* doctrine meaning. They may be summarized as follows: the "in concert" requirement (1) increases probability that matters of general concern will be advanced; (2) increases probability that valid complaints will be advanced; (3) focuses the issue; (4) fosters labor peace; (5) prevents unruly employees from taking advantage of their coemployees; (6) helps employers to deal with individuals with poor work habits; (7) increases the employer's willingness to bargain collectively; (8) favors the inexpensive grievance process; (9) maintains a clear definition of Board jurisdiction. See id.
The public shares the employee's interest in acceptable working conditions and fair treatment and the employer's interest in efficient production. Furthermore, the public has an especially keen interest in the peaceful compromise of potentially conflicting interests. As the dissenting opinion of Justice O'Connor pointed out, however, the public interest may be implicated in another, more important way which transcends the parochial concerns of the labor law field. At issue, Justice O'Connor claimed, was a fundamental question of the appropriate scope of authority of an administrative agency operating in an area where its authority has not been expressly granted by Congress.124

By extending its jurisdiction over the conduct of individual employees, the Board has enabled such individuals to make unfair labor practices out of their contract disputes.125 Congress, however, has expressly indicated that contract disputes are to be resolved by the grievance/arbitration process, with ultimate recourse to the courts, rather than by the Board.126 When the Board asserts jurisdiction to resolve the dispute it necessarily interprets the collective-bargaining agreement.127 In the instant case, for example, the Board determined that the established grievance procedures were too complicated for the individual employee to understand and implement.128 That the Board, a quasi-judicial administrative agency, has acquired for itself this undelegated power is a matter of general concern regarding the appropriate extent of governmental regulation of business.

*City Disposal Systems* has extended section 7's protections to the individual employee who asserts a right contained in his collective-bargaining agreement. The Court's adoption of the Board's *Interboro* doctrine, however, imposes a number of costs on the labor-management employment relationship which the Board should assess as it determines the scope of the *City Disposal Systems* rule in future decisions. While it has arguably aided the individual union employee by its ruling, the Court has increased governmental regulation of private labor contracts and aggravated the employers' attempts at compliance. Perhaps most important, how-

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124. 104 S. Ct. at 1517 (O'Connor, J., dissenting).
125. Id.
128. 104 S. Ct. at 1515.
ever, is the weakening effect this decision has on the Act's fundamental goals of encouraging employees to work together for their common benefit and of encouraging employers to meet with the employee groups to fashion a common understanding. If the Act is to be an effective tool for aiding the re-emergence of a dynamic economy characterized by efficiency and fairness in labor relations, the interpretation of each section of the Act should strive for an optimum balance of the varied management, labor and public interests. The Court has missed this opportunity in City Disposal Systems.

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