

Berkeley Journal of Employment and Labor Law

VOLUME 20

1999

NUMBER 2

ARTICLES

“By Any Means Necessary”— Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act

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Let us not oppose discretionary power; let us oppose unnecessary discretionary power. . . . Let us not oppose discretionary justice that is properly confined, structured, and checked; let us oppose discretionary justice that is improperly unconfined, unstructured, and unchecked.¹ Kenneth Culp Davis (1969)

In this article Professor Sharpe examines the inconsistency of loss of protection decisions under section 7 of the National Labor Relations Act. He begins with a description of the multifactor test for establishing protection under section 7 and identification of the means test as the focus of this article. Sharpe considers the textual, legislative history and decisional bases for current loss of protection doctrine as well as the inconsistency of cases in this area of law. Finally, Sharpe proposes a rule-like standard and

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1. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 26 (1969)

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demonstrates its ability to rationalize loss of protection jurisprudence and bring clarity, predictability and fairness to the administration of section 7.

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I. INTRODUCTION

The issue of how far unorganized and organized employees can go in pressing legitimate claims has been controversial since the inception of the National Labor Relations Act (Act or NLRA).² Recent union tactical innovations, such as inside games and corporate campaigns,³ have heightened

2. Pub. L. No. 74-198, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 et seq. (1994)). See Archibald Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951).

3. See Robert Bruno, *Alternatives to the Strike as a Model of Resistance: Case Studies and Theory Building*, 48 LAB. L.J. 449 (1997) (analyzing alternatives to strikes as a model of employee

the controversy. Consider, for example, an employer and union negotiating under an expired collective bargaining agreement. During this period the normal grievance-arbitration machinery is suspended, though other terms of the expired agreement remain intact as part of the status quo. In order to pressure the employer toward a successor agreement, the union organizes a grievance meeting about safety and health concerns. Leaving their jobs during working time, a majority of the employees go to the administration building in an orderly manner and demand that the employer protect their safety and health. Feeling pressure to return to the orderly procedure of a collective bargaining agreement, the employer accedes to the Union's demands at the bargaining table.⁴ The Union is able to achieve its objectives in this case without resorting to a strike that would leave its members vulnerable to the permanent replacement rights of the employer. Could the employer have terminated, replaced, or disciplined the employees who participated in the mass exodus from their work stations, even though they were not ostensibly engaged in a strike?⁵

Professor Northrup describes several other common methods unions use to exert pressure on employers:

The tactics utilized in the inside game include efforts to convince employees to impede or to disrupt production by slowing the work pace, refusing to work overtime, refusing to do work without receiving minute instructions from supervisors or management even though such instructions have not heretofore been required, filing mass charges with government agencies, and mass grievances, castigating management and supervision both within and without the plant, engaging in "work-to-rule" slowdowns, sick outs, hit-and-run strikes, and generally attempting to build a climate in which reasonable worker-management relationships, worker-management cooperation, and normal quality and quantity of production cannot exist.⁶

resistance using three case studies of union campaigns); Herbert R. Northrup, *Union Corporate Campaigns and Inside Games as a Strike Form*, 19 EMP. REL. L.J. 507 (1994) (defining and tracing the early practice of corporate campaigns and inside games to uncover their common characteristics and the affinity that they share with the conventional strike); Barrie Clement, *Flying Pickets on the Superhighway*, INDEP., Feb. 8, 1998, at 7 (describing the workers' use of an "electronic picker" against Critchley Labels at Croespenmaen in southeast Wales as a "techno-strike" necessitated by the ineffectiveness of the conventional strike).

4. See Tom Balanoff, *The Cement Workers' Experience*, 7 LAB. RES. REV. 5 (recounting the experience of cement workers with in-plant strategies).

5. The classic inside game (what Northrup calls the "capstone of the inside game") is "work-to-rule." Describing this tactic, he says:

This involves considerably more than simply following work rules in an orderly, intelligent fashion. Rather it has come to mean doing the minimum possible, doing nothing without minute direction from supervisors, denying or evading personal responsibility for doing the job, wasting as much time as possible, reducing effort from the normal expected and heretofore applied activities, taking no initiatives to handle problems—in effect leaving one's brains, training, and normal work practices out of the job. In other words, to "work-to-rule" is actually to create a slowdown although unions consistently deny that a slowdown is in process when advocating work-to-rule. Northrup, *supra* note 3, at 523-24.

6. *Id.* at 513.

Corporate campaigns have also included picketing the homes of members of boards of directors, pressuring companies through political figures, attempting to influence brokers and affect the prices of company stock, bringing pressure on customers and suppliers, and creating legal problems for companies by filing complaints.⁷

New union tactics have increased the need for a standard to differentiate protected and unprotected concerted activity. Like the conventional strike, the success of these union strategies depends on employee participation. The willingness of employees to participate in such concerted activity may depend on the level of protection extended under the Act. Moreover, the Board and courts have been inconsistent in specifying how the means chosen to effectuate even unorganized, garden variety, concerted activity may result in a loss of protection.⁸

The basic grant of protection which the NLRA gives to employees is expressed in section 7 as follows:

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.⁹

Thus, employees engaged in protected activity are insulated from various adverse employer actions, most importantly discharge, in response to exercising their statutory rights. On the other hand, as Professor Robert Gorman notes in his excellent treatise:

An employer is free to discharge or otherwise discipline an employee, consistently with the Labor Act, for engaging in activity which is *not* protected by section 7. Whether employee activity falls within or without the shelter of section 7 is thus a definitional issue of utmost importance in the administration of the Act.¹⁰

While section 7 enables both the unorganized and organized group activity of employees, the Act generally governs union activity that includes collective bargaining under an administrative apparatus.¹¹ My concern in this article, however, is less with section 7's protection of organizing activity than with its protection of the "right to . . . engage in other concerted

7. See *Id.* at 509.

8. See *infra*, notes 29-42 and accompanying text.

9. 29 U.S.C. § 157. See also Section 2 of the Act for categories of employees that are excluded from coverage. 29 U.S.C. § 152(3). The RLA, 45 U.S.C. 151 et.seq., 44 Stat. 577, (1926) and public sector statutes (see e.g. Ohio Rev. Stat. Ch. 4117, as well as a variety of state statutes, see e.g. Wis. Stat. Ch. 111, sec. 111.01 - 111.19) generally give employees protections that are comparable to private sector employees covered by the NLRA.

10. ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 296 (1976).

11. See 29 U.S.C. § 159 (outlining the right of duly selected representatives to exclusively bargain on behalf of employees, the Board's obligation to determine appropriate units, and the administrative apparatus for determining bargaining status)

activities for the purpose of . . . other mutual aid or protection.”¹² The reason for this focus is threefold. First, because it affords employees protection beyond or short of organizational activity, section 7 can potentially fill some of the void in employee protection resulting from recent declines in union membership.¹³ Second, even organized employees may forfeit section 7 protection because of the nature of their activity.¹⁴ Third, decision-makers have applied section 7 in ways that undermine the protection intended for both unorganized and organized employees.¹⁵

Part I of this paper examines the components of the three-pronged protected concerted activity doctrine and isolates the branch that is the focus of this article. Part II identifies the sources of the doctrine, discussing its statutory, historical and judicial origins. Part III proposes a standard to govern loss of protection for employees engaged in concerted activity across categories of cases. The jurisprudential literature on rulemaking and an examination of the relative merits of rules and standards in law promulgation,¹⁶ as well as earlier scholarly and judicial efforts, inform the proposed standard. Furthermore, under the proposed standard this section analyzes the employer’s long term viability in a variety of contexts bearing upon the employer’s legitimate interests. Finally, Part IV tests the proposed standard against various applications.

II.

COMPONENTS OF PROTECTED CONCERTED ACTIVITY¹⁷

Labor lawyers use the term of art “protected concerted activity” to describe the segment of section 7 that gives employees the right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹⁸ The doctrine of protected concerted activity has three components, only one of which this article will address in detail. Nonetheless, I will briefly describe the other two as important background to this discussion.

12. 29 U.S.C. § 157.

13. See Alan Hyde, *Employee Caucus: A Key Institution In The Emerging System Of Employment Law*, 69 CHI.-KENT L. REV. 149, 150-58 (1993) (describing employee caucuses as perhaps the emerging “voice” of employees in the non-union workplace).

14. Some union campaigns and inside games are subject to such a finding. See, e.g., NLRB v. Local Union No. 1229, IBEW (Jefferson Standard Broad. Co.), 346 U.S. 464 (1953) (union employees’ distribution of handbills disparaging to employer is adequate cause for employee discharge when action is unrelated to any pending labor controversy).

15. See *infra* notes 27 - 41 and accompanying text.

16. As discussed in this article, a rule supplies the content of the law before the conduct triggering its application (*ex ante*). In contrast, a standard supplies the law’s content after such conduct has occurred (*ex post*). See *infra* notes 32-38 (citing cases showing a lack of consistency in NLRB and Court decisions that will predictably lead to a chilling effect on the exercise of concerted rights under section 7).

17. See generally *id.* at 296-325.

18. 29 U.S.C. § 157.

A. Concertedness

The Supreme Court has recognized the Board's interpretation of protected concerted activity as requiring some kind of group activity: "concerted activities" are "the activities of employees who have joined together in order to achieve common goals."¹⁹ Therefore, individuals acting on their own behalf are not engaged in protected concerted activity; instead, individual employee activity must be "linked to the actions of fellow employees" in order to be concerted.²⁰

The issue has arisen whether actions taken individually (not by or on behalf of others), but presumed to be of mutual interest to all employees, should be deemed concerted by a "constructive concerted activity" theory.²¹ An example would be a lone employee reporting company safety violations to a state agency. The Board does not currently recognize such activity as concerted.²²

B. Appropriate Objectives or Ends

Concerted activity must also have appropriate objectives or ends in order to receive protection. The test is whether the ends are related closely enough to legitimate employee concerns to warrant protection. The Supreme Court has broadly interpreted the scope of subject matter falling within section 7's protection.²³ However, the breadth of the Supreme Court's standard notwithstanding, lower courts and the Board have narrowed the potential reach of the Supreme Court's approach.²⁴

C. Appropriate Means

Under the third branch of protected concerted activity doctrine, properly directed group activity (group activity with a proper purpose under

19. NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 (1984).

20. In *City Disposal Systems* an employee who resisted the driving of an unsafe truck based on his good faith understanding of a contractual right was engaged in concerted activity. Even though the action only involved him and not other employees, the Court found this action of a single employee to be concerted because "[t]he invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement." *Id.* at 831.

21. Interboro Contractors, Inc., 157 NLRB 1295 (1966), *enforc'd*, 388 F. 1d 495 (2d Cir. 1967).

22. See Meyers Indus. Inc., 268 NLRB 493 (1984).

23. See Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) (holding protected a union newsletter that urged employees to engage in political action such as writing state legislators to oppose a constitutional amendment incorporating a right-to-work statute into the state constitution and defeating the enemies and electing the friends of organized labor). For a discussion of this "ends test" see DOUGLAS N. RAY ET AL., UNDERSTANDING LABOR LAW, (1999).

24. See NLRB v. Motorola, Inc., 991 F.2d 278 (5th Cir. 1993) (holding employer's ban of on-premises literature distribution by employee members of a political organization was permissible, even though the literature addressed the workplace issue of drug testing); Harrah's Lake Tahoe Resort Casino, 307 NLRB 182 (1992) (holding concerted activity unprotected because it was directed toward an employee purchase of the company and did not relate to the interest of employees as employees, rather than as owners).

section 7) can lose protection because of *how* it is conducted.²⁵ For example, if employees are concerned about their own substandard wages and working conditions, their concerted activity with a legitimate section 7 purpose does not give them a license to destroy the plant or equipment, or to assault the plant manager.²⁶ On the other hand, the mounting of an economic strike against the employer in order to pressure the employer to meet the union's demands at the bargaining table is proper activity explicitly protected by Section 13 of the statute.

It should be noted that collective bargaining activity, such as economic strikes, is a subset of protected concerted activity. Just as employees who engage in unorganized concerted activity can lose protection by using improper means, organized employees can lose protection in the same way. The cases regarding strike misconduct are examples of this phenomenon.²⁷

However, uncertainty remains whether courts will find other forms of concerted activity protected under section 7. Suppose unorganized employees find plant conditions so intolerably cold that they walk off the job. Can they be fired? Is the manner of protesting these working conditions—or, at least the breach of a work rule—improper? Or suppose the organized employees attempt to bring pressure on the employer at the bargaining table by initiating a public campaign disparaging the company's product? Are their means improper? What is the test for propriety?

In the walk-out case, the Supreme Court found the activity protected, because walking out was a reasonable way for these unorganized employees to protest the intolerably cold conditions. This was particularly true in light of the employer's unresponsiveness to earlier individual complaints about the lack of heat.²⁸

Conversely, the Court held that the disparagement campaign was unprotected activity.²⁹ The Court found the employee allegations made in the disparagement campaign to be distinct from the issues involved in the labor dispute. Because the campaign allegations were insufficiently related to the labor dispute, the Court concluded that the campaign constituted disloyalty, a cause for discharge under section 10(c) of the Act.³⁰

25. See *NLRB v. Local Union No. 1229, IBEW* (Jefferson Standard Broad. Co.), 346 U.S. 464 (1953) and MICHAEL C. HARPER & SAMUEL ESTREICHER, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 226 (4th ed. 1996) (referring to this branch of the analysis as the "'Protected' Concerted Activity: Means Test").

26. See, e.g., *Humhoso Inc. d/b/a Humana Hospital-Brandon*, 282 NLRB 1184 (1987) (upholding discharge of employee for altercation with supervisor).

27. See, e.g., *Clear Pine Moldings, Inc.*, 268 NLRB 1044 (1984) (upholding the discharges of two strikers for abusively threatening conduct on the picket line). ARMAND J. THIEBLOT, JR. & THOMAS R. HAGGARD, UNION VIOLENCE: THE RECORD AND THE RESPONSE BY COURTS, LEGISLATURES, AND THE NLRB 322 - 363 (Labor Relations and Pub. Policy Series No. 25, 1983) (discussing the history of strike misconduct cases).

28. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 10 (1962).

29. *NLRB v. Local Union No. 1229, IBEW* (Jefferson Standard Broad. Co.), 346 U.S. 464 (1953).

30. *Id.* at 476-477.

Justice Frankfurter dissented from the Court's denial of protection, warning that the imprecision of the standard supported by the majority would "open the door wide to individual judgment by Board members and judges [and] needlessly stimulate litigation."³¹ His warning has proved prophetic.³² For example, in *New River Industries v. NLRB*, the Fourth Circuit found unprotected a sarcastic letter written by two employees deriding the employer's offering of free ice cream to celebrate an important agreement that the employer reached with a supplier.³³ In so holding, the Fourth Circuit reversed the decision of the Board, which had found the activity protected and the discharges unlawful.³⁴ In a similar case, *Reef Industries, Inc., v. NLRB*, the Fifth Circuit agreed with the Board's position and held protected a sarcastic letter and t-shirt protesting what employees perceived to be disparaging remarks made by a company official.³⁵

31. 346 U.S. at 481.

32. The earliest example of Frankfurter's prediction is *Patterson-Sargent Co.*, 115 NLRB 1627 (1956), where the union and employer were negotiating toward a new contract. Following the failure of the parties to reach agreement, the employees organized a strike against the employer, who continued to operate using supervisors to make the paint. The employees distributed circulars informing customers that, as a result of the strike, paint was not being made by "the well-trained, experienced employees who have made the paint you have always bought." *Id.* at 1628. It also continued a warning that the paint may "peel, crack, blister, scale or any one of many undesirable things that would cause you inconvenience, lost time and money." *Id.* The circular concluded with the assurance that the employees would inform the public when the paint was once again made by regular employees.

Jefferson Standard was susceptible to two readings. One, the Court's observation that statements were not made in the context of a labor dispute intended to suggest a legitimate means of disparaging employer products. Only disparagement that is disassociated with the labor dispute is unprotected. Two, "means" refers to any use of disparagement.

In *Patterson-Sargent*, the Board interpreted means to refer to public disparagement of the employer's product regardless of whether the disparagement is associated with the labor dispute. *Id.* at 1630. The dissent adopted the first reading. *Id.* at 1635-36. Reasoning that the handbills were intended to impugn the quality of the employer's product making their circulation distinguishable from a boycott publicizing an existing labor dispute, the Board majority found the distributing employees' activities unprotected relying on *Jefferson Standard*.

33. *New River Indus., Inc. v. NLRB*, 945 F.2d 1290 (4th Cir. 1991). The offending letter read:

The employees of New River would like to express their great appreciation of the 52 flavors of left over ice cream from the closed Meadow Gold Plant. It has boosted moral [sic] tremendously. Several employees were heard to say they were going to work harder together, and do better so we could have some more old ice cream.

We realize what a tremendous sacrifice this has been for management and [it] will be long remembered. We hope this has not cut into computer expenses.

Many feel this almost out does the company picnic [sic] this summer [sic]. We are also glad the Milliken employees enjoyed this immensely. They said they have never seen employees treated like this. We sincerely appreciate all the sacrifices management has made for us and anticipate the Thanksgiving and Christmas, New Year Employee Appreciation Day combination dinner.

As the Court noted, there had not been a company picnic that summer nor was a Company dinner for employees planned. *Id.* at 1292.

34. *Id.* The court decided *New River* on the basis of an absence of a section 7 purpose, i.e. it held that "the letter was not a medium intended to resolve or call attention to conditions of employment." *Id.* at 1295. Yet, the decision and cited authority hint that the method of protest was improper and thus a Section 7 violation.

35. *Reef Industries, Inc. v. NLRB*, 952 F.2d 830 (5th Cir. 1991). After a personnel manager testified that the average employee was at a 10th grade education level, employees made a tee-shirt and

The case law is full of such inconsistent decisions. For example, in a case where the employees called the company plant manager "Castro," the conduct was deemed unprotected.³⁶ However, in a case where company security policies toward minority employees were referred to as "gestapo," such remarks were held protected.³⁷

However, no case better demonstrates the need for more consistent and predictable decisions in this area than does *Cambro Manufacturing Company*.³⁸ In *Cambro* twelve employees engaged in a work stoppage to protest their treatment at the hands of their immediate supervisor and the appointment of a particular employee as a leadperson. The supervisor instructed the employees to return to work three times during a span of about two hours. The second and third instructions included a direction to clock out if the employees did not intend to return to work. The third instruction followed a telephone conversation between the supervisor and the plant's general manager. The GM instructed the supervisor to tell the employees to either return to work or to clock out and return to the plant the following morning for a meeting with the general manager. This last instruction prompted one of the employees to return to work. However, the others persisted with the work stoppage without clocking out. The company fired the employees who persisted with the stoppage and spared the one employee who returned to work.

While the Administrative Law Judge (ALJ) found that all of the employees were engaged in a "reasonable, nondisruptive, and limited," — hence, a protected — protest,³⁹ the Board, with one member dissenting, held that only the employee who returned to work after the third instruction was protected.⁴⁰ The Board recognized that the peaceful, focused, and non-disruptive nature of the work stoppage entitled the employees to persist for

letter. These included a cartoon depicting a head-scratching, cross-eyed, duck-like featured individual, saying, "Don't ask me! Duh I Dunno? I've got a 10th Grade Edukation." The legend "MAD OD-SCENES (sic) '89" and the initials MAD also appear on the cartoon. The employees' letter read: "... As a result of such a flattering, unbiased statement. We here at REEF feel it is in order to present you with this token of our esteem graditude. We hope you value it and cherish it, as much as we value your opinion of us.

It is apparent that you hold us in you highest thoughts.

Sincerely,

S.B. REEF EMPLOYEES

P.S. Flattery will get you no where!"

Id. at 833. Unlike some of the courts that have attempted to construct a rule-like standard to apply to loss of protection cases, the Fifth Circuit's finding in this case that the Board's conclusion finding the tee-shirt and letter not so offensive as to lose their protection under NLRA section 7 is not particularly helpful. *See infra* notes 162-180 and accompanying text.

36. *Boaz Spinning Co. v. NLRB*, 395 F.2d 512 (5th Cir. 1968).

37. *NLRB v. New York Univ. Med. Ctr.*, 702 F.2d 284 (2nd Cir. 1983) *vacated on different grounds*, 464 U.S. 805 (1983).

38. *Cambro Mfg. Co.*, 312 NLRB 634 (1993).

39. *Id.* at 635.

40. *Id.* at 637.

a “reasonable period of time.”⁴¹ Nevertheless, the Board concluded that the instruction following the supervisor’s telephone conversation with the general manager defined the “point at which the Respondent was entitled to reclaim the use of its entire premises.”⁴²

The Board acknowledged that the “line between a protected work stoppage and an illegal trespass is not clear-cut.”⁴³ The Board’s approach was to balance the means used by the employees against the property interest of the employer. The Board suggested that this balance favored the employer after the second instruction to either return to work or clock out and return the following morning:

[The directive] did not impair the employees’ protected right to present their grievances. They had already discussed their problems among themselves and with [the supervisor]. They had demanded, and were lawfully denied, an unprecedented predawn meeting with Respondent’s plant manager or owner. They were assured the opportunity, in full accord with the Respondent’s open door policy, to meet in just a few hours with [the general manager] for further discussion of their complaints. They had met with him in the very same manner and at the very same time on October 25.⁴⁴

Regarding the employer’s interest, the Board said the following:

[The supervisor’s third] direction that employees return to work or leave the plant and return later for the meeting served the Respondent’s immediate interest in maintaining its established grievance procedure and placed no undue restriction on those employees’ right to present grievances within a few hours pursuant to that procedure. . . . Further in-plant refusals to work served no immediate protected employee interests and unduly interfered with the employer’s right to control the use of its premises.⁴⁵

The problem with the Board’s analysis is twofold. First, this balancing formula does not distinguish the case of the one employee who returned to work from those who did not. Returning to work after the second instruction would also have preserved the employee’s grievances and served the employer’s interest in maintaining an established grievance procedure and ending undue control of the employer’s premises. One can argue that by returning to work after the third instruction rather than persisting, the lone employee who was deemed protected challenged the employer’s authority less than the others. However, the degree of difference in the challenges seems small enough to raise a question about whether statutory protection should turn on such subtlety. Second, as an ex post balancing analysis, the Board’s approach gave the employees no notice of where the line would be drawn or of when their conduct would cease to warrant statutory protection.

41. *Id.* at 636.

42. *Id.*

43. *Id.* at 643.

44. *Id.* at 635.

45. *Id.*

The Board not only failed to offer a persuasive distinction between the employee who returned to work after the third instruction and those who did not, but also failed to offer any test that might serve as guidance in subsequent cases. Why was the refusal to return to work after the second instruction not the pivotal point? The points made by the Board about the preservation of the grievance, the employer's interest in protecting the grievance procedure, and the reclaiming of the employer's premises are all equally applicable after the second and third instructions. The disagreement between the ALJ and dissenting Board Member Devaney on the one hand, and Board Members Stephens and Raudabaugh on the other hand, point again to Justice Frankfurter's warning in *Jefferson Standard*: the imprecision of standards for loss of protection in concerted activity cases has "open[ed] the door wide to individual judgment by Board members and judges."⁴⁶

III. SOURCES AND INTERPRETATION

A. *Legislative History*

As already mentioned, section 7 of the NLRA gives employees "the right to self-organization," as well as the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁴⁷ Unfortunately, the NLRA spells out no standard or rule distinguishing between protected and unprotected manifestations of concerted activity. However, the legislative history of the Act offers considerable guidance for defining the parameters of protected means of concerted activity.⁴⁸ To understand these parameters, one must start at section 10(c), an amendment to the original statute made by the Taft-Hartley Act.⁴⁹

46. NLRB v. Local Union No. 1229, IBEW (*Jefferson Standard Broad. Co.*), 346 U.S. 464, 481 (1953).

47. Labor Management Relations Act, ch. 120, sec. 101, § 7, 61 Stat. 136, 140 (1947) (codified as amended at 29 U.S.C. § 157 (1994) and popularly known as the Taft-Hartley Act).

48. The language of section 7 made its first appearance in section 2 of the Norris LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101 (1932). It later surfaced in the National Industrial Recovery Act of 1933, 48 Stat. 195 (1933), the precursor of the NLRA, and then in the NLRA of 1935. The political opinion of the time focused on industrial democracy and this theme was reflected in legislative debates over the NLRA. See Theodore J. St. Antoine, *How the Wagner Act Came to Be: a Prospectus*, 96 Mich. L. Rev. 2201, 2205 (1998) (discussing the intellectual sources of Senator Wagner's thought about concepts of industrial democracy). See Robert A. Gorman & Matthew W. Finkin, *The Individual And The Requirement Of 'Concert' Under The National Relations Act*, 130 U.Pa. L. Rev. 286, 331-46; see also Mary Ann Glendon, *Civil Service*, NEW REPUBLIC, April 1, 1996, at 39 (reviewing MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996)) (suggesting that the ability of employees to have a say in the government of the workplace—an ability that has been undermined by the changing economy—is an important mediating structure of civil society that is important to self-government in a civic republic).

49. Labor Management Relations Act, ch. 120, sec. 101, § 10(c), 61 Stat. 136, 147 (1947) (codified at 29 U.S.C. § 160(c) (1994)).

The formation of Section 10(c) was a reaction to a perceived imbalance in the Act favoring unions.⁵⁰ Section 10(c) forbade the Board to reinstate or grant back pay to any employee who had been discharged for cause.⁵¹ The legislative history makes it clear that this amendment was designed to prevent the Board from inferring unlawful—namely anti-union—motivation, where an employer had terminated an employee for cause.⁵² Indeed, the legislative history cites several cases where the Board had ordered reinstatement of employees who had engaged in unlawful sit-down strikes, mutiny, and mass picketing, all constituting cause for discharge.⁵³ However, the House Conferees rejected an earlier version proposed by the House Committee on Education and Labor that would have explicitly excepted from the protection of section 7 certain kinds of concerted activities: unfair labor practices, unlawful concerted activities, and activities violating collective bargaining agreements.⁵⁴

This earlier version was rejected in part to avoid a narrow interpretation that would restrict the loss of protection to merely the enumerated exceptions. Congress was concerned that it might be interpreted in such a way as to protect “improper conduct” that deserved no protection, even though such conduct might not be unlawful.⁵⁵ Although it contains no clues about what Congress thought was improper, the legislative history makes it very clear that the legislature intended to limit the statutory protection granted to employees for concerted activities in section 7 of the Act to lawful and proper conduct.⁵⁶

Thus, the interpretive problem under section 7 has been defining the boundaries of improper means for carrying out concerted activity when that activity motivates the discharge. On its face, the statute protects the right to

50. See National Labor Relations Act, *supra* note 2, known popularly as the Wagner Act.

51. 29 U.S.C. § 160(c) (1994) (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.)

52. H.R. Rep. No. 80-245, at 42-43 (1947), reprinted in 1 NLRB, *LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT*, 1947, at 292, 333-34 (1948).

53. H.R. Conf. Rep. 80-510, at 38-39 (1947), reprinted in 1 NLRB, *LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT*, 1947, at 505, 542-43 (1948).

54. H.R. Rep. No. 80-245, at 27-28 (1947), reprinted in 1 NLRB, *LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT*, 1947, at 292, 318-19 (1948).

55. See H.R. Conf. Rep. 80-510, at 38-39 (1947), reprinted in 1 NLRB, *LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT*, 1947, at 505, 542-43 (1948).

56. See *supra* notes 51-52 and accompanying text. Moreover, Congress intended the Board in its factfinding to be careful to distinguish legitimate business motives from illegitimate anti-union motives for discharging employees—the Board should use its statutory authority to remedy only unlawfully-motivated employer actions. If an activist maintenance employee is terminated for being unable to repair machines (unsatisfactory performance), for example, the employer should not be deemed unlawfully motivated because the employee happens to be an activist. Essentially the 10(c) amendment reiterated the Board's obligation to practice integrity in factfinding, which is, in the end, an unremarkable expectation.

strike but outlaws certain concerted activities such as secondary boycotts.⁵⁷ Moreover, it explicitly does not protect strikes occurring during cooling off periods within the context of collective bargaining.⁵⁸ In addition, section 10(c) prevents statutory remedies where discharges have been for cause, and the legislative history of section 10(c) states that the section 7 right does not extend to "unlawful" or "other improper conduct."⁵⁹ Unfortunately, while the legislative history offers several examples of "unlawful conduct," it offers none of "improper conduct."⁶⁰ Consequently, the statute leaves decision-makers with the task of determining when concerted conduct is "improper" and should thereby deprive the actor of section 7 protection.

Though this traditional examination of text and legislative history has yielded some important evidence of how an appropriate standard should read, the failure of either text or history to spell out the content of "improper conduct" makes it necessary to consider evolving applications of the statute. Examination of Supreme Court cases, as well as some of the basic policies of the Act, such as the ongoing need to accommodate section 7 rights and legitimate business interests, are helpful in interpreting the statute.⁶¹

B. Jefferson Standard and Washington Aluminum

Two Supreme Court cases have been very important in determining the scope of improper conduct. *Jefferson Standard* involved a group of nine technicians who worked for a fledgling television station, WBTV in Charlotte, North Carolina in 1949.⁶² The technicians, represented by the International Brotherhood of Electrical Workers (IBEW), had negotiated to impasse with the station about the kind of arbitration provision to be contained in the new contract.⁶³ After conventional picketing failed to generate sufficient pressure on the company at the bargaining table, the technicians commenced a campaign criticizing the quality of the station's programming. They distributed 5000 handbills not only on the picket line, but in barber shops and restaurants and on buses. They also mailed the handbills

57. 29 U.S.C. § 163 and § 158(b)(4) (1994).

58. 29 U.S.C. § 158(d) (1994).

59. H.R. Conf. Rep. 80-510, at 38-39 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 505, 542-43 (1948).

60. *Id.*

61. In this sense, the current enterprise resembles Professor Eskridge's model of dynamic statutory interpretation. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483-84 (1987).

62. NLRB v. Local Union No. 1229, IBEW (Jefferson Standard Broad. Co.), 346 U.S. 464 (1953).

63. *Id.* at 467. The employer wanted a provision that narrowly circumscribed the arbitrator's jurisdiction in discharge cases to determining the facts and leaving the appropriate penalty to the employer. The Union wanted broader authority for the arbitrator to determine whether discharges were for "just cause."

to businesses, saying that WBTV used stale, piped-in programming such as sporting events from New York, Boston, Philadelphia or Washington.⁶⁴ In the handbills the technicians pointedly suggested that the station did not carry local programming and had not purchased the equipment needed to carry such programming, because WBTV regarded Charlotte as a “second class city”.⁶⁵ The handbills were signed “WBT TECHNICIANS.” While it was conceded that the campaign was designed to bring pressure upon the company at the bargaining table, the handbills made no reference to the union, collective bargaining, or the labor dispute between the company and union.⁶⁶

The Supreme Court offered two rationales for finding the handbilling unprotected activity. However, neither supplies much guidance in deciding future cases. Taking the Board’s ruling as a signal, the Court’s first approach was to view the tactics of the technicians as isolated from the collective bargaining negotiations. Because the handbilling was insufficiently related to the collective bargaining issues at stake, the Court said the technicians’ campaign breached a duty of loyalty owed to the company. This breach constituted cause for discharge.⁶⁷ The Court treated the case the same way it would treat a case where an employee unsatisfactorily performs the job and cannot be saved by her concurrent union activism, because the discharge is motivated by the performance problem rather than the activism.⁶⁸

The Court’s second strand of analysis was to treat the Union’s tactic as though it was a conventional appeal for support of the Union in its dispute with the company. On this point the Court simply stated, “the means used by the technicians in conducting the attack have deprived the attackers of the protection of [section 7], when read in the light and context of the purpose of the Act.”⁶⁹ This conclusory statement creates more confusion than it dispels. Are the means cited by the Court the disparaging of the product without disclosing the existence of a labor dispute and the economic purpose of the campaign?⁷⁰ Or are the means simply product disparagement?⁷¹ And if the means are simply “product disparagement,” what are the characteristics of those means that cause them to trump the section 7 protection

64. *Id.* at 468.

65. *Id.*

66. *Id.* at 468, 476.

67. *Id.* at 471-76.

68. See, e.g., J.L.M. Inc. d/b/a Sheraton Hotel Waterbury, 312 NLRB 304, 304-305,320-321 (1993) (upholding written warning issued to union activist by openly anti-union employer, where laundry employee failed to properly dispose of dirty linen).

69. 346 U.S. at 477-478 (1953).

70. *Id.*, at 475.

71. *Id.* at 477.

that employees are thought to have when they engage in "concerted activities for mutual aid and protection?"⁷²

One could read the *Jefferson Standard* decision as Justice Frankfurter did in his dissent: that is, the majority establishes a rule that any conduct constituting cause leads to the loss of protection under section 7.⁷³ However, such a reading would ignore the design of the statute as interpreted in other cases,⁷⁴ in the legislative history,⁷⁵ and in other Supreme Court interpretations of the effect of cause on loss of protection.⁷⁶

The other important Supreme Court case is *Washington Aluminum*, decided by the Supreme Court nine years after the *Jefferson Standard* case.⁷⁷ *Washington Aluminum* involved an aluminum fabrication company that fired a group of seven non-union machinists after they walked off the job to protest bitterly cold shop conditions. As anticipated after *Jefferson Standard*, the employer in *Washington Aluminum* made the argument that the employee walkout violated a plant rule forbidding employees from leaving work without the permission of the foreman. This conduct, the argument continued, constituted "cause" for discharge—in the employer's words, "wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant."⁷⁸ In reasoning that speaks generally to the problem examined in this article, the Court described the relationship between the "cause" language of section 10(c) and section 7 protection as follows:

Section 10(c) of the Act does authorize an employer to discharge employees for "cause" and our cases have long recognized this right on the part of an employer. But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which section 7 of the Act protects. And the plant rule in question here purports to permit the company to do just that for it would prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission of the company's foreman was obtained.⁷⁹

72. 29 U.S.C. sec 157 (1994).

73. 346 U.S. at 479-480.

74. Section 7 limits legitimate employer prerogatives. See "no solicitation" rule cases: Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (holding unlawful a broad no-solicitation rule) and Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978) (holding unlawful a no-solicitation rule barring solicitation in work areas open to the public).

75. Section 7 intended to institute industrial democracy. See *supra* note 48; *Jefferson Standard*, 346 U.S. at 480 (Frankfurter dissenting) (the "legislation [was] designed to put labor on a fair footing with management.").

76. NLRB v. Washington Aluminum, 370 U.S. 9 (1962).

77. *Id.*

78. *Id.* at 16. This argument had been adopted by the 4th Circuit, 291 F.2d 869 (1961), which had reversed the Board order to reinstate the employees with backpay.

79. *Id.* at 16-17.

As explained in the following section, the Court's holding in *Washington Aluminum* brought some light to the issue after its hazy decision in *Jefferson Standard*; nonetheless it fell short of establishing a clear standard.

C. Overlapping Categories

Washington Aluminum and *Jefferson Standard*, the statute, and its legislative history demonstrate that protected concerted activities and conduct constituting cause for discharge are overlapping categories that are mutually limiting. Figure 1 demonstrates this overlap.⁸⁰

PROTECTED CONCERTED ACTIVITIES CAUSE

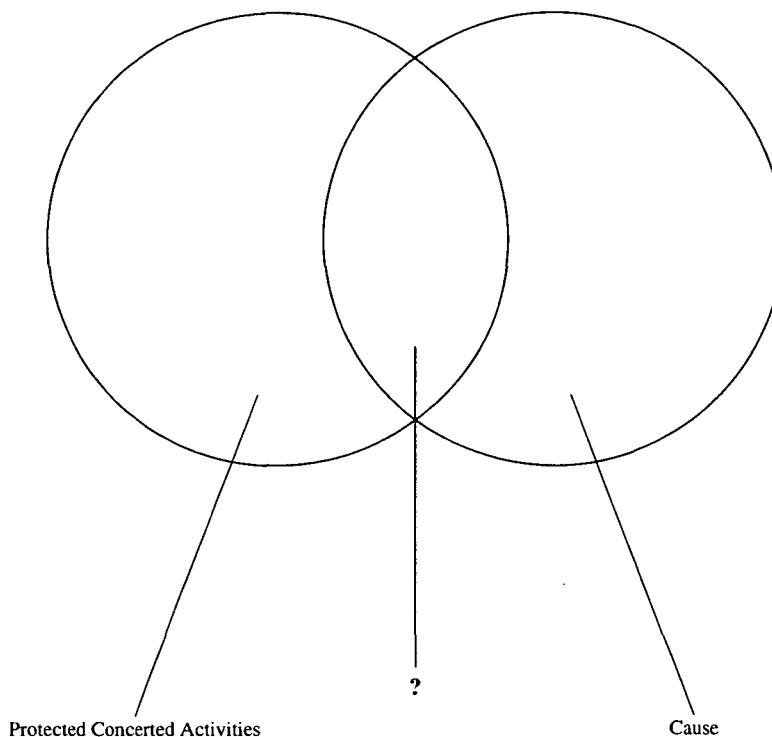


Figure 1. The overlapping circles represent the two large separate areas carved out by sections 7 and 10 of the Act and also a shared space. As the question mark indicates, the elusive loss of protection issues addressed in this paper arise in the shared area.⁸¹

80. NLRB v. Washington Aluminum, 370 U.S. 9 (1962) and NLRB v. Local Union No. 1229, IBEW, 346 U.S. 464 (1953).

81. Assaulting a supervisor would constitute cause. See General Motors Corp., GM Assembly Div., 245 NLRB 1186 (1979) (upholding discharge of union committeeman for assaulting foreman). A group letter suggesting improvements in compensation and working conditions is protected concerted activity. See Garfield Park Comprehensive Community Health Center, 232 NLRB 1046 (1977) (finding

Washington Aluminum is very helpful in clarifying this relationship after *Jefferson Standard* left open the possibility that cause always trumps section 7 protection. The *Washington Aluminum* Court rejected the company's claim that cause alone—violation of the company's work station plant rule—is sufficient to justify loss of protection, even when it is intertwined with concerted activity. In doing so, the Court affirmed the reality that section 7 protection sometimes trumps cause.

But *Washington Aluminum* does only a little better than *Jefferson Standard* in plotting the boundaries between section 7 protection and loss of protection because of misconduct. The *Washington Aluminum* Court stated only that walk-outs do “not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent, or in breach of contract,” nor do they constitute disloyal acts as discussed in *Jefferson Standard*.⁸² Thus, after *Washington Aluminum*, identifying boundaries remains a problem. What are the other categories of unprotected concerted activities? How are we to know when conduct that cannot be characterized as unlawful, violent, impermissibly disloyal, or as a breach of contract, is nonetheless unprotected?⁸³

IV. PROPOSED STANDARD

A. *Loss of Protection: Rule or Standard*

A threshold consideration raised by questions of how to identify categories of lawful but unprotected concerted activity (and how to determine their content) is whether loss of protection in labor cases should be governed by a rule or a standard. A related concern is how complex the law should be. Professor Louis Kaplow has discussed both the extent to which laws should be promulgated by rules or by standards and the question of how much complexity is appropriate.⁸⁴ The distinction between a rule and a standard is based upon whether content is given to the law *ex ante* (before conduct triggering the application of the law occurs) or *ex post* (after such

unlawful the discharge of a psychologist for soliciting views of fellow staff members and submitting a written memorandum to the employer about standards to be used in wage increase policies). Walking off the job to protest working conditions, holding the employer's officials up to public ridicule, challenging a supervisor's work directive, and giving less than a 100% work effort as a pressure tactic are examples of conduct that would constitute cause for discipline or discharge, were they not also group protests directed toward legitimate employee goals. The issue, of course, is the ultimate characterization of these actions under section 7.

82. 370 U.S. at 17.

83. On the uncertainty and impropriety of an “impermissible disloyalty” test see Melinda J. Branscomb, *Labor, Loyalty, and the Corporate Campaign*, 73 B.U.L. Rev. 293, 320-339 (1993).

84. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992).

conduct occurs).⁸⁵ Complexity, on the other hand, deals with the amount of detail contained in the law, whether promulgated by rule or standard.⁸⁶

A basic cost-benefit analysis reveals why the ex ante/ex post distinction is important. The choice between rules and standards carries cost implications.⁸⁷ Professor Kaplow observes that rules are more costly to promulgate, while standards increase the cost of learning the law's contents (advice) and of enforcing the law.⁸⁸ He examines the relative costs of rules and standards at the three stages of the law's operation: (1) promulgation (when government enacts the law), (2) individual choice (an individual's decision about whether to acquire legal advice), and (3) enforcement (an adjudicator's determination of the law's application). The brunt of the costs associated with rules occurs at the promulgation stage (ex ante) when materials are assembled and analyzed to determine the rule's content. However, the specific content of rules makes learning and applying the law's content less burdensome. Standards, on the other hand, are more general, requiring much less effort in promulgation and much more in learning and applying the law's content.⁸⁹

Professor Kaplow posits the frequency of the law's application as the pivotal determinant of the choice between rules and standards.⁹⁰ Although promulgation costs are higher with rules, advice and enforcement costs are lower when rules are chosen. High frequency in application justifies promulgation costs because advice and enforcement costs are lower over a larger number of cases.⁹¹ In contrast, advice and enforcement costs, including supplying legal content ex post, might be prohibitive if the law is applied with high frequency.⁹²

85. *Id.* at 559-560. With Kaplow's notion of the distinction between rules and standards compare Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L.J. 65, 66-79 (1983). Diver uses the terms rule and standard interchangeably but distinguishes between ex ante and ex post content based on degree of transparency, accessibility, and congruence. Also compare Isaac Ehrlich and Richard A. Posner, *An Economic Analysis Of Legal Rulemaking*, 3 J. Legal Stud. 257, 258, 277 (1974). Posner defines the "difference between a rule and standard [as] a matter of degree—the degree of precision." He describes a standard as not specifying "the circumstances relevant to decision or the weight of each circumstance but as merely indicat[ing] the kinds of circumstance[s] that are relevant."

86. Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J. L. Econ. & Org. 150 (1995). See also Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, And Cures*, 42 Duke L.J. 1, 3 (1992) (defining legal complexity as the extent to which legal "processes, institutions, and supporting culture possess . . . density, technicality, differentiation, and indeterminacy or uncertainty.")

87. Kaplow, *supra* note 84, at 562-563.

88. *Id.* at 568-570.

89. *Id.*

90. *Id.* at 572-577.

91. *Id.* at 571-579.

92. *Id.*

1. Costs And Benefits In Loss Of Protection Law

Loss of protection cases are governed by the standard of impropriety.⁹³ For example, in deciding a case where employees protest the employer's compensation system through a sarcastic open letter to all employees, the Board and Courts must determine whether the letter is "improper" ex post by considering the contents of the letter and the circumstances surrounding its publication. This standard could generate a variety of costs to employees and the legal system.⁹⁴ Employees who consider writing such a letter may incur substantial costs in the following ways. First, a finding of impropriety could result in a loss of employment.⁹⁵ Second, because the contents of the law have not been supplied ex ante, employees concerned about the consequences of sending the letter would need to do their own research or seek legal advice in advance to predict an ultimate finding regarding propriety.⁹⁶ Finally, the NLRB and courts would be required to do legal research and deliberate on the propriety of the letter.⁹⁷

The standard would also produce less tangible costs. Because employees would have no advance notice of whether the letter was improper, they would be unsure of how to conform their conduct to the law.⁹⁸ In this context they would tend to think of any finding of impropriety as unfair.⁹⁹ Decisionmakers, who would have no guidelines for exercising their discretion, would then reach inconsistent results in similar cases, and to some extent would undermine the legitimacy of the law and legal institutions.¹⁰⁰

Although standards may be beneficial in avoiding the cost of ex ante promulgation associated with rules,¹⁰¹ the benefits associated with rules may outweigh their costs. For example, it would be costly to generate a rule providing for the protection of non-libelous letters protesting management practices that bear upon wages, hours, and terms and conditions of employment. Indeed, it might well be possible only after an investigation

93. See *supra* note 55.

94. See Kaplow, *supra* note 84, at 570, 572-573 (explaining the nature of law enforcement under standards and the costs associated with standards).

95. See *Jefferson Standard*, 346 U.S. at 477.

96. See Kaplow, *supra* note 84 at 569 (describing the effect of standards on individual choice).

97. See *id.* at 570 (describing the effect of standards on enforcement). See also Diver, *supra* note 85 (describing the numerous and expensive conflicts and broad range of fact finding and offers of proof under general standards).

98. See Diver, *supra* note 85 (describing an accessible rule as follows: "An accessible rule . . . promotes communal and 'dignitary' values by enabling members of its audiences to anticipate its application to their individual circumstances.").

99. See Kaplow, *supra* note 85, at 607-608 (pointing out that rules provide more notice leading to greater fairness).

100. See *id.* at 609 (noting that rules "may be preferred to standards in order to limit discretion, thereby minimizing abuses of power").

101. See *id.* at 582 (pointing out that giving content to the law may be cheaper at the enforcement stage because only one set of facts needs to be considered and those facts may well supply information regarding the appropriate content of the law).

and determination of the frequency and impact of such letters, based on information supplied by experts and interested parties.¹⁰²

The rule would also present what Diver calls congruence problems, because it would be under-inclusive (leave unprotected some conduct that should be protected) and over-inclusive (protect some conduct that should be left unprotected).¹⁰³ For example, the protest letter, distributed both in the plant and the surrounding community, might assert that the company comptroller's mishandling of company revenues is a major reason for the unavailability of funds to improve employee compensation. This arguably defamatory statement might render the letter unprotected, despite the importance of employee compensation concerns. Conversely, it may protect a calculated, although non-defamatory, effort to destroy the company's good-will with general and unfair allegations of poor employee treatment. Neither of these effects would further the underlying statutory purpose of protecting legitimate employee protests and employer business interests.

On the other hand, under the protest letter rule employees would know how to use protest letters "properly" without incurring substantial legal costs, because the rule would give specific guidance. Such knowledge would lead to less unprotected conduct and result in fewer cases alleging violations of the Act.¹⁰⁴ The Board and Courts, without needing to exercise broad discretion, could limit their consideration to whether the letter was libelous and bore upon "wages, hours, terms and conditions of employment."¹⁰⁵ Repeated application of this rule in similar cases should yield consistent results.¹⁰⁶

As already noted, Kaplow's formulation holds that frequency of application is pivotal in determining whether laws should be promulgated by rules or standards.¹⁰⁷ Frequency refers to a specific component of the law rather than a more general doctrine that may include the relevant component. For example, Professor Kaplow cites the negligence rule as frequently applied. However, a certain aspect of that rule, perhaps due care, involves such variable facts that a given occurrence is infrequent, making a standard appropriate for that aspect.¹⁰⁸

102. See *id.* at 569. See generally Kathleen A. Curran, Note, *The National Labor Relations Board's Proposed Rules on Health Care Bargaining Units*, 76 Va. L. Rev. 115, n.1 (1990) (detailing the costly procedures associated with promulgation of the hospital unit determination rule).

103. See Diver, *supra* note 85, at 66-67, 73, 82-83 (discussing congruency and the effect of rule precision on behavior including the pilots as an example).

104. See *id.* at 71-72 (noting "[c]ongruence directly fosters the law's substantive moral aims by promoting outcomes in individual cases consistent with those aims.").

105. The terms of the non-libelous letter rule would so limit the inquiry.

106. See Kaplow, *supra* note 84, at 611-616.

107. See Kaplow, *supra* note 84 and accompanying text.

108. See *id.* at 600.

Loss of protection cases have arisen with great frequency.¹⁰⁹ However, they also occur with considerable variation.¹¹⁰ Although the frequency of such cases suggests application of a rule, the variation suggests a standard.¹¹¹ A “rule-like standard” might preserve the benefits of rules (less costly advice and enforcement as well as greater predictability and fairness) and standards (less costly promulgation and greater responsiveness to case variation) while diminishing their costs.¹¹²

Although a detailed rule like the “protest letter” rule discussed above is not possible for broad, cross-categorical application in loss of protection cases,¹¹³ a clear standard with accompanying criteria would provide rule-like benefits.¹¹⁴ It would inform employees in advance of the factors to be considered in evaluating conduct without the need for substantial legal advice. This would permit employees to conform their conduct to the requirements of the law and avoid the economic consequences of noncompliance. A rule-like standard would also structure decisional discretion and lead to greater consistency in decision making in loss of protection cases.¹¹⁵ Decisionmakers could retain enough discretion to address the variation and avoid incongruence in loss of protection cases. Additionally, the investigation costs associated with promulgating a more detailed rule would be avoided.¹¹⁶

2. Content

If a rule-like standard is optimal in loss of protection cases, the question about what content to give such a standard remains. How precise and complex should the standard be? Professor Colin Diver has argued that precision in administrative policymaking should be great enough to gener-

109. See Appendix showing the categories and frequency of loss of protection cases.

110. As the Appendix shows, LOP cases might be broken down into the following categories: disloyalty, strikes, insubordination, outrageous conduct, and unlawful conduct.

111. Note the frequency within categories and the tendency for scholars and the courts to promulgate rules for categories. The ambition here is to achieve lower costs and greater consistency through a rule that transcends categories.

112. See Kaplow, *supra* note 84, at 560-561, n.5 (describing “rule-like” standards as facilitating resolution of cases ex post and making prediction easier ex ante; see also, STEVEN BURTON, JUDGING IN GOOD FAITH (Cambridge 1993)).

113. As the Appendix suggests, LOP cases occur with a great deal of variation and with varying frequency. Under Kaplow’s formulation low frequency suggests a standard, while high frequency makes a rule efficient. Although there is a significant occurrence of LOP cases, the factual variation prevents the kind of frequency that would make useful a detailed rule. See Kaplow, *supra* note 85, at 599-600 (discussing the difficulty of formulating rules where factual permutations are great and noting that while negligence cases are numerous they may be infrequent “at the relevant degree of detail.”).

114. See Kaplow, *supra* note 85, at 601 (“A legal command is defined here to be rule-like to extent that greater effort has been expended ex ante, rather than requiring such effort to be made ex post.”).

115. In Kaplow’s usage, a rule, whose contents are supplied ex ante, necessarily removes the discretion of the enforcement authority to supply such content. See *id.* at 561-562, 600 (noting the effect of a detailed rule on judicial discretion and the rule-like benefits of identifying relevant criteria in advance).

116. See *id.* at 568-569.

ate in the intended audience an understanding that is easily ascertained and productive of desired behavior. Such precision is a function of the qualities of transparency, accessibility and congruence. Diver emphasizes that varying precision in the law has an impact on behavior and administrative costs.¹¹⁷

Because precision increases compliance and reduces advice and enforcement costs, the rule-like standard should be sufficiently clear, accessible, and congruent to produce these benefits.¹¹⁸ On the other hand, the promulgation costs, the inaccessibility of excessively complex rules,¹¹⁹ and the probability of under- or over-inclusiveness associated with precision suggests a need for greater generality.¹²⁰

Precision, as defined by Diver, and complexity are different qualities.¹²¹ Professor Kaplow defines the complexity of legal rules as the "number and difficulty of distinctions the rules make,"¹²² and he suggests that complexity is a function of the range of possibilities presented by a legal problem.¹²³ Kaplow recognizes the benefits and costs of complex rules, which permit better control of behavior while entailing greater learning and enforcement costs.¹²⁴ Professor Peter Shuck points out that laws are located on a simplicity—complexity continuum, because no bright line demarks simplicity and complexity.¹²⁵ He also notes that indeterminacy or uncertainty is an aspect of complexity.¹²⁶ While conceding certain exceptions, Schuck suggests that reducing complexity generally improves certainty in the law.¹²⁷

The "impropriety" standard for determining loss of protection has the rule-like feature of providing some guidance to the audience—employees,

117. See Diver, *supra* note 85, at 66-68, 73.

118. *Id.*

119. *Id.* at 69-71.

120. *Id.* at 73-74.

121. See Schuck, *supra* note 86, at 2-5.

122. Louis Kaplow, *supra* note 86, at 150. To explain this point he says the following:

A tax on wage income is more complex the more deductions for various expenses are permitted. An environmental regulation is more complex the more types of pollutants or sources of pollution are distinguished. In each case, the more difficult it is to determine the applicable category—whether the difficulty involves understanding the rules themselves or ascertaining the relevant facts—the greater complexity is said to be. *Id.*

123. Kaplow, *supra* note 84, at 588-590.

124. Kaplow, *supra* note 86, at 150-151.

125. Peter H. Schuck, *supra* note 86, at 2-5 (arguing that legal complexity is a growing and problematic phenomenon caused in part by the "political economy of complexity" and suggesting where and how law should be simplified.)

126. Schuck defines complexity as a composite of four variables: density (numerous and comprehensive regimes, e.g. ERISA governing pension administration), technicality (rules drawing fine distinctions and requiring expertise to decipher, e.g. tax code), differentiation (varied institutional decision-makers, e.g. products liability featuring several agencies, the courts and private organizations), and indeterminacy or uncertainty, using the familiar reasonableness standard of tort law as an example of the last variable. *Id.* at 3-4.

127. *Id.* at 4 (describing the relationship between complexity and indeterminacy).

employers, the Board and the Courts—about the kinds of conduct protected under section 7.¹²⁸ The problem is that this standard's content is too general to be of much help in reducing advice and enforcement costs or producing acceptable behavior and consistency in decision making.¹²⁹ Yet, because of the variability among loss of protection cases, promulgating a highly detailed rule that attempts to specify the outcome in all such cases would be too costly to promulgate and too complex to be accessible.¹³⁰ How much precision should an optimal loss of protection rule contain? How much complexity? Earlier formulations have struggled to find the right balance.

B. Attempts at Formulating a Standard

I. Scholarly Proposals

a. The Coxian Approach

Professor Archibald Cox of the Harvard Law School first recognized the problem in 1951.¹³¹ As the following passage indicates, Professor Cox was concerned with identifying standards that would reduce the unpredictability of decisional outcomes (which this paper terms "structuring decisional discretion"):

[S]ection 7 fixes the bias from which the definition of "concerted activities" should be approached; it does not furnish criteria by which to draw the line between protected and unprotected activities. Thus the central problem becomes the establishment of standards by which wholly egregious factors can be eliminated and the subjective attitudes of judges and administrators reduced to minimal roles.¹³²

Cox found sources of objective standards in: (1) express prohibitions in the Act against union activity—if the Act prohibited unions from committing certain acts, employees doing those acts on their own without union sponsorship would be unprotected (although not guilty of an unfair labor practice);¹³³ (2) well-defined policies of the Act that furnish objective standards—for example, strikes in breach of contractual no-strike clauses or activity such as wildcat strikes that undermine the majority representative;¹³⁴ and (3) other federal statutes such as the mutiny statute and the Wage Stabilization Act.¹³⁵ From these sources Cox distilled a proposed

128. Under the Kaplow formulation, every standard is by implication rule-like to the extent that it announces ex ante some legal content. See Kaplow, *supra* note 84, at 560-61, n.5.

129. *See id.* at 569-577 (describing the enforcement and informational characteristics of standards).

130. *See* Kaplow, *supra* note 85, at 600; and Diver, *supra* note 85, at 68-71.

131. Archibald Cox, *The Right To Engage In Concerted Activities*, 26 Ind. L. J. 319 (1951).

132. *Id.* at 325.

133. *Id.* at 325-328.

134. *Id.* at 328-333. Note that the Cox article preceded *Emporium Capwell* by 23 years.

135. *Id.* at 333, 46 U.S.C. Secs. 564,713; *see also* Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942) and American News Co., 55 NLRB 1302 (1944).

standard that would deny protection only for violence, mass picketing and related misconduct outlawed by the labor laws or general criminal statutes.¹³⁶

The Coxian approach has the virtues of clarity and accessibility. Unlike the general impropriety test, it is a rule-like standard that would reduce the decisional task solely to deciphering parameters created by statute or other existing law and determining whether the employee conduct was out-of-bounds under the law. Employees would be presumed to know the content of existing law and to have had notice of the consequences associated with unlawful conduct. Decision making would be more predictable and, hence, more fair.

However, Cox's proposal ignores an important part of the legislative history and undermines legitimate employer concerns that compete with the interest that employees have in such broad statutory protection. As already noted, the House Conference Report on the Taft-Hartley Amendments to the Act reflects a well-considered decision to avoid amending section 7 and to add section 10(c) to the Act in order to limit section 7's reach and exclude protection for both "unlawful" and "improper" conduct.¹³⁷ The Coxian approach would give no effect to the category of "improper conduct."¹³⁸

Because statutory rights read like unlimited grants of immunity but operate on a delicate balance between legitimate employer concerns and statutory protection, the Coxian approach simply does not go far enough. For example, although section 8(a)(1) prohibits interference with section 7 rights, employers have a right to prohibit union solicitation during working time even though such a ban interferes with the union organizing effort.¹³⁹ Similarly, even though the termination of an employee may be partially motivated by union or other concerted activity, the employer's legitimate interest in maintaining performance standards may nonetheless sustain the discharge.¹⁴⁰ Furthermore, because some employee concerted activity, like the product disparagement in *Jefferson Standard*, may involve lawful conduct that improperly undermines the employer's legitimate interest, a stan-

136. *Id.* at 333-344. Similarly, Cox proposed a section 7 purpose standard that would protect "the federal right to engage in concerted activities [such as] strikes, boycotts and picketing whose purpose is to achieve any objective of collective bargaining which has not been outlawed by the state." *Id.* at 344. The Cox proposal was elaborated in George Schatski, *Some Observations and Suggestions Concerning a Misnomer—'Protected' Concerted Activities*, 47 Texas L. Rev. 378 (1969) (arguing that employees should not be subject to termination for concerted activities unless they knowingly engage in illegal conduct).

137. H.R. Report No. 510, 38-39, reprinted at Legislative History of the Labor-Management Relations Act, 1947, 542-543.

138. See Cox, *supra* note 123, at 333-334.

139. Though this no-solicitation rule interferes, the employer's managerial interest in discipline and order in the workplace limit the potential breadth of employee solicitation rights. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

140. See *Wright Line*, 251 NLRB 1083 (1980) *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*. 455 U.S. 989 (1982) and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

dard recognizing only unlawful conduct as a basis for removing protection would be too narrow. Any standard that purports to govern loss of protection cases comprehensively must account for the competing interests of employees and employers.

b. Getman's Observations

Another thoughtful treatment of this issue can be found in Professor Getman's 1967 article, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*.¹⁴¹ Though his concern is primarily the use of economic weapons, Getman devotes a section of the article to loss of protection due to improper means and discusses some of the issues raised by *Jefferson Standard* (the disloyalty case) and *Washington Aluminum* (the case involving intolerably cold conditions).¹⁴²

Professor Getman addresses the protected use of economic pressure and permissible employer responses and acknowledges the importance of the issue: One of the central unanswered questions about the scope of section 7 is the extent to which lawful economic pressure for a legitimate purpose may be held unprotected.¹⁴³

In addition, Getman challenges the holdings of some courts that equate organized economic pressure with unorganized economic pressure. He also challenges holdings that treat the economic pressure of independent employee groups equally, regardless of whether such tactics are consistent or inconsistent with union positions. Getman argues that unorganized employees should often be protected because of their special circumstances,¹⁴⁴ and that independent employee pressure, not inconsistent with the union's status, should be protected.¹⁴⁵ Getman further advocates reevaluating decisions holding intermittent work stoppages and product disparagement unprotected in light of later enhancement of employer economic weapons and Supreme Court pronouncements against the balancing of economic weapons.¹⁴⁶

In critiquing such holdings, Professor Getman makes a number of helpful observations that can be integrated into a rule-like standard. First, he recognizes the difficulty of establishing a rule that will always properly accommodate conflicting interests in cases involving attempts to influence third parties. Therefore, he suggests that the Board should decide on a case-by-case basis using factors such as (a) the nature of the issue, (b) the state of labor relations, (c) the number of employees who walk out, (d) the length of

141. Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. Pa. L. Rev. 1195 (1967).

142. *Id.* at 1233-1240.

143. *Id.* at 1210.

144. *Id.* at 1237-1240.

145. *Id.* at 1242-1248.

146. *Id.* at 1216-1218.

the walkout, (e) the degree to which the employer was damaged economically, and (f) other similar factors.¹⁴⁷ Second, he acknowledges the employer's business interest in discharging employees "who engage in continuous and extremely disruptive pressure tactics," such as using disruptive economic pressure where the employer is willing to negotiate.¹⁴⁸ Third, he criticizes "disloyalty . . . as a basis for distinguishing the cases," because "almost all types of economic pressure are disloyal."¹⁴⁹ Fourth, he recognizes that economic pressure that is too "inconsistent with a continuing employer-employee relationship" may be a basis for loss of protection.¹⁵⁰ Finally, he proposes a rule to govern the status of independent pressure:

[The employer] should be able to require the union to either adopt or disavow the employees' action. If the union does the latter, the conduct would be unprotected; if it adopts the employee's action, the company should be able to respond as it would to union sponsored pressure.¹⁵¹

Although Getman's discussion contains several helpful insights that can be used in formulating a comprehensive standard governing this area, his work contains only fragmented suggestions that deal primarily with the use of economic weapons.¹⁵² Thus, these suggestions fall short of a comprehensive rule-like standard that would apply in the myriad cases involving loss of protection.

c. Atleson's Approach

Professor James Atleson in *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* has proposed that neither sit-down strikes nor slowdowns be subject to the loss of protection.¹⁵³ Although many of Atleson's arguments are persuasive, some seem to minimize relevant legislative history and Supreme Court pronouncements. For example, Atleson argues that even illegal activity such as sit-down strikes should be protected because sanctions other than employer self-help are available and that lawful activity such as slowdowns should be protected because the courts should not be balancing economic weapons.¹⁵⁴ In Atleson's view, courts have incorrectly found that such activity is not costly to employees, and he argues in response that employers can still respond with a whole range of permissible economic pressures.¹⁵⁵ Atleson, like Getman, is concerned only about eco-

147. *Id.* at 1222. As noted by Kaplow, setting out factors in advance makes the standard more rule-like.

148. *Id.* at 1238.

149. *Id.*

150. *Id.* at 1240.

151. *Id.* at 1245.

152. *See supra* notes 143-150.

153. *See* JAMES ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 44-66 (1983).

154. *Id.* at 48-55.

155. *Id.* at 55.

nomic weapons and specifically sit-downs and slowdowns. However, his discussion offers insights into why the basic protected concerted activity analysis has survived, despite the industrial democracy foundation of the Act.¹⁵⁶

d. Branscomb's Contribution

In the most recent critique of loss of protection cases, Professor Melinda J. Branscomb examines the role of the loyalty doctrine.¹⁵⁷ Branscomb advocates jettisoning the disloyalty test as a measure of when employee conduct warrants the loss of protection.¹⁵⁸ Specifically, Branscomb argues that more clarity is needed in protected concerted activity doctrine. She proposes that the first step required to enhance clarity is understanding and applying consistently the following three part analysis: (1) whether the activity is concerted, (2) whether the purpose is proper, and (3) whether the means are proper. The next step is to disentangle duty of loyalty from product disparagement cases—the two concepts were fatefully linked in Jefferson Standard—and from other “exceptions” to section 7 protection, such as insubordination, interruption of production, illegal conduct, and improper disclosure of confidential information. The final step is acknowledging that “disloyalty” is not a workable standard for separating protected from unprotected means, because most collective activity, such as community publicity, union organizing rallies, lawful boycotts, and strikes, could be characterized as disloyal.

Although Professor Branscomb makes a persuasive case for abandonment of the disloyalty test, she acknowledges that she does not purport to create an overarching standard in loss of protection cases.¹⁵⁹ Her concluding observation is that such a standard is needed.¹⁶⁰ As noted, formation of that standard is the goal of this article.

2. Judicial Proposals

Courts have long been aware of the difficulties created by the unstructured discretionary approach to deciding loss of protection cases.¹⁶¹ In response, several of the circuit courts have grappled with the formulation of rule-like standards to govern decision-making in this area.

156. *Id.* at 57-59 (noting that the pivotal consideration in leaving partial strikes unprotected is preventing employees from determining their level of effort and assuring that employers have the ability to do business planning and direct the working forces).

157. Melinda Branscomb, *Labor, Loyalty, and the Corporate Campaign*, 73 B.U. L. Rev. 293 (1993).

158. *Id.* at 387-88.

159. *Id.* at 324, n.148.

160. *Id.* at 388.

161. See, e.g., *Earle Industries Inc. v. NLRB*, 75 F.3d 400 (8th Cir. 1996); *NLRB v. New York University Medical Center*, 702 F.2d 285 (2d Cir. 1983).

a. Earle Industries, Inc. v. NLRB

In the recently decided *Earle Industries, Inc. v. NLRB*,¹⁶² an employee, Wallace, defied the personnel manager when he asked Rev. Jesse Jackson, who had entered the plant through the employee entrance, to leave the plant and return by the visitor's entrance. Wallace urged Jackson to walk past the personnel manager and misrepresented that the front door was locked. Wallace maintained this position, even after the personnel manager told her that she was wrong about the front door. After an exchange between Jackson and the personnel manager, in which the latter was unable to persuade Jackson to leave the plant, the personnel manager retreated to his office amidst cheers from the employees.

Acknowledging the overlap between cause and protected activity, the Board said that Wallace's conduct was protected in the context of concerted activities by the "leeway" accorded protected misbehavior.¹⁶³ The leeway is lost only if the conduct is "flagrant" and "opprobrious."¹⁶⁴

Calling the Board's concept of "leeway" for misconduct "far too blunt an instrument when applied without regard to the situation in which the misconduct took place," the Eighth Circuit Court of Appeals acknowledged that some contexts call for "leeway."¹⁶⁵ But the court limited acceptable insubordination to grievance proceedings, negotiation meetings, strikes, and captive audience speeches.¹⁶⁶ Other factors considered by the court were impulsiveness on the part of the employee (there was no such evidence in this case) and the company's interest in maintaining discipline (Wallace's conduct was seen as undermining the personnel manager's authority).¹⁶⁷

Though identifying factors such as impulsiveness and maintaining discipline is more helpful than the Board's "flagrant" and "opprobrious" standard (since it supplies rule-like content to the doctrine),¹⁶⁸ it is not the overarching approach contemplated in this article. While the employer's interest in ordering the employment relationship is important, a comprehensive standard must address the employer's operational and labor-management interests. It must also encompass not only insubordination but also other categories of conduct such as strike misconduct, outrageous conduct, economic weapons, and disloyalty.¹⁶⁹

162. 75 F.3d 400 (8th Cir. 1996). *Earle Industries* is relevant to this analysis because the 8th Circuit takes up the question of whether an employee's insubordination and dishonesty in effecting concerted activities warrants loss of protection.

163. *Id.* at 404.

164. *Id.* at 405.

165. *Id.*

166. *Id.* at 405-406.

167. *Id.* at 407.

168. See Kaplow, *supra* note 85, at 561-562 (noting that stated criteria supply rule-like content to standards).

169. See Appendix for citations to cases falling into each of these categories.

b. NLRB v. NYU Medical Center

In *NLRB v. New York University Medical Center*,¹⁷⁰ the Second Circuit had to determine whether leaflets were improper that branded the employer as a “gestapo” who used fascist tactics in searching minority employees. The Court said that the test for when objectionable language loses protection is “whether the provocation could be expected to threaten plant discipline” or whether the language is “so violent or of such serious character as to render the employee unfit for further service.”¹⁷¹ The court examined the context of the leaflet and found that it “posed no danger of breach of employee discipline.”¹⁷²

The court explained that the leaflet was directed at fellow employees to garner support in a union election rather than at the employer and that there had been no history of violence or labor strife. The court further found that the leaflet had not challenged the employer’s authority in the same way as the “Ma Bell is a cheap mother” sweatshirts, held unprotected in *Southwestern Bell Telephone Co.*¹⁷³ The Court also noted that defamatory statements are unprotected as measured by the *New York Times Co. v. Sullivan*¹⁷⁴ standard: “Erroneous assertions lose their protected status only when they are published with ‘knowledge of their falsity or with reckless disregard of whether they were true or false.’”¹⁷⁵

NYU Medical Center involves a different type of activity (leafletting) than *Earle* (insubordination and dishonesty) and creates a useful test for the former category of conduct¹⁷⁶ because it focuses on a narrow range of con-

170. 702 F.2d 284 (2d Cir. 1983).

171. *Id.* at 290 (footnote omitted). Other objectionable language cases cited by the court were *Southwestern Bell Telephone Co.*, 200 NLRB 667, 671 (1972) (sweatshirts saying “Ma Bell is a Cheap Mother” deemed unprotected) and *Borman’s Inc. v. NLRB*, 676 F.2d 1138, 1139 (6th Cir. 1982) (shirt with legend “I’m tired of bustin my ass,” where Sixth Circuit reversed a Board finding of protection, because employer conduct was isolated and wearing the shirt was not protected). The court noted Supreme Court precedent that federal law “gives a union the 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,” citing *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974). *Id.* at 290.

172. *Id.* at 291.

173. In *Southwestern Bell Telephone Co.*, 200 NLRB 667, 671 (1972), the Board held permissible the Employer’s forbidding the wearing of a sweatshirt with the legend: “Ma Bell is a Cheap Mother.” The Board based the holding on its view that the message was a threat to plant discipline:

Respondent was under no compulsion to wait until resentment piled up and the storm broke before it could suppress the threat of disruption by exercising its right to enforce employee discipline. 200 NLRB at 671.

174. 376 U.S. 254 (1964).

175. 702 F.2d at 291. The court (702 F.2d at 292) cited the following language from *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 58:

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, embellishing their respective positions with imprecatory language.

176. *Id.* at 290.

duct that might result in the loss of protection, the *NYU Medical Center* test is limited by lack of comprehensiveness in the same way as the *Earle* test. The *NYU Medical Center* test's focus on language may suffice for the category of outrageous conduct, but it will provide little guidance in the areas of strike misconduct, insubordination, disloyalty, and economic weapons.

c. Dreis & Krump v. NLRB

In *Dreis & Krump v. NLRB*, an employee passed out leaflets accusing his supervisor of being malicious, grossly negligent, and careless. The Seventh Circuit adopted a Board standard that turned loss of protection upon whether the conduct "render[ed] the employee unfit for further service."¹⁷⁷ In addressing the employer's claim that the employee's leafletting sought to by-pass the grievance procedure, the court further stated that the question was whether the activity: "abandons the principles of exclusive representation by circumventing established grievance procedures, and attempts instead to bargain with the employer regarding working conditions on separate terms."¹⁷⁸ Again the employees' fitness for future service may well be a useful component of a comprehensive rule, but the *Dreis & Krump* test is limited in the same way that the *Earle* and *NYU Medical Center* rules are limited.¹⁷⁹ The *Dreis & Krump* formulation focuses on the employment relationship without considering operational and labor-management concerns of the employer, and it addresses only the category of outrageous conduct.¹⁸⁰

C. Comprehensive Rule-like Standard

A comprehensive rule-like standard must strive to give as much content (detail) to the law *ex ante* as is consistent with the goals of accessibility. The standard must also comprehend the terms, legislative history, and purpose of the Act, in addition to taking into account the principal Supreme Court pronouncements regarding the test for improper means.¹⁸¹ Its usefulness depends upon its predictability and ease of broad application to loss of protection cases.

The proposed standard is:

177. *Dreis & Krump Mfg. Co., Inc. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976). The Court restated the standard as articulated by the Board: "communications occurring during the course of otherwise protected activity remain likewise protected unless found to be so violent or of such serious character as to render the employee unfit for further service." *Id.* (citation omitted).

178. *Id.* at 326.

179. Fitness for service is a concept deriving from the arbitration literature, which refers to whether the employee's conduct shows that the prospects for rehabilitation are so dim or the impact of the employee's conduct on the discipline of other employees is so great that termination is the most appropriate sanction. See Roger Abrams and Dennis Nolan, *Toward a Theory of 'Just Cause' in Employee Discipline Cases*, 1985 Duke L.J. 594.

180. See Appendix for other categories and frequency data of conduct leading to loss of protection.

181. See discussion, *supra* notes 35-89 and accompanying text.

Employees who engage in lawful concerted activity for a section 7 purpose should not be deprived of protection unless the activity itself (the means) unreasonably threatens the long-term viability (LTV) of the enterprise, the labor-management relationship, or the employment relationship.

This standard does not call for an analysis of the actual impact of employee activity on the employer. Rather, in the tradition of agency factfinding,¹⁸² the focus is on the reasonable tendency of the activity to threaten LTV. The qualifying word "unreasonably" is important in view of the centrality of the employer's legitimate interests throughout the interpretation of the statute. Not only does the standard shield the employer from unreasonable activity, it also protects employees engaged in reasonable activity against economically vulnerable employers.

The latter protection is consistent with the framework of the Act. Conventional strike activity, of course, is specifically protected by Section 13 of the Act, even where it drives employers out of business.¹⁸³ The Eastern Airlines situation is a poignant example of this problem. In that dispute, the Union's strike was a legitimate exercise of economic power in pursuit of its bargaining interests and, along with the intransigency of management, accounted for the demise of the company.¹⁸⁴ If an employer's LTV is threatened when a less important matter is disputed, the LTV standard suggests a finding of no protection.

This LTV standard is sensitive to the employer's interests in operational necessity, the labor-management relationship, and the employment relationship. It also governs the loss of protection across the categories of potential employee misconduct, including strike misconduct, outrageous conduct, the use of economic weapons, insubordination, and disloyalty.

At many junctures in the Act's application the employer's legitimate interest is limited.¹⁸⁵ At the same time, the protection afforded employees under the statute cannot mean that employees are permitted to engage in conduct that leads to the undoing of the enterprise. Section 7 rights would be very hollow without a source of employment, so those rights are limited

182. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (noting that the expertise of administrative agencies makes it appropriate for them to infer statutory violations based on proven evidentiary facts).

183. 29 U.S.C. Sec. 163 provides:

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

184. See *Eastern's Pilots Union Ends Strike*, N. Y. TIMES, Nov. 3, 1989 (describing the causes of the strike) and *Eastern Airlines Is Shutting Down And Plans to Liquidate Its Assets*, N. Y. TIMES, Jan. 19, 1991 (announcing the shutdown and liquidation of the airline).

185. Regarding no solicitation rules, see *Republic Aviation*, 324 U.S. 793 (1945); discipline and discharge, see *Wright Line*, 251 NLRB 1083 (1980); and secondary boycotts, see 29 U.S.C. Sec. 158(b)(4)(B).

by the employer's interest in continuing to exist.¹⁸⁶ Yet, the Act, given its purpose of facilitating industrial democracy, contemplates employees playing an enhanced role in the decisions that affect their working lives. The Act expressly protects the right to strike, a weapon that is designed to inflict economic harm on the employer.¹⁸⁷ The harm inflicted by the strike is designed to produce short term pressure that will both lead to a favorable settlement and preserve the employer's competitive position in the longer term. Employee tactics that are different in kind from the economic strike, that aim at destroying the long-term viability of the enterprise, should fall outside the boundaries set by the terms of the statute and its underlying policies.¹⁸⁸

Employee conduct that does not create direct economic pressure may nevertheless threaten the long-term viability of the enterprise by undermining its employment relationship. Unpunished conduct, such as attacking a supervisor (physically or verbally) or clear instances of insubordination, may so undermine discipline that an employer's ability to sustain the production of goods and services may be severely hampered.¹⁸⁹ Such conduct would also far exceed what might be reasonably necessary to express a concerted, section 7 concern.¹⁹⁰ Thus, much of the conduct that might con-

186. Examples of limitations reflecting the interests of employers are the right to hire permanent replacements in an economic strike, *see NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), and the right to confer benefits on employees even in the midst of a union campaign under some circumstances, *see NLRB v. Circo Resorts, Inc.*, 646 F.2d 403, 405 (9th Cir. 1981) (permitting wage increases during a union campaign to prevent employees from taking other jobs). On the employer's right to fire union activists even if partially motivated by union activity, *see NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (upholding the Board's dual motive test). On the right to limit the time and place of union solicitational activity, *see Republic Aviation*, 324 U.S. 793 (1945), and the right to control access of non-employee union organizers onto company premises, *see Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (upholding an employer's right to eject non-employee union organizers from company property).

187. *See supra* note 183.

188. *See, e.g., supra* notes 2-6 and accompanying text regarding certain corporate campaign-inside game tactics.

189. *See, e.g., Marico Enterprises Inc.*, 283 NLRB 726, 731-32 (1987) (upholding the discharge of an employee spokesperson for insubordination, citing as a rationale that the conduct became so flagrant that it threatened the employer's ability to maintain order and respect in the conduct of its business).

190. Although the Supreme Court in *Washington Aluminum* disavowed the relevance of reasonableness, necessity and wisdom in determining whether a labor dispute existed between unorganized employees and the employer, the Court dedicated a portion of the decision to explaining why the action of these employees was reasonable. 370 U.S. at 13. In rejecting the employer's argument that the employees' conduct was unprotected "because they [did] not present a specific demand upon their employer to remedy a condition they [found] objectionable," the Court said the following:

The language of section 7 is broad enough to protect concerted activities whether they take place before, after or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of section 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects.

370 U.S. at 9, 12. The Court said that under the circumstances the employees had to speak themselves. It also recounted the absence of a bargaining representative and established bargaining procedure, and

stitute “just cause” for discharge under a collective bargaining agreement might actually warrant the loss of protection, because an appropriate employer response to employee misconduct may be necessary to deter further misconduct among employees or protect the effective functioning of the enterprise.¹⁹¹ Balancing the employer’s legitimate interest against employee section 7 rights at a minimum calls for a “just cause” floor supporting or justifying employer self-help measures against concerted activities with a section 7 purpose.¹⁹²

Also, the long-term viability of the labor-management relationship may be as important as the employer’s interest in business viability and employment relations. Where the collective bargaining regime is in place, the employer is entitled to look to the collective bargaining representative as the sole source of employee voice and economic pressure.¹⁹³ The statute supports this entitlement by making the majority representative’s status exclusive.¹⁹⁴ During the life of the collective bargaining relationship, the health of the enterprise may depend on how well the parties can order their relationship. Independent pressure outside this bilateral structure may violate the spirit of exclusivity and threaten long-term enterprise viability.¹⁹⁵

In determining whether the employee activity threatens the long-term viability of the enterprise a number of factors are relevant, though none is necessarily determinative: (1) nature of the enterprise,¹⁹⁶ (2) conventionality of the tactic,¹⁹⁷ (3) relationship between means and

the repeatedly unsuccessful complaints about the cold conditions. The Court said that they “took the most direct course to let the company know that they wanted a warmer place in which to work.” *Id.*

191. See Abrams and Nolan, *supra* note 179 at 602-06 (detailing the management interests that inform the just cause standard).

192. Abrams and Nolan point out that employers in disciplining and discharging employees have a legitimate interest in rehabilitation, specific and general deterrence, and protecting profitability. Courts’ identifying and understanding the importance of these factors in defining the employer’s interest in loss of protection cases would bring greater consistency, predictability and fairness, *supra* note 179.

193. See *Emporium Capwell v. Western Addition Community Organization*, 420 U.S. 50, 68-70 (1975) (noting the threat of long term harm to the collective bargaining regime caused by the fragmentation of collective bargaining).

194. See section 9(a) of the Act.

195. *Emporium Capwell v. Western Addition Community Organization*, 420 U.S. 50 (1975).

196. A walkout at anytime may be reasonable in a manufacturing plant but not at the height of the dinner hour in a restaurant. See *Dobbs House*, 325 F.2d 531 (5th Cir. 1963). Also, a fledgling business such as WBTV in *Jefferson Standard* may run a greater risk of demise than a well-established one. See also *Bob Evans Farms, Inc. v. NLRB*, 163 F.3d (7th Cir. 1998) (holding unprotected a walkout by fifteen employees to protest the discharge of a supervisor and saying “it is enough to reiterate that the Act does not protect employees who protest a legitimate grievance by recourse to unduly and disproportionately disruptive or intemperate means.”).

197. If tactics are conventional, historical evidence supports the view that they do not threaten the long-term viability of the enterprise. See CHARLES R. PERRY ET AL., *OPERATING DURING STRIKES* 114-115, 121 (1982) (discussing the strategy of operating during a strike to secure a long run economic and bargaining benefit). History does offer examples of when conventional tactics have threatened the long-term viability of the enterprise. See *supra* note 184. This should not mean that unconventional tactics violate the long-term viability standard per se. Such a view would needlessly deprive employees of the creativity that section 7 seems to leave open. See Alan Hyde, *Symposium on the Legal Future of Em-*

ends,¹⁹⁸ and (4) context.¹⁹⁹ The long-term viability standard, accompanied by the factors to be considered in applying it, supplies employees and decisionmakers with such rule-like benefits as predictability, fairness, and reduced cost.²⁰⁰

V. APPLICATION

A. Explaining Supreme Court Precedent

How well does the proposed standard explain the Supreme Court cases? The LTV standard would produce the same outcome in *Jefferson Standard*.²⁰¹ The television station was a fledgling business, making it particularly vulnerable to the disparagement campaign of the technicians. The total absence of any perceivable relationship between the disparagement campaign and the bargaining dispute removed the activity from the context of a labor dispute and severed any connection between campaign and bargaining table demands. A campaign framed in this way would reasonably tend to inflict greater long term harm on the company than one identified with the union's economic objectives. The predictable long-term impact of the product disparagement by the union in *Jefferson Standard* was a threat to the employer's long-term viability.

ployee Representation, Employee Caucus: A Key Institution in the Emerging System of Employment Law, 69 Chi-Kent L. Rev. 149 (1993).

198. Reasonable means may have a lower probability of threatening LTV. While means that are not reasonably related to the purpose of concerted activity may signal a long-term threat, means that are reasonably related to the section 7 purpose will probably be protected even if they threaten LTV, e.g. if *Washington Aluminum* facts occur in a seasonal industry and the intolerable conditions persist for a substantial part of that season, the walkout should be protected (as reasonable) even if it threatens long-term viability. However, it seems unlikely that a massive walkout at the height of a seasonal business over the number of times that a supervisor tours the plant during the work day would warrant protection. *But see* Gorman's interpretation of *Washington Aluminum* as rejecting a reasonableness test unless there is a "threat or actuality of harm to person or property," *supra* note 48, at 313-14.

199. The product disparagement in *Jefferson Standard* is very different, as the Supreme Court suggests, when it is presented as related to the union's labor dispute with the employer. *See, e.g.*, American Tel. & Tel. Co. v. NLRB, 521 F.2d 1159 (2d Cir. 1975) (where the context of grievance processing insulated the employee's insubordination.); *cf.* Earle Industries, Inc. v. NLRB, 75 F.3d 400 (1996) (where context led to a lack of protection). In a context such as *Cambro*, 312 NLRB 634 (1993), where the employer ignores the complaints of employees forcing them to escalate the form of the protest, the employer's lack of responsiveness indicates the absence of a threat to LTV. Vulnerable employers, on the other hand, may be more likely to strive for accommodation with their employees. *See* Rafael Gely, *Whose Team Are You On? My Team Or My Team?*, 49 Rutgers L. Rev. 323 (1997).

200. *See* Kaplow, *supra* note 84. In acknowledging the difficulty of formulating law as rules due to the variability of relevant facts or problems and their solutions, Kaplow states: "The choice between rules and standards is one of degree. Deciding solely on the relevant criteria in advance may save costs for both individual actors and adjudicators, while providing individuals some guidance. Also, adopting presumptions or ruling certain options in or out might be possible." *Id.* at 600.

201. *See supra* Section III(B) of this article for a reiteration of the facts of *Jefferson Standard* and *Washington Aluminum*.

In *Emporium Capwell*, employee attempts to bargain with the employer over the issue of racial discrimination backed by the economic pressure of picketing and handbilling was properly deemed unprotected under the LTV standard. The dissident employees in that case explicitly ignored the grievance procedure and contractual anti-discrimination provision, the means designed to address the problem.²⁰² Justice Marshall acknowledged the clash between the principles of non-discrimination and exclusive representation in our national labor policy and aptly made the point about long-term viability of the labor-management relationship:

The policy of industrial self-determination as expressed in section 7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered.²⁰³

On the other hand, the walk-out in *Washington Aluminum* occurred in an established manufacturing facility, a viable business.²⁰⁴ The walkout (means) was a direct and reasonable response to the subject matter of the dispute using a tool traditionally used by employees to lodge protests. The context of the protest also made the walkout appropriate, because the employees' earlier efforts to get relief were spurned by the employer.

B. Further Application

In addition to the comprehension of Supreme Court precedent by the LTV standard, its application in a variety of cases demonstrates more consistent and predictable results than the approaches used by the Board and the lower courts thus far. In *Patterson-Sargent Company*, a product disparagement case decided three years after *Jefferson Standard*, chemical workers struck the employer for three and a half months during negotiations for a new contract.²⁰⁵ During the strike, six of the strikers distributed a "Beware of Paint Substitute" leaflet informing the public of the strike; moreover, the leaflet warned potential customers that paint made during the strike was not being made by regular employees who had the expertise and knowledge to make a quality paint.²⁰⁶ The leaflet said that any paint the customer bought during the strike might "peel, crack, blister, scale" or be defective in other ways.²⁰⁷ The leaflet concluded by reiterating the warning and reassuring

202. *Emporium Capwell*, 420 U.S. 50, 54-55 (1975).

203. *Id.* at 70. *Cf. Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320 (7th Cir. 1976) (where employee's statements criticizing the employer's treatment of his grievance were not deemed to be an attempt to bypass the contractual grievance procedure).

204. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12 (1962).

205. *Patterson-Sargent Co.*, 115 NLRB 1627 (1956).

206. *Id.* at 1627-28.

207. *Id.* at 1628.

the public that the strikers would inform members of the public when they could again purchase paint made by regular employees.²⁰⁸

The Board majority in *Patterson Sargent* ruled the conduct unprotected.²⁰⁹ However, under the LTV standard the employees would not have lost protection for this product disparagement. *Patterson-Sargent* was a well-established paint manufacturing business whose dispute with the union was advertised, providing a context for the disparagement. The leaflets essentially encouraged a boycott of the employer's product, a conventional tool that was reasonably related to the union's section 7 purpose of bringing economic pressure against the company at the bargaining table. These factors strongly indicate that the company's long-term viability was not threatened by the strikers' activity.

In *American Arbitration Association*,²¹⁰ an employee was discharged for protesting on behalf of fellow employees the employer's ban on wearing jeans in the workplace.²¹¹ The terminated employee was a tribunal administrator who decided to protest the ban in three ways: (1) wearing jeans to work in defiance of the ban, (2) writing a letter to a Vice-President at AAA headquarters in New York, and (3) writing a letter to a list of users of the agency's services (lawyers, arbitrators and companies).²¹² The letter to the users discussed the effect of the ban controversy on the agency's ability to serve its users and attached a questionnaire that made light of the ban and suggested comparisons between dogs, monkeys, AAA management, and some of the agency's users, a few of whom were named specifically.²¹³ Following this letter, the agency's regional director received phone calls

208. *Id.*

209. *Id.* at 1630.

210. 233 NLRB 71 (1977).

211. *Id.* at 71. As the Board explains, the American Arbitration Association is a nongovernmental administrative agency that supplies dispute resolution services, primarily arbitration, to parties in a variety of disputes. Tribunal administrators for the AAA assist in the selection of arbitrators, the selection of hearing dates, the handling of correspondence concerning the arbitration, and the issuance of the award. Although the arbitrator's award may be published with the consent of the parties, the arbitration process is private and many of the documents handled by the agency are confidential. See *Labor Arbitration Procedures and Techniques*, Arbitration Arbitration Association (1994); see generally ROBERT COULSON, *LABOR ARBITRATION WHAT YOU NEED TO KNOW* (4th ed.) (Rev. 4th ed.) (AAA 1998).

212. 233 NLRB at 72-73.

213. *Id.* at 73. The jeans questionnaire contained the following five questions:

1. Should jeans suits be allowed to be worn by (a) supervisors, (b) secretaries, (c) the director, (d) administrators?
2. Are jeans hats more appropriate when worn on the heads of (a) administrators, (b) secretaries, (c) janitors, (d) directors, (e) supervisors?
3. Do jeans jackets look better on (a) dogs, (b) directors, (c) administrators, (d) all of the above, (e) none of the above?
4. When worn in the reception area, are jeans coveralls, more attractive on (a) attorneys, (b) secretaries, (c) supervisors, (d) nobody in the whole world?
5. Should jeans be worn in the office of the AAA by (a) children, (b) monkeys, (c) directors, (d) administrators, (e) electricians, (f) letter carriers, (g) claimant's attorney, (h) respondent's attorney, (i) claimant, (j) dogs, (k) grownups, (l) the President, (m) temporary help, (n) part time help, (o) permanent part time help, (p) supervisors, (q) janitors, (r) anyone from the firm of Sommers, Schwartz, & Silver, (s) nobody from D.A.I.L.E., (t) reporters,

from users wanting to know what problems precipitated the questionnaire.²¹⁴

In this case the context of the activity (external communication with customers) exacerbated the likely effect of the conduct. This conclusion is suggested by the nature of the enterprise and the relation between means and ends. The AAA is an enterprise that depends upon the goodwill of its users. Much of this goodwill is generated through the competent and confidential handling of materials and procedures that relate to settling disputes among the agency's subscribers. The employee's questionnaire diminished the agency's goodwill as an enterprise in three ways: (1) the adolescent content of the questionnaire could be expected to raise questions about the level of competence of the staff; (2) questions which compared two named users to dogs and monkeys was likely to cause resentment among both the named and unnamed users; and (3) the letter accompanying the questionnaire indicated that the employer could not competently serve its constituency. Furthermore, the questionnaire was not reasonably related to the employee's effort to remove the ban. The employee's letter to the AAA Vice-President was quite appropriate, however, and actually led to the lifting of the ban before the regional director learned of the employee's questionnaire. The Board appropriately held the perpetrator's conduct unprotected.

In contrast, the sarcastic letters protesting the treatment of employees by employers in *Reef Industries, Inc.* and *New River Industries* had a *de minimus* impact on long-term viability.²¹⁵ Nothing in the nature of either business made the protests in those cases inappropriate.²¹⁶ Contextually, in both cases the communications were internal and triggered by specific management actions. In *New River* the letter protesting a management policy of inadequate compensation was addressed to no particular management official, while in *Reef* the letter and cartoon were addressed to the offending management official. Both sets of communications addressed employees' section 7 concerns, and neither so undermined the authority of management in the eyes of all employees as to warrant discharge for general deterrence reasons (relationship of means to ends).²¹⁷ No evidence in either of these

(u) Italians, (v) Xerox sales representatives, (w) witnesses, (x) secretaries, (y) some of the above, (z) all of the above?

214. *Id.* at 74.

215. *Reef Industries, Inc. v. NLRB*, 952 F.2d 830 (5th Cir. 1991) and *New River Indus., Inc. v. NLRB*, 945 F.2d 1290 (4th Cir. 1991) involved the treatment issues of respect and compensation. In neither case was there evidence of any significant threat to the company's viability. Nor should such an effect be expected, given the nature of the protests.

216. *New River Industries* was an acetate fiber products manufacturer, while *Reef Industries* was a plastics manufacturer.

217. A reasonable and effective response of the personnel manager in *New River* might have been to meet with the employees after receipt of the letter, determine the cause of the employee sentiment, explain the misunderstanding, and reassure the employees of management's respect for their intelligence.

cases suggested that the business was seriously threatened by these employee actions.²¹⁸

In *Cambro Mfg. Co.*,²¹⁹ the case that motivated this article, the work stoppage did not threaten the long-term viability of the company. The stoppage involved eleven employees out of 400 production and maintenance employees on the second of three shifts of an established manufacturing concern.²²⁰ The stoppage reasonably related to the employees' purpose of addressing the problems of the supervisory treatment of workers. Indeed, the stoppage followed a supervisory interrogation of a single employee with a warning against stirring up grievances.²²¹ Also, the general manager had failed to promptly follow up on an earlier grievance meeting as he had promised.²²² The company's grievance procedure had been unilaterally promulgated, and the employees were unrepresented. In this context, it was questionable whether the structure permitted for the effective processing of the grievance. In such circumstances, a work stoppage is the ultimate, conventional tactic.²²³

218. This analysis supports the Court's decision in *Reef Industries* but not in *New River Industries*. See Timekeeping Systems, Inc., 323 NLRB 244 at 248 (1997) (finding that Section 8(a)(1) was violated by the discharge of a software engineer for the "tone" of a generally distributed e-mail message that was critical of the chief operating officer's proposed change in vacation policy). The Board's approach in this case reflected the stringency of the long term viability standard as follows: "[T]he Board has invoked a forfeiture of the protection of the act only in cases where the concerted behavior has been truly insubordinate or disruptive of the work process." When the means consist of speech as in *New River* and *Reef*, some hold the view that section 7 should be held to protect all speech that is not violent, obscene or incitements to illegal action regardless of content. See, e.g. Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 Tex. L. Rev. 1, 15 (1981) (conceding the propriety of restrictions on the time, place and manner of speech, but arguing analogously from first amendment free speech protection that section 7 should be "held to protect all attempts by employees to communicate with each other on matters of self-defined mutual concern, regardless of the content of the communication"). See also Alan Hyde, *Employee Caucus: A Key Institution In The Emerging System Of Employment Law*, 69 Chi-Kent L. Rev. 149, 167, 168 n.62 (1993) (noting his earlier criticism of rules that make section 7 protection turn on the contents of speech). However, the most apt analogy in first amendment jurisprudence would seem to be cases involving public sector employees who claim free speech protection for workplace communications, where the Court attempts to balance in the manner proposed in this article the interest of employees in free expression against the employer's interest in the "effective functioning of the public employer's enterprise." See *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). *Rankin* incorporates *Perry v. Sindermann*, 408 U.S., 597 593 (1972) (may not discharge employee for reasons that infringe constitutionally protected free speech). See also *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (balancing the interest of employees to speak on matters of public concern and the interest of the employer in promoting the efficiency of the public service—"effective functioning of the public enterprise") and *Connick v. Myers*, 461 U.S. 138, 152-154 (1983)(employee did not establish that speech was a matter of public concern rather than merely personal concern—in balancing, consider "the manner, time, and place" of employee expression and "the context in which the dispute arose.").

219. 312 NLRB 634 (1993).

220. *Id.* at 634.

221. *Id.*

222. *Id.*

223. A problem that has concerned the Board and the courts since the early days of the act is the status of unconventional economic pressure tactics such as intermittent work stoppages and slowdowns. See *UAW v. Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245 (1949) (to

On the other hand, the LTV standard supports the Eighth Circuit's conclusion in *Earle Industries*.²²⁴ Unlike *Jefferson Standard* and *Emporium Capwell*, the employee's actions in this case did not directly threaten the long term viability of the enterprise or the labor-management relationship. Rather, the LTV standard focuses here on the viability of the employment relationship, the maintenance of discipline within the workforce that leads to the ultimate success of the enterprise. Though the employee's conduct in *Earle* might be regarded as unprotected because she aided Jackson's unlawful conduct of trespassing,²²⁵ under the LTV standard this conduct is also unprotected because it threatened the long-term viability of the employment relationship.

The pivotal factor in *Earle* is the employer's interest in preserving plant discipline through the authority of its supervisors. Not only has management's interest in production and discipline been recognized by the Supreme Court as a limitation on section 7 rights from the earliest interpretation of the statute,²²⁶ "just cause" theorists have also identified general deterrence as an important reason to impose plant discipline.²²⁷ Rapid deterioration of plant discipline is likely, if management must tolerate conduct such as employee Wallace's humiliation of the personnel manager to the cheers of co-workers. However, as the Eighth Circuit pointed out, the same

support bargaining demands the union carried out a series of intermittent work stoppages); Elk Lumber Co., 91 NLRB 333 (1950) (work slowdown to protest change in pay rate and force a pay increase). Under the long-term viability standard, these tactics, like the typical strike, are likely to have only short term effects on the employer's operations. Also, the Court's later decision in *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960), refusing to find a work slowdown unlawful, even though the Court assumed arguendo that it was unprotected, casts doubt on the *Briggs & Stratton* decision. Professor Getman points out that *Insurance Agents* and *Briggs & Stratton* might be read as sanctioning complete freedom in the use of economic weapons, a policy that would be inconsistent with tying the employer's hands by finding a slowdown protected and the union's hand by finding it unlawful. Getman makes the persuasive observation that a finding of protection while limiting the employer's response does not eliminate it. See Gorman and Finkin, *supra* note 48, at 297. Indeed, one response may be to lock out the unconventional strikers thereby converting the unconventional strike into a conventional one and creating an opportunity for the use of more effective employer weapons.

224. 75 F.3d 400 (8th Cir. 1996). See *supra* Section IV(B)(2)(a) of this article for a description of the facts of *Earle*.

225. Another problem is the dubious relationship between means and ends. Assuming the legitimacy of a purpose to have Rev. Jackson walk through the plant to the management offices (a question of protected ends: step 2 rather than step 3 analysis), this might have been more directly, and less harmfully, accomplished by simply asking the personnel manager on behalf of the group to grant Jackson permission to be on the premises and to visit the management offices.

226. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

227. See Abrams and Nolan, *supra* note 179, at 603-05. Although the Board's decision in *Time-keeping Systems, Inc.*, *supra* note 218, reflects an awareness of the concerns underlying the long term viability standard, it uses the following standard couched in the language of specific rather than general deterrence: "[C]ommunications occurring during the course of otherwise protected activity remain likewise protected unless found to be so violent or of such serious character as to render the employee unfit for further service." 323 NLRB at 248 (citation omitted).

conduct in a different context—negotiations, grievance processing, strike—might well have been protected.²²⁸

Application of the LTV standard to two other delicate cases, *Dobbs* and *Aroostook*, further demonstrates the LTV standard's ability to address wide-ranging sets of facts and yield justifiable results. In *Dobbs House*,²²⁹ the employees' evening long walkout at the height of the restaurant's dinner hour to protest the discharge of a favored supervisor unreasonably threatened the long term viability of the restaurant. Restaurant ownership is a notoriously risky business that must provide customers with a predictable quality of service in order to survive. In an industry where one bad service experience can permanently alienate a restaurant's customers, an unannounced walkout during peak hours is likely to have a devastating effect on future business. The walkout can be considered unreasonable because there was no evidence in the case that less destructive means such as a letter, wire, or phone call to the owner, Mr. Dobbs, who travelled to the restaurant's location in Birmingham from Memphis the following day, were not likely to be effective.²³⁰

Aroostook involves the discharge of one ophthalmic technician and three registered nurses from an ophthalmology center in Maine.²³¹ The discharges occurred after the employees complained about a work schedule change within earshot of patients in violation of a company rule.²³² The long term viability of employers in the health care business depends on their ability to provide quality medical service. Such service might be affected by a range of general care factors independent of specific treatment, including patient comfort. If a rule against complaining about working conditions within earshot of patients were not enforceable against caregivers, a medical care facility could not be expected to thrive.²³³ The context of such complaints makes the employer rule appropriate and makes the discharges

228. 75 F.3d at 405-06. In a passage that captures the Eighth Circuit's reasoning:

In view of the purposes of the NLRA, we have recognized that an employer cannot insist on subordination in the context of bargaining or grievance processes. These are situations in which the Act aims for equality of bargaining positions between employer and employee to permit meaningful negotiation. (citations omitted).

The Court noted further:

[I]t is evident that, in enacting Section 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.

Id. quoting *NLRB v. City Disposal Sys.*, 465 U.S. 822, 835 (1984).

229. 325 F.2d 531 (5th Cir. 1963).

230. *Id.* at 538-39.

231. *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996).

232. *Id.* at 211.

233. The Supreme Court has recognized the uniqueness of hospitals by supporting broad no-solicitation rules for medical employers. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978).

justifiable under the LTV standard. This would be particularly true for a small surgery center such as the one in this case.²³⁴

The long-term viability of the employment relationship was also an issue in *Aroostook*. The ophthalmology center had a general deterrence concern that compelled the discharges in order to preserve the integrity of the employment relationship.²³⁵ Also, the employees could have used other equally (if not more) effective and less harmful means, such as written communications and private meetings in order to air their concerns.

Finally, under the LTV test corporate campaigns and inside games are not susceptible to a single analysis.²³⁶ Just as a range of tactics might fall within the corporate campaign or inside games rubric, the outcomes under a LTV analysis may vary. The placement of a lawful picket at the home of a company executive or appeals to shareholders, customers, creditors, or government agencies in order to apply pressure upon the employer at the bargaining table may be so tailored as to pose no significant threat to the employer's long term viability.²³⁷ Similarly, inside games, particularly at the beginning, may be symbolic actions (for example, employees wearing identical clothing, arm bands or buttons, or marching in single file into the plant at the beginning of the shift) that pose no threat to long-term viability.²³⁸ But as the severity of these tactics escalates from symbolic actions to protracted slowdowns under work to rule programs that threaten a long-term loss in productivity and market share, participating employees would lose section 7 protection under the LTV standard.²³⁹ This approach favors a contextual analysis of the corporate campaign and inside games strategy over Professor Northrup's suggestion that all such strategies lead to a forfeiture of employee protection.²⁴⁰

234. *Id.* at 213.

235. One of the components of the fundamental understanding in the employment relationship is the employee's obligation to protect the profitability of the business. *See Abrams and Nolan, supra* note 179.

236. *See supra* notes 2-6 and accompanying text.

237. *See generally* Northrup, *supra* note 3, at 507-513 describing the definition and development of corporate campaigns.

238. *See* Northrup's description of the SEIU program contained in the Manual and *Growing Numbers of Unions Adopting In-Plant Actions To Avoid Strikes*, Daily Labor Report (BNA) (Aug. 6, 1991).

239. *See* Northrup, *supra* note 3, at 516-537.

240. Professor Northrup says:

As a strike, the corporate campaign-inside game combination must be understood as such and treated as such if the company targeted is to deal with its consequences and to continue as a viable organization. Likewise, employees should recognize the combination corporate campaign-inside game for what it is, namely, a form of unprotected partial strike which may result in discipline, discharge, or even the elimination of their jobs. And, of course, government regulators should understand this as well. *Id.* at 538.

VI. CONCLUSION

The standard proposed in this article seeks to combine the best features of ex ante and ex post law promulgation, while supplying enough detail to guide employee conduct and institutional decisionmaking. However, it does not and cannot avoid the Board's and courts' decisional discretion altogether. The article seeks to structure discretion rather than accomplish the impossible—the elimination of discretion in loss of protection labor cases. It is premised on the view that despite the residual indeterminacy permitted under the long term viability standard, it achieves greater clarity, predictability and fairness than the existing regime.

Judges may well disagree on case outcomes under this standard. For example, some may view *Earle* as involving a single incident of insubordination or the letter in *AAA* as a silly protest not warranting loss of protection. However, if the disagreements are based on an application of the standard and its relevant factors, the extreme variability and apparent arbitrariness observed under the current approach are likely to be absent. As Steven Burton points out in **JUDGING IN GOOD FAITH**:

[D]isagreement on the legal result surely is possible in a way that places all positions in good faith — by dispensing with any need to dismiss as legally invalid the standards relied on by another. We can agree on all the relevant legal reasons at the same time we disagree on the result due to disagreement on matters of weight.²⁴¹

By identifying the relevant legal reasons to be considered in loss of protection cases, this article has sought to provide more information to potential litigants as well as to aid in more effective judging by agency and judicial decisionmakers.

241. STEVEN BURTON, **JUDGING IN GOOD FAITH**, 89 (1993).

APPENDIX: TYPOLOGY OF UNPROTECTED CONDUCT CASES: 1985-1995*

No.	Case name	Citation	Date	Year	*Key number	Category	Description
1	Medlife of N.M., Inc.	316 NLRB 629, <i>affirmed</i> , 723d 780 (10th Cir. 1985)	3/6/95	1985	52,345	Strike Misconduct	shoulding slab and other epithets protected
2	United States Serv. Indus., Inc.	315 NLRB 285	5/30/94	1994	6050-2500	Strike Misconduct	Intermittent work stoppage protected
3	Medlife of N.M., Inc.	314 NLRB 1145	6/15/94	1994	52,345	Strike Misconduct	hitting car with cardboard sign protected
4	Coca-Cola Bottling Co., Southeast, Inc.	313 NLRB 1197	5/9/94	1994	52,345	Strike Misconduct	throwing rats in parking lot not protected
5	Bellair Indus., Inc.	311 NLRB 708	5/29/93	1993	52,345	Strike Misconduct	dropping mowing tasks in parking lot not protected
6	Gibson Greetings, Inc.	310 NLRB 1206, <i>modified</i> , 53 F.3d 385 (D.C. Cir. 1995)	5/7/93	1993	52,345	Strike Misconduct	car chase/threats protected
7	Virginia Mig. Co.	310 NLRB 1281, <i>affirmed</i> , 27 F.3d 565 (4th Cir. 1994)	5/7/93	1993	52,345	Strike Misconduct	variety of misconduct
8	Dunaway Trading Corp.	310 NLRB 777, <i>affirmed</i> , 16 F.3d 517 (2nd Cir. 1994)	3/23/93	1993	52,345	Strike Misconduct	Pushing and shoving protected
		1993 Count		4			
9	Big Horn Coal Co.	309 NLRB 735	10/16/92	1992	52,345	Strike Misconduct	blocking entrance to plant not protected
10	Circuit-Wise, Inc.	308 NLRB 981, <i>affirmed</i> , 992 F.2d 519 (2nd Cir. 1993)	6/30/92	1992	52,345	Strike Misconduct	variety of misconduct
11	International Paper Co.	309 NLRB 31, <i>aff'd sub nom.</i> Local 14, United Paperworkers Int'l Union v. NLRB, 14 F.3d 982 (1st Cir. 1993)	8/30/92	1992	52,345	Strike Misconduct	threat on line not protected
12	Altio-Sharm, Inc.	307 NLRB 1468, <i>affirmed</i> , 906 F.2d 1219 (7th Cir. 1991), <i>cert. denied</i> , 510 U.S. 945 (1993)	7/24/92	1992	52,345	Strike Misconduct	threat on line not protected
13	S.M.K. Milling & Constr. Co.	305 NLRB 718	3/17/92	1992	52,2539	Strike Misconduct	Driving truck in front of 18-wheeler not so violent as to lose protection
14	Noblin Bros., Inc.	305 NLRB 329	6/30/91	1991	52,345	Strike Misconduct	spitting and slursing fists not protected
15	Bellaville Cracker Co.	303 NLRB 578	6/29/91	1991	52,345	Strike Misconduct	vehicular misconduct not protected
16	Wayne Strand Cardiffs, Inc.	303 NLRB 332	6/18/91	1991	52,345	Strike Misconduct	obscene gesture and language not protected
17	National Gypsum Co.	302 NLRB 534	4/15/91	1991	52,345	Strike Misconduct	rock throwing not protected
18	Kaco Indus., Inc.	301 NLRB 303	1/25/91	1991	52,345	Strike Misconduct	gun in waistband while in vicinity of plant/guns not protected/activity
		1991 Count		5			

* James Powers prepared the Appendix in connection with his survey of NLRB and Circuit Court cases decided from 1985-1995.

** Key number refers to the Labor Relations Reference Manual (BNA) Case Digest Index.

19	Mohawk Liqueur Co.	300 NLRB 1075, enforced sub nom., General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1368 (D.C. Cir. 1991)	12/31/90	1990	52-345	Strike Misconduct	throwing rocks not protected
			1990 Count	1			
20	Alaska Pulp Corp.	298 NLRB 1260, enforced, 944 F.2d 909 (9th Cir. 1991)	10/08/89	1989	6020-3300	Strike Misconduct	accessory to vandalism unprotected
21	Teledyne Indus., Inc.	265 NLRB 161, enforced, 911 F.2d 1214 (6th Cir. 1990)	6/15/89	1989	52-345	Strike Misconduct	threats of physical harm -- unprotected
22	Ornamental Iron Work Co.	265 NLRB 473, enforced, 935 F.2d 270 (6th Cir. 1991)	6/15/89	1989	52-345	Strike Misconduct	threat of physical violence -- unprotected
23	Columbia Portland Cement Co.	294 NLRB 410, enforced, 915 F.2d 553 (6th Cir. 1990)	5/31/89	1989	52-345	Strike Misconduct	harassment or constitutes with vehicle -- unprotected
24	Chesapeake Plywood, Inc.	284 NLRB 201, enforced, 917 F.2d 22 (4th Cir. 1990)	5/25/89	1989	6050-0100	Strike Misconduct	strike violence unprotected
25	Massachusetts Coastal Seafoods, Inc.	283 NLRB 496	3/30/89	1989	52-345	Strike Misconduct	throwing tomatoes and threats -- unprotected
26	Virginia Holding Corp.	283 NLRB 182	3/15/89	1989	52-345	Strike Misconduct	setting dummy at gate entrance -- protected
			1989 Count	7			
27	Nelco L. Tires Co.	261 NLRB 346	10/31/88	1988	52-345	Strike Misconduct	non-threatening statements -- protected
28	General Chem. Corp.	290 NLRB 76	7/25/88	1988	52-345	Strike Misconduct	stabilizing tires -- unprotected
29	Arctic Bus Lines, Inc.	289 NLRB 102	7/22/88	1988	52-345	Strike Misconduct	variety of conduct -- unprotected
			1988 Count	3			
30	Tube Craft, Inc.	287 NLRB 491	12/16/87	1987	52-345	Strike Misconduct	blocking gate for a long period of time -- unprotected
31	Lend Air Delivery, Inc.	286 NLRB 1131, review denied, 862 F.2d 354 (D.C. Cir. 1988), cert. denied, 483 U.S. 810 (1989)	11/27/87	1987	4067-8700	Strike Misconduct	running car off road, vandalism -- all unprotected activity
32	Axation, Inc.	285 NLRB 602	B1/897	1987	52-345	Strike Misconduct	chasing nonstrikers in car -- unprotected
33	American Gypsum Co.	285 NLRB 100	7/31/87	1987	6020-3300	Strike Misconduct	physical violence -- unprotected
34	Cem Urethane Corp.	284 NLRB 1349	7/27/87	1987	52-345	Strike Misconduct	blocking a/wielding baseball bat -- unprotected
35	GSM, Inc.	284 NLRB 174	6/1/87	1987	2017-0800	Strike Misconduct	intentionally driving car to shield rock -- protected
36	U.S. Gypsum	284 NLRB 4	5/29/87	1987	52-345	Strike Misconduct	variety of activities -- unprotected
37	F.E. Wray, Inc.	283 NLRB 771	4/29/87	1987	2017-1700	Strike Misconduct	threatening nonstrikers -- unprotected
38	Louisiana-Pacific Corp.	282 NLRB 1303, enforced, 858 F.2d 576 (9th Cir. 1988)	2/18/87	1987	52-345	Strike Misconduct	throwing rocks -- unprotected
39	CorbinTeed Corp.	282 NLRB 1101	2/8/87	1987	52-345	Strike Misconduct	standing nails up in driveway -- unprotected
			1987 Count	10			
40	Cartridge Actuated Devices, Inc.	282 NLRB 726	1/21/86	1986	52-345	Strike Misconduct	scratching car -- protected where disparate treatment of strikers existed
41	Richmond Recording Corp.	280 NLRB 515, enforced, 936 F.2d 269 (7th Cir. 1991)	6/24/86	1986	52-345	Strike Misconduct	throwing nails, rocks, burning vehicles -- all unprotected
42	Bingham-Wilmette Co.	279 NLRB 270	4/14/86	1986	52-345	Strike Misconduct	throwing eggs -- unprotected
43	Harry Hoffman & Son Printing	278 NLRB 87	2/21/86	1986	52-345	Strike Misconduct	throwing tomato at care -- unprotected
			1986 Count	4			
44	Georgia Kraft Co.	275 NLRB 636	5/31/85	1985	2017-0800	Strike Misconduct	threat on life -- unprotected

		1995 Count	1	Strike Macroduct Count	44	Macroduct Count	4
		Total					
45	Guardian Indus. Corp.	318 NLRB 542	10/16/95	1985	52/2542	Outrageous Conduct	mid epithet protected
46	Newark Morning Ledger Hosp.	316 NLRB 1268	4/19/95	1985	2017-7100	Outrageous Conduct	altering business documents not protected
47	HCA/Pottsmouth Regional Hosp.	316 NLRB 919	3/29/95	1985	52/2542	Outrageous Conduct	spreading false rumors not protected
48	Henz Corp.	316 NLRB 672	3/6/95	1985	6080-1100	Outrageous Conduct	threatening employees while soliciting support for union protected
49	Grocery Handlers, Inc.	315 NLRB 1312	1/13/95	1985	2017-5000	Outrageous Conduct	threats by union official of loss of seniority during union organizing drive protected
		1995 Count	5				
50	Morton Int'l, Inc.	315 NLRB 564	11/10/94	1984	4987-5000	Outrageous Conduct	obscane language protected
51	Brother Indus., Inc.	314 NLRB 1218	9/20/94	1984	2001	Outrageous Conduct	lying on NLRB affidavit protected
52	Peter Vitale Co.	313 NLRB 971	3/29/94	1984	2017-1700	Outrageous Conduct	baiting up lists toward supervisor not appropriate conduct
		1994 Count	3				
53	United Parcel Serv., Inc.	311 NLRB 974	5/28/93	1983	2017-6700	Outrageous Conduct	impersonating a police officer unprotected
		1993 Count	1				
54	Southdown Ctr. Ctr.	308 NLRB 225	8/13/92	1982	6095-0100	Outrageous Conduct	noisy protest -- scaring residents unprotected
55	Alpha Resins Corp.	307 NLRB 1219	7/11/92	1982	52/2542	Outrageous Conduct	threat of bodily harm protected
		1992 Count	2				
56	Woodlawn Cemetery	305 NLRB 640	11/20/91	1981	52/2542	Outrageous Conduct	protest letter containing malicious language protected
57	Wolkendorf Co.	305 NLRB 592	11/12/81	1981	2017-0800	Outrageous Conduct	misuse of bulletin board protected
58	United Parcel Serv. of Ohio	305 NLRB 453, vacated sub nom. Kane v. NLRB, 81 F.3d 27 (9th Cir. 1993)	10/15/91	1981	2017-0800	Outrageous Conduct	false statements on grievance not protected
59	Mini-Togs, Inc.	304 NLRB 644, <i>rev'd in part</i> , 980 F.2d 1027 (5th Cir. 1993)	8/27/91	1981	2017-7100	Outrageous Conduct	Obscene language at co-workers protected
60	Champion Int'l Corp.	303 NLRB 102	5/26/91	1981	6070-5000	Outrageous Conduct	newspaper's crude and unpleasant language protected
61	United Enviro Sys., Inc.	301 NLRB 842, <i>enforce</i> 856 F.2d 364 (3rd Cir. 1992)	2/27/91	1981	52/2539	Outrageous Conduct	profane language protected
62	Webb's Country Club	301 NLRB 664	2/12/91	1981	52/2542	Outrageous Conduct	obscene language protected
		1991 Count	7				

63	Reef Indus., Inc.	300 NLRB 956, enforced, 952 F.2d 630 (5th Cir. 1991), <i>rely'd denied</i> , 952 F.2d 639 (5th Cir. 1992)	12/21/90	1990	52:25:42	Outrageous conduct unflattering cartoon protected
64	Burle Indus., Inc.	300 NLRB 458	10/15/90	1990	52:25:39	Outrageous Conduct obscene language protected
65	New River Indus., Inc.	289 NLRB 773, <i>rely'd</i> , 945 F.2d 1290 (4th Cir. 1991)	9/24/90	1990	2017-5000	Outrageous Conduct satire letter protected
66	Laminated Prod., Inc.	294 NLRB 816	6/6/89	1989	2017-0803	Outrageous Conduct surreptitious manner of looking at checks/slying not protected
		1989 Count	1			
67	YMCA of the Pikes Peak Region, Inc.	291 NLRB 968, enforced, 914 F.2d 1442 (10th Cir. 1990), cert. denied, 500 U.S. 904 (1991)	11/30/88	1988	2001	Outrageous Conduct telephone call to investigate grievance not harassing protected
68	Washington Adventist Hosp., Inc.	291 NLRB 85	8/30/88	1988	2017-1700	Outrageous Conduct misuse of computer system to send message unprotected
69	Spann Bldg. Maintenance Co.	288 NLRB 915	7/15/88	1988	2017-1700	Outrageous Conduct use of mild epithet protected
70	Readmaster Corp.	288 NLRB 1185, enforced, 874 F.2d 448 (7th Cir. 1989)	5/31/88	1988	4067-9000	Outrageous Conduct signing other employee's name to a grievance protected
71	Freeman Decorating Cn.	288 NLRB 1235	5/31/88	1988	52:25:42	Outrageous Conduct verbal puttnery - protected
		1988 Count	5			
72	A.H. Belo Corp.	285 NLRB 807	9/16/87	1987	2017-0800	Outrageous Conduct loud tone of voice not excessive -- protected
73	Kroger Co.	284 NLRB 661, <i>aff'd</i> , 859 F.2d 827 (11th Cir. 1988)	6/30/87	1987	2017	Outrageous Conduct protest not excessive or extreme -- protected
74	E.R. Carpenter Co.	284 NLRB 273	6/17/87	1987	2017-6700	Outrageous Conduct putting flyers on car windshields in violation of state law -- protected
		1987 Count	3			
75	Chelsea Lab., Inc.	282 NLRB 500, enforced, 825 F.2d 880 (2nd Cir. 1987), <i>cert. denied</i> , 484 U.S. 1026 (1988)	12/22/86	1986	2017-0800	Outrageous Conduct raised voice held protected
76	Troyer Clinic	280 NLRB 6	5/30/86	1986	6060-5000	Outrageous Conduct dissemination of cartoon not so inflammatory or outrageous -- protected
		1986 Count	2			
77	Caterpillar Tractor Co.	276 NLRB 1323	9/30/85	1985	2017-0800	Outrageous Conduct obnoxious cartoon containing obscenities -- unprotected
78	Southern Cal. Edison Co.	274 NLRB 1121	3/25/85	1985	6095	Outrageous Conduct button with off-color language -- not so offensive as to base protection
79	Ozark Properties, Inc.	274 NLRB 687, <i>enforced</i> , 794 F.2d 878 (8th Cir. 1986)	2/28/85	1985	2017-6700	Outrageous Conduct abusive language during contract negotiations held protected
		1985 Count	3			
		Total	35	Outrageous Conduct Count	35	

80	Fleischman Care Center	316 NLRB 201	1/3/1985	1995	52,344	Insubordination	congregating around nursing home lobby to deliver grievances protected
		1995 Count	1				
81	Earle Indus., Inc.	315 NLRB 310, rev'd, 75 F.3d 400 (8th Cir. 1996)	10/21/84	1994	52,2542	Insubordination	encouraging Jessie Jackson to go to front office was protected
		1994 Count	1				
82	Health Care & Retirement Corp.	310 NLRB 1002	3/31/83	1993	52,2539	Insubordination	Walkout protected
83	Mike Yurosek & Son, Inc.	310 NLRB 331, enforced, 53 F.3d 261 (9th Cir. 1995)	3/25/83	1993	52,2539	Insubordination	refusal to work extra hour protected
		1993 Count	2				
84	Transpac Fiber Optics & Telecomm., Inc.	305 NLRB 974	12/20/91	1991	2017-0800	Insubordination	persistent asking questions of management protected
85	NTA Graphics, Inc.	303 NLRB 1010	7/27/91	1991	6050-7550	Insubordination	refusing to leave plant to insubordination
86	Bridgeport Ambulance Serv., Inc.	302 NLRB 358, enforcd, 986 F.2d 725 (2nd Cir. 1992)	3/29/91	1991	52,2539	Insubordination	Walkout protected despite no union sanction
87	United Parcel Serv., Inc.	301 NLRB 1142	2/28/91	1991	52,2539	Insubordination	refusal to drive truck because of belief that it would violate contract protected
		1991 Count	4				
88	Farby Candy Co.	300 NLRB 649	12/10/90	1990	52,349	Insubordination	Work stoppage not insubordination or an interruption of strike
89	Sawyer of NAPA, Inc.	300 NLRB 131	9/28/90	1990	6050-2500	Insubordination	one-time refusal to work overtime protected
		1990 Count	2				
90	Elton Concrete, Inc.	287 NLRB 98, 9/17, 984 F.2d 1389 (4th Cir. 1999)	12/11/87	1987	2017-0800	Insubordination	repeated refusal to "shut up" held unprotected
91	Ecker Mfg. Corp.	286 NLRB 770	9/30/87	1987	2017-0800	Insubordination	raised voice held not to be insubordination -- protected
92	W.G. Dieni Distrib. Co.	283 NLRB 524	3/1/87	1987	2017-1700	Insubordination	intemperate language/cold voice not insubordinate - protected
93	Finlay Bros. Co.	282 NLRB 37	1/14/87	1987	2017-1700	Insubordination	consistent refusal to wear work uniform -- insubordinate and unprotected
94	U.S. Postal Serv.	282 NLRB 686	1/9/87	1987	2017-1700	Insubordination	repeated refusal to lower voice -- not protected
		1987 Count	5				
95	Dandridge Terilla, Inc.	278 NLRB 89	3/31/86	1986	2017-0800	Insubordination	disrespectful remarks to supervisor not insubordination -- protected
96	Zack Co.	278 NLRB 958	3/1/86	1986	2017-1700	Insubordination	excessive talking about grievances without doing work -- unprotected
97	BASF Wyandotte Corp.	278 NLRB 173	1/22/86	1986	2017-0800	Insubordination	destroying papers in meeting with management -- protected
		1986 Count	3				
98	Mead Corp.	275 NLRB 323	4/20/85	1985	2017-1700	Insubordination	Refusal to work overtime held insubordination where a grievance procedure existed
		1985 Count	1				
99	Mike Yurosek & Son, Inc.	306 NLRB 1037	3/31/92	1992	6050-2500	Economic Weapons	refusing to work overtime protected

		1992 Count	1	
100	Hester Marine Transp. Sys., Inc.	288 NLRB 188	4/9/90	1980
101	Aubrey Eaton	297 NLRB 958, enforced 919 F.2d 141 (6th Cir. 1990)	3/2/1980	1980
		1990 Count	2	
102	PHT, Inc.	297 NLRB 228, enforced 920 F.2d 711 (D.C. Cir. 1990) cert. denied, 502 U.S. 810 (1991)	11/1/1989	1989
103	Phillips Indus., Inc.	295 NLRB 717	6/15/1989	1989
104	All American Gourmet	292 NLRB 1111	2/11/1989	1989
		1988 Count	3	
105	City Dodge Ctr. Inc.	289 NLRB 194, enforced sub nom. Roseville Dodge, Inc. v. NLRB, 882 F.2d 1355 (8th Cir. 1989)	6/17/1988	1988
		1988 Count	1	
106	Jasper Seating Co.	285 NLRB 550, enforced 857 F.2d 419 (7th Cir. 1988)	8/3/1987	1987
107	Lumbee Farms Cop., Inc.	285 NLRB 497, enforced 850 F.2d 689 (4th Cir. 1988) cert. denied, 488 U.S. 1010 (1989)	8/31/1987	1987
108	Dickinson-Ion Community Action Agency	285 NLRB 1029, enforced 843 F.2d 1380 (8th Cir. 1988)	5/1/1987	1987
109	MCI Mining Corp.	283 NLRB 638, enforced 849 F.2d 609 (6th Cir. 1988)	4/2/1987	1987
110	Buck Brown Contractiling Co.	283 NLRB 488	3/31/1987	1987
111	Coast Engraving Co.	282 NLRB 1236, enforced 860 F.2d 1088 (8th Cir. 1988)	2/1/1987	1987
		1987 Count	6	
112	Modern Iron Works, Inc.	281 NLRB 1119	9/3/1986	1986
113	Highlands Reg'l Med. Ctr.	278 NLRB 1087	3/2/1986	1986
		1986 Count	2	
114	Daniel Inrl Corp.	277 NLRB 795	11/26/1985	1985
115	McEver Engg. Inc.	275 NLRB 921, enforced 784 F.2d 634 (5th Cir. 1986)	6/29/1985	1985
116	River Oaks Nursing Home	275 NLRB 84	4/11/1985	1985
117	Advance Cleaning Serv.	274 NLRB 942	3/19/1985	1985
		1985 Count	4	
		Total	19	Economic Weapons Count
118	Clempower, Inc.	316 NLRB 496	2/27/1985	1985
				Disobey
				appealing to building manager to intervene in labor dispute protected

119	Diamond Walnut Growers, Inc.	316 NLRB 36, <i>rev'd in part</i> , 113 F.3d 1259 (D.C. Cir. 1997) (<i>en banc</i>)	1/20/95	1995	\$2,345	Disloyalty	boycott of product protected
		1995 Count	2				
120	Neil-Perkins Co.	315 NLRB 1229	1/23/94	1994	6070-5000	Disloyalty	Complaining in front of major customer not disloyal
121	K&O, Inc.	315 NLRB 570, <i>enforced</i> , 96 F.3d 1448 (6th Cir. 1996)	1/17/94	1994	6080-5000	Disloyalty	employee's remarks not defamatory
		1994 Count	2				
122	Blue Circle Cement Co.	311 NLRB 623, <i>enforced</i> , 41 F.3d 203 (5th Cir. 1994)	5/28/93	1993	52,2535	Disloyalty	printing leaflets about company's burning of hazardous waste protected
123	Delta Health Ctr., Inc.	310 NLRB 26, <i>aff'd</i> , 5 F.3d 1494 (5th Cir. 1993)	1/7/93	1993	52,2535	Disloyalty	sending memo to funding agency protected
		1993 Count	2				
124	Dougherty Lumber Co.	289 NLRB 295, <i>enforced</i> , 941 F.2d 1209 (6th Cir. 1991)	7/5/90	1990	4067-9500	Disloyalty	posting note not disloyal
125	United Cable Television Corp.	299 NLRB 138	7/27/90	1990	6060-5000	Disloyalty	comments about employer's product not reckless or untrue
126	Brownsville Garment Co.	298 NLRB 507, <i>enforced</i> , 937 F.2d 809 (6th Cir. 1991)	5/16/90	1990	6070-5000	Disloyalty	
		1990 Count	3				
127	Cordia Transport, Inc.	286 NLRB 237	8/23/89	1989	6070-5000	Disloyalty	asking question of major customer protected
128	GHH Energy Corp.	284 NLRB 1011, <i>aff'd</i> , 924 F.2d 1055 (5th Cir. 1991)	6/13/89	1989	6070-5000	Disloyalty	letter to newspaper protected
129	Martin Marietta Corp.	293 NLRB 719	4/20/89	1989	2017-0810	Disloyalty	use of word poison in describing reason for employee's sickness not disloyal
		1989 Count	3				
130	Elmer Nordstrom	292 NLRB 899, <i>enforced</i> , 888 F.2d 125 (2nd Cir. 1989)	2/8/89	1989	4067-9500	Disloyalty	public complaints about team doctor not disloyal
		1988 Count	4				
131	Sierra Publ Co.	291 NLRB 540, <i>enforced</i> , 889 F.2d 210 (5th Cir. 1989)	10/31/88	1988	6060-5000	Disloyalty	letter to newspaper advertisers not disloyal
132	San Juan Hotel Corp.	289 NLRB 1453	7/29/88	1988	6070-2500	Disloyalty	statement in letter protected where letter was directed only at employees
133	Cincinnati Suburban Press, Inc.	289 NLRB 968	7/20/88	1988	4067-9500	Disloyalty	newspaper letter not disloyal
134	Almond Transfer Serv., Inc.	287 NLRB 1244	2/25/88	1988	4067-9500	Disloyalty	strike as collusion with employer's competitor not disloyal
		1987 Count	4				
135	Emarco, Inc.	284 NLRB 832	6/30/87	1987	6070-5000	Disloyalty	communication with general contractor -- not disloyal
136	Pontiac Osteopathic Hosp.	284 NLRB 442	6/23/87	1987	6060-5000	Disloyalty	fictitious newsletter -- not disloyal who no info, satiric -- not disloyal who no denigration of employer
		1987 Count	2				
137	Thomas Steel Co.	281 NLRB 389	9/9/86	1986	2017-1700	Disloyalty	Interfering with customer-employee relationship and misrepresentation to customer -- unprotected
138	Local No. 380, UAW	280 NLRB 1378, <i>enforced</i> , 819 F.2d 1134 (3rd Cir. 1987)	7/31/86	1986	6080-5000	Disloyalty	false statements to newspaper not disloyal

139	Mitchell Manuals, Inc.	280 NLRB 230	5/30/86	1985	2017-1700	Disloyalty	false statements about employer -- protected
140	Turner Beverage Co.	278 NLRB 160	3/31/86	1986	2017-1700	Disloyalty	making anonymous calls to employer's franchiser -- disloyal/unprotected
141	Sehara Datsun, Inc.	278 NLRB 1044, enforced, 811 F.2d 1317 (9th Cir. 1987)	3/20/86	1986	2017-6700	Disloyalty	false accusation against employer -- held disloyal and unprotected
		1986 Count	5				
142	Bell-Halter, Inc.	276 NLRB 1208	9/30/85	1985	2017-6700	Disloyalty	false statements about employer -- unprotected/disloyal
143	Squier Distrib. Co.	276 NLRB 1195, enforced sub nom., Squier Distrib. Co. v. Local 7, Int'l Brotherhood of Teamsters, 801 F.2d 238 (8th Cir. 1986)	9/30/85	1985	4067-9500	Disloyalty	reporting employer misconduct to sheriff not disloyal
144	Technicolor Gov't Serv., Inc.	276 NLRB 383, enforced, 785 F.2d 916 (11th Cir. 1986)	9/24/85	1985	2017-0800	Disloyalty	disseminating employment application forms for a competitor of employer -- protected
145	Crystal Linen & Uniform Serv., Inc.	274 NLRB 946	3/14/85	1985	4067-9500	Disloyalty	persuading employees to work for competitor -- disloyal and unprotected
		1985 Count	4				
		Total	28	Disloyalty Count	28		
		Grand Count	145	Grand Count	145		

<i>Year</i>	<i>85</i>	<i>86</i>	<i>87</i>	<i>88</i>	<i>89</i>	<i>90</i>	<i>91</i>	<i>92</i>	<i>93</i>	<i>94</i>	<i>95</i>	<i>Total</i>
Strike Misconduct	1	4	10	3	7	1	5	5	4	3	1	44
Outrageous Conduct	3	2	3	5	1	3	7	2	1	3	5	35
Insubordination	1	3	5	0	0	2	4	0	2	1	1	19
Economic Weapons	4	2	6	1	3	2	0	1	0	0	0	19
Disloyalty	4	5	2	4	4	3	0	0	2	2	2	28
Totals	13	16	26	13	15	11	16	8	9	9	9	145