PROTECTED EMPLOYEE ACTIVITY UNDER SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT

NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973)

Smith and three co-workers had negotiated for a new employment contract with respondent trucking company. Although the co-workers agreed to new terms, Smith continued to express his dissatisfaction with the new contract. The company discharged him, claiming that his persistent complaining was causing dissension among his co-workers. The National Labor Relations Board ordered respondent to reinstate Smith,[1] finding that the company had violated section 8(a)(1) of the National Labor Relations Act,[2] which prohibits the discharge of an employee for engaging in activities protected by section 7 of the Act.[3] The Fifth Circuit Court of Appeals denied enforcement of the order[4] and

---

1. 197 N.L.R.B. No. 70 (June 12, 1972).

2. National Labor Relations Act § 8, 29 U.S.C. § 158 (1970) [hereinafter cited as NLRA] provides:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title.

3. NLRA § 7, 29 U.S.C. § 157 (1970) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

4. NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973). The court characterized its decision as resting on the law and not the facts of the case. *Id.* at 719. The United States Supreme Court presented the standard for court review of NLRB orders in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). A reviewing court can set aside a Board decision

> when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

Id. at 488. Prior to *Universal Camera*, the Fifth Circuit had taken the position that since employee reinstatement is a harsh remedy, there is a presumption that employer testimony is true, and employee claims must "substantially contradict" the testimony. NLRB v. Tex-O-Can Flour Mills Co., 122 F.2d 433 (5th Cir. 1941). The Supreme Court has admonished the Fifth Circuit for applying a more stringent test than the one laid down by *Universal Camera*. NLRB v. Watson Mfg. Co., 369 U.S. 404 (1962). Thus the court in *Buddies* was careful to reverse the Board order on the law rather than the facts of the case. For a discussion of *Watson*, see 62 COLUM. L. REV. 1330 (1962). For a general overview of the Fifth Circuit's decisions in labor cases for the

held: Smith's complaints constituted mere individual action and hence were not protected by the Act.[5]

Until the relevant common law was modified by an act of Parliament in 1875,[6] the English courts consistently held that any employee attempt to organize the labor force constituted an unlawful combination.[7] American courts initially adhered to the common law's total prohibition against employee combination,[8] but public pressures eventually forced

---

period 1966-1972, see Comment, *Labor Law in the Fifth Circuit: A Survey of Selected Areas*, 9 HOUSTON L. REV. 717 (1972).

5. The decision also reversed a second Board order. The Board had found that respondent had violated § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1970), which prohibits "discrimination in regard to hire or tenure of employment . . . to encourage or discourage" union membership. The respondent contended that it had no knowledge of union activity, and that the discharge was made because of the employee's dishonesty. The court held that knowledge of union activity could not be imputed to the respondent, and thus the discharge was not discriminatory. For a discussion of the requirement of employer knowledge in § 8(a)(3) violations, see Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968); 48 B.U.L. REV. 142 (1968).

6. Conspiracy and Protection Act of 1875, 38 & 39 Vict., c. 86. *See* note 7 *infra*.

7. The criminality resulted from the mere combination, and it did not matter if the end was lawful:

> [A] conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it . . . .

The King v. Journeymen-Taylors of Cambridge, 88 Eng. Rep. 9, 10 (K.B. 1721). "[E]ach may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal . . . ." The King v. Mawbey, 101 Eng. Rep. 736, 745 (K.B. 1796). *See also* The King v. Eccles, 99 Eng. Rep. 684 (K.B. 1783); The King v. Sterling, 83 Eng. Rep. 331 (K.B. 1665). For an outline of conspiracy cases in the English courts, see J. LANDIS & M. MANOFF, CASES ON LABOR LAW 1-40 (2d ed. 1942).

The rise of trade unionism as a political force in England probably triggered the passage of the Conspiracy and Protection Act, which provided that a combination by two or more persons to do an act which was legal for one to do was not unlawful. The fall of Gladstone, a constant foe of legislation ameliorating the conspiracy rule, and the first election of labor members to the House of Commons in 1874, certainly added to the pressure for new legislation. For a thorough analysis of trade unionism in England, see B. WEBB & S. WEBB, THE HISTORY OF TRADE UNIONISM (rev. ed. 1920).

8. The American courts upheld the doctrine throughout the 18th century and into the 19th century. The first important case to adopt the theory was the Case of the Philadelphia Cordwainers (Commonwealth v. Pullis) (Mayor's Ct. Phila. 1806), *reported in* 3 J. COMMONS & E. GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-248 (1910). *See also* People v. Fischer, 14 Wend. 9 (N.Y. 1835); People v. Trequier, 1 Wheel. Crim. Cas. 142 (N.Y. 1823); People v. Melvin, 2 Wheel. Crim. Cas. 262 (N.Y. 1810). For a brief survey of these early cases, see J. LANDIS & M. MANOFF, *supra* note 7; Witte, *Early American Labor Cases*, 35 YALE L.J. 825 (1926).

a relaxation of the restriction.[9] Finally, Congress encouraged and protected labor organizing by passing the National Labor Relations Act in 1935.[10] Section 7 of the Act protects "concerted activities" by employees[11] and section 8(a)(1)[12] impliedly prevents an employer from discharging an employee who engages in those activities.

It is unclear what specific concerted activities are protected by the broad language of section 7. In the absence of any legislative history on this issue,[13] the courts have developed certain standards to be used

9. The steady growth of unionism in American society generated increasing public pressure for revision of the common law. Finally, in 1842, the Supreme Judicial Court of Massachusetts, faced with a potential riot, set aside the criminal conviction of seven members of the Boston Journeymen Bootmakers' Society. Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842). After the *Hunt* decision, few courts applied the conspiracy theory. One of the last reported cases invoking the conspiracy rule was State v. Donaldson, 32 N.J.L. 151 (Sup. Ct. 1867). For a brief summary of the American conspiracy rule, see A. COX, CASES ON LABOR LAW 8-21 (4th ed. 1958); J. WILLIAMS, LABOR RELATIONS AND THE LAW 18-23 (3d ed. 1965).

10. Ch. 372, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. §§ 141-87 (1970). The first legislation that spoke to the problem of employee organization was the Clayton Act of 1914, which provided: "[N]o . . . injunction shall prohibit any person or persons, whether singly or in concert, from . . . ceasing to perform any work or labor . . . ." Ch. 323, § 20, 38 Stat. 738, *as amended*, 29 U.S.C. § 52 (1970). The Norris-LaGuardia Act of 1932, which affirmed the right of labor to organize, provided:

> [I]t is necessary that [the individual unorganized worker] shall be free from the interference, restraint or coercion of employers . . . in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Ch. 90, § 2, 47 Stat. 70, *as amended*, 29 U.S.C. § 102 (1970).

The NLRA was passed in 1935, and, in pertinent part, contained virtually the same provisions as are found in current 29 U.S.C. §§ 157, 158 (1970). In passing the Act, Congress moved from recognition of the right to organize to a policy of protecting and encouraging unionism. *See generally* C. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY (1948); C. GREGORY, LABOR AND THE LAW (rev. ed. 1958); H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY (1950); Note, *The Requirement of "Concerted" Action Under the NLRA*, 53 COLUM. L. REV. 514 (1953).

11. *See* note 3 *supra*.

12. *See* note 2 *supra*.

13. The legislative history is contained in S. REP. NO. 114, 73d Cong., 1st Sess. (1933); H.R. REP. NO. 159, 73d Cong., 1st Sess. (1933); S. REP. NO. 573, 74th Cong., 1st Sess. (1935); H.R. REP. NO. 1147, 74th Cong., 1st Sess. (1935). *See also* 79 CONG. REC. 7653-75 (1935) (Senate debates); *id.* at 9687-731 (House debates). The overriding policy of the Act is set out in § 1:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

in ascertaining when the discharge of an employee violates section 8(a)(1). At the very least, it is clear that a discharge is not wrongful unless made with knowledge of the employee's activity.[14] Nor does the Act protect "unlawful" concerted activities[15] or protests unrelated to employment conditions.[16] Most activities involving a significant mi-

29 U.S.C. § 151 (1970). The Supreme Court has stated that the Act was passed primarily to recognize a fundamental right to organize. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936). For a full interpretation of the legislative history, see H. MILLIS & E. BROWN, *supra* note 10.

14. Since the employer must consciously interfere with protected rights in order to violate § 8(a)(1), he must know of the activities and discharge the employee because of them. *See* Southwest Latex Corp. v. NLRB, 426 F.2d 50 (5th Cir. 1970); NLRB v. Office Towel Supply Co., 201 F.2d 838 (2d Cir. 1953); NLRB v. Westinghouse Elec. Corp., 179 F.2d 507 (6th Cir. 1949). *See generally* 66 HARV. L. REV. 1534 (1953); 62 YALE L.J. 1263 (1953).

This scienter requirement is even clearer in cases of a § 8(a)(3) discriminatory discharge because of union activities. The word "discrimination" implies a choice between alternative courses made with full knowledge of the facts. *See* NLRB v. Schill Steel Prods., Inc., 340 F.2d 568 (5th Cir. 1965); NLRB v. Coal Creek Coal Co., 204 F.2d 579 (10th Cir. 1953). *See generally* Gorske, *Burden of Proof in Grievance Arbitration*, 43 MARQ. L. REV. 135, 149-58 (1959); articles cited note 5 *supra*.

15. There is some uncertainty as to what constitutes an "unlawful" protest. Generally, the courts will not consider a protest in contravention of state or federal law to be a protected activity under § 7. *See* Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942) (strike in violation of federal meeting statute); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (strike in violation of local laws prohibiting violence or seizure of property). Some courts consider activity in violation of the employment contract and activity unfairly harmful to the employer as unprotected activities. *See* Local 1229, Int'l Bhd. of Elec. Workers v. NLRB, 202 F.2d 186 (D.C. Cir. 1952), *rev'd*, 346 U.S. 464 (1953) (handbill derogating product held unfairly damaging to employer); Hoover Co. v. NLRB, 191 F.2d 380 (6th Cir. 1951) (employees remaining at work cannot request consumer boycott); NLRB v. Mylan-Sparta Co., 166 F.2d 485 (6th Cir. 1948) (solicitation during work hours unprotected if against company rules); NLRB v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946) (partial work stoppage unprotected if breach of employment contract).

16. The courts have asserted that the purpose of the NLRA was to equalize the bargaining position of the laborer vis-a-vis his employer in the context of the employment contract. *See* NLRB v. Bretz Fuel Co., 210 F.2d 392 (4th Cir. 1954) (activities to influence legislation not protected); NLRB v. Jamestown Veneer & Plywood Corp., 194 F.2d 192 (2d Cir. 1952) (walkout to protest short notice of layoff not for the purpose of improving conditions); Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749 (4th Cir. 1949) (attempt to discharge foreman made for personal reasons); NLRB v. Reynolds Int'l Pen Co., 162 F.2d 680 (7th Cir. 1947) (walkout to protest demotion of foreman was in his interest, not employees'). *See generally* Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1950); 44 ILL. L. REV. 234 (1949). For a general discussion of "unlawful" concerted action, see Note, *Unprotected Activity Under the National Labor Relations Act*, 3 UTAH L. REV. 358 (1953); 66 HARV. L. REV. 1321 (1953); 4 SYRACUSE L. REV. 377 (1953).

nority of employees, however, whether non-union or union, generally are within the scope of section 7. Thus, an employer may not discharge employees because of a group walkout protesting the conditions of the work area or treatment of a co-employee,[17] union activity in the form of organization attempts and petitions,[18] or employee action in support of fellow unions.[19]

While the decisions have been relatively consistent in ascertaining whether employee discharge for union or other cohesive group activity violates section 8(a)(1), inconsistency has arisen in applying the Act to actions by individual employees. The Third Circuit has held that section 7 does not protect conduct by one employee unless it is for the purpose of inducing group action.[20] Thus, although the employee need not be a formally chosen spokesman, he is protected from discharge

17. Since any employer action jeopardizing the rights of a particular employee affects the general employer-employee relationship, courts have usually held that group protest of one employee's treatment is protected. *See* NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859 (5th Cir. 1966); Modern Motors, Inc. v. NLRB, 198 F.2d 925 (8th Cir. 1952); NLRB v. J.I. Case Co., 198 F.2d 919 (8th Cir. 1952), *cert. denied*, 345 U.S. 917 (1953); Carter Carburetor Corp. v. NLRB, 140 F.2d 714 (8th Cir. 1944).

18. *See* Texas Aluminum Co. v. NLRB, 435 F.2d 917 (5th Cir. 1970); A.J. Krajewski Mfg. Co. v. NLRB, 413 F.2d 673 (1st Cir. 1969); NLRB v. Mid State Sportswear, Inc., 412 F.2d 537 (5th Cir. 1969); NLRB v. Transport Clearings, Inc., 311 F.2d 519 (5th Cir. 1962); NLRB v. Quality Art Novelty Co., 127 F.2d 903 (2d Cir. 1942). For a casebook evolution of this topic, see A. Cox, *supra* note 9, at 282-333. A general discussion and list of cases is contained in Annot., 18 A.L.R.2d 352 (1951).

19. The case most often cited as support for this proposition is NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503 (2d Cir. 1942). Judge Learned Hand, writing for the court, reasoned that any union is interested in the success of its fellow unions since that success strengthens the labor movement in general. *See* Signal Oil & Gas Co. v. NLRB, 390 F.2d 338 (9th Cir. 1968); NLRB v. Louisville Chair Co., 385 F.2d 922 (6th Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968); NLRB v. City Yellow Cab Co., 344 F.2d 575 (6th Cir. 1965). For a general discussion of this area, see Cox, *supra* note 16; Note, *supra* note 10.

20. In Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964), the court stated:

> It follows that, if we were to hold that Keeler's conversations constituted concerted activity, it could only be upon the basis that any conversation between employees comes within the ambit of activities protected by the Act provided it relates to the interests of the employees. We are unable to adopt this view.

Accord, Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) (employees acted independently and individually in protest over profit-sharing plan); Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967) (cartoon deriding wage increase unprotected personal protest); NLRB v. Office Towel Supply Co., 201 F.2d 838 (2d Cir. 1953), *noted in* 22 GEO. WASH. L. REV. 111 (1953) *and* 66 HARV. L. REV. 1534 (1953) (mere griping too inchoate for protection). *See generally* Note, *Concerted Activity Under Section 7 of the National Labor Relations Act*, 1955 U. ILL. L.F. 129.

only if the object of his speech is to form a united group for the presentation of a grievance.[21]

In contrast to the Third Circuit, the Second Circuit has adopted a "collective rights" approach to actions by individuals under section 7. Pursuant to this approach, a personal grievance by an employee is protected as long as the right he enforces is common to all other employees.[22]

In *Buddies* the Fifth Circuit adopted the Third Circuit's reasoning. The court concluded that since the other employees were satisfied with the new contracts, Smith's persistent complaints were individual and thus unprotected by section 7.[23] The court explicitly rejected the Second Circuit's "collective rights" formulation on two grounds. First, it distinguished the cases underlying that formulation[24] by noting that each involved a collective bargaining agreement; hence the court limited

21. *See* Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1349 (3d Cir. 1969); NLRB v. Guernsey-Muskingum Elec. Co-op., 285 F.2d 812 (6th Cir. 1960).

The NLRB in *Buddies* evidently rested its decision to some extent on this factor. While Smith was not a formally chosen spokesman, there was testimony to indicate that his co-workers "expected" him to bring up the matter of the new contract with the respondent. Brief for Petitioner at 21, NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973).

22. The main decision setting forth the Second Circuit's view is NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967). In NLRB v. John Langenbacher Co., 398 F.2d 459, 463 (2d Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969), the court clarified its position by holding that an attempt by employees to enforce their understanding of a collective bargaining agreement is a protected activity if the employees have a reasonable basis for believing that their understanding of the terms was the understanding that had been agreed upon.

The most complete discussion of the collective rights approach is contained in Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 281-90 (8th Cir. 1968) (Lay, J., dissenting). Judge Lay's main argument is that Congress passed the NLRA to protect the employee in his relationship with the employer. Any act that materially affects that relationship, regardless of intent, should be protected. That does not mean, however, that § 7 protects individual protest which is vented by reason of personal animosity or is unrelated to group interest or concern. The Eighth Circuit subsequently adopted this position. NLRB v. Selwyn Shoe Mfg. Co., 428 F.2d 217 (8th Cir. 1970). Recently, the Seventh Circuit approved the *Interboro* language and held that one employee acting alone was protected in his effort to enforce a previous promise of a wage increase. NLRB v. Ben Pekin Corp., 452 F.2d 205 (7th Cir. 1971).

23. The court ignored Smith's earlier acts of leadership when the drivers were all unsigned. The NLRB considered this activity as the primary reason for his discharge, noting the close temporal relation between his efforts to unite the drivers and his discharge. Brief for Petitioner at 22, NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973). By concentrating on Smith's activity after the drivers had signed, the court found it easier to characterize the activities as purely personal.

24. *See* note 22 *supra*.

the application of the "collective rights" approach to contracts secured by collective bargaining.[25] Secondly, the court construed section 7 to protect conduct by an employee only if intended to induce collective *activity*, and not individual action designed solely for the *benefit* of other employees.[26]

Although the National Labor Relations Act protects the right of employees to organize, it leaves the non-union employee particularly vulnerable to discharge.[27] At least three circuits protect an individual employee with a collective bargaining agreement in his efforts to negotiate a grievance.[28] The non-union employee who fails to generate a united group, however, risks discharge because his continued complaining represents "individual" action unprotected by the National Labor Relations Act. It is difficult to justify the individual/group activity distinction when one considers the goal of the Act—to allow the employee to nego-

25. While *Interboro, Langenbacher*, and *Selwyn* concern protests over collective bargaining agreements, there is nothing in these opinions to suggest that the "collective rights" approach is limited to cases involving such agreements. The Second Circuit view seems to treat collective bargaining agreements as a source of rights common to all. Thus, when an employee protests to secure a right under a collective bargaining agreement, he automatically affects the rights of his co-employees.

In the principal case, if Smith had succeeded in his negotiations, there would have been a resulting benefit for the other drivers. This case seems most similar in its facts to the Seventh Circuit's decision in *Pekin*. *See* note 22 *supra*. There, the court noted the absence of a written collective bargaining agreement, but stressed that there was a "relationship" between the employees as a group and the employer, and an oral agreement to negotiate for new contracts. 452 F.2d at 206.

26. The court's statutory construction argument is taken from the Third Circuit's rejection of the "collective rights" approach in NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971). That court reasoned that only *group activity* is protected, and, therefore, an individual is protected only when he intends to generate group activity. Judge Biggs' dissent, quoting from the Second Circuit's opinion in *Interboro*, reasoned that the individual who asserts a right held by all employees is, in effect, representing that group. Therefore, Judge Biggs concluded, the collective nature of the right asserted fulfills the statutory requirement of concerted activity. *Id.* at 888 (Biggs, J., dissenting).

27. The Fifth Circuit in its first discussion of § 7 stated:

> Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions . . . .

NLRB v. Schwartz, 146 F.2d 773, 774 (5th Cir. 1945).

The 1947 amendments, in extending protection to the right of individual employees to *refrain* from concerted activities, would seem to indicate an increased congressional concern for the rights of the individual employee. *Compare* NLRA § 7, ch. 452, § 7, 49 Stat. 452 (1935), *with* Labor Management Relations Act § 7, ch. 120, § 7, 61 Stat. 140 (1947). *See generally* 22 GEO. WASH. L. REV. 111 (1953).

28. *See* note 22 *supra*.

tiate for better working conditions without fear of discharge. Rather than adopt the individual/group distinction, it would seem more logical to analyze section 8(a)(1) cases simply by determining if the relief sought by the employee would directly benefit his co-workers, regardless of whether the employee's conduct was intended to induce collective action. While adoption of this suggested test arguably would not have altered the result in the principal case, it would eliminate the difficulties associated with the Third Circuit approach. The court would no longer be required to draw a fine line between an individual employee's complaining and conduct designed to induce group action. Those employees who attempt to cause disruption by persistent complaints on minor or purely personal issues would not be protected, while those with legitimate ideas for improving general working conditions would be free to negotiate without fear of discharge.