

Union Presence in Disciplinary Meetings

In recent years, the National Labor Relations Board (NLRB) has endeavored to protect employee job security by recognizing a right under the National Labor Relations Act¹ to have a union steward attend disciplinary meetings.² In 1967 the NLRB held that denial of a union steward's request to accompany an employee is a breach of the employer's duty to bargain with the union imposed by section 8(a)(5); the Fifth Circuit denied enforcement on other grounds.³ In 1972 the Board asserted that an employer's denial of an employee request for a steward violates section 8(a)(1), because attendance of the steward is one of the "concerted activities for . . . mutual aid or protection" protected by section 7 of the Act.⁴ The Fourth, Fifth, and Seventh Circuits have rejected this position.⁵

¹ Ch. 372, §§ 1 *et seq.*, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. §§ 151 *et seq.* (1970) [hereinafter cited as NLRA].

² Two cases before 1967 had raised this issue. In *Ross Gear & Tool Co.*, 63 N.L.R.B. 1012, 1033-34, 17 L.R.R.M. 36, 39 (1945), an employee-union representative was the subject of an investigatory meeting and, relying on the fact that grievance procedures were then pending, requested the attendance of union committeemen. The employer refused the request and the Board held that the refusal violated section 8(a)(1). The Seventh Circuit disagreed and stated that permitting employees to refuse attendance at such meetings would encourage insubordination. *NLRB v. Ross Gear & Tool Co.*, 158 F.2d 607, 613 (7th Cir. 1947). In *Dobbs Houses, Inc.*, 145 N.L.R.B. 1565, 1571, 55 L.R.R.M. 1218 (1964), the Board affirmed without opinion a trial examiner's dismissal of a section 8(a)(1) complaint based on an employer's refusal to allow union representation at a disciplinary meeting.

³ *Texaco, Inc., Producing Div.*, 168 N.L.R.B. 361, 66 L.R.R.M. 1296 (1967), *enforcement denied on other grounds*, 408 F.2d 142 (5th Cir. 1969) (holding that the meeting was investigatory). Section 8(a)(5) declares that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title [NLRA § 9(a)]." 29 U.S.C. § 158(a)(5) (1970). Section 9(a) provides in part that such representatives "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a) (1970).

⁴ See cases cited note 5 *infra*. Section 8(a)(1) declares that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [NLRA § 7]." 29 U.S.C. § 158(a)(1) (1970). Section 7 provides that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157 (1970).

⁵ *NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135 (5th Cir.), *petition for cert. filed*, 42 U.S.L.W. 3544 (U.S. Mar. 26, 1974) (No. 1363), *denying enforcement* of 202 N.L.R.B. No. 69, 82 L.R.R.M. 1559 (1973); *Mobil Oil Corp. v. NLRB*, 482 F.2d 842 (7th Cir. 1973), *denying enforcement* of 196 N.L.R.B. 1052, 80 L.R.R.M. 1188 (1972); *NLRB v. Quality Mfg.*

This comment considers whether the National Labor Relations Act provides a right to have a union steward⁶ present at disciplinary meetings.⁷ It concludes that this right is granted employees under sections 7 and 8(a)(1) and unions under sections 9(a) and 8(a)(5). The comment demonstrates that exercise of these rights would not seriously disrupt employer operations and suggests a rule for defining when a meeting is disciplinary. Finally, the comment discusses whether the union and the individual should be permitted to waive these rights.⁸

I. DEVELOPMENT OF THE DOCTRINE

In seeking to establish the right to union presence at disciplinary meetings, the Board has not articulated adequately the statutory foundation for the right or assessed the impact of the right on employer operations. The Board has also failed to provide more than a very general definition of what constitutes a disciplinary meeting. These failures may explain the refusal of the courts of appeals to enforce the Board's orders.

A. Breach of the Duty to Bargain under Section 9(a) as Protected by Section 8(a)(5)

In *Texaco, Inc., Houston Producing Division*,⁹ an employee was suspended for an alleged theft. The employer denied requests by both the

Co., 481 F.2d 1018 (4th Cir.), *petition for cert. filed*, 42 U.S.L.W. 3340 (U.S. Nov. 12, 1973) (No. 765), *denying enforcement in part* of 195 N.L.R.B. 197, 79 L.R.R.M. 1269 (1972).

⁶ This comment will use the term "steward" to describe the union's representative for a unit; the use of this term does not imply that a particular, titled union official is appropriate for this statutory right.

⁷ The Board cannot force employers to hold disciplinary meetings; its remedies in these cases have been limited to cease and desist orders against the meetings and reinstatement for those employees discharged for refusal to attend such conferences alone. *Mobil Oil Corp.* 196 N.L.R.B. 1052 n.3, 80 L.R.R.M. 1188, 1193 n.3 (1972). This comment suggests that remedies should be limited to reversal of improperly imposed discipline. *See text and notes at notes 91-95 infra.*

In theory, the employer could resort to summary discipline. In practice the meetings serve to prevent erroneous discipline and are likely to continue even if steward attendance is required. Loss of trained personnel not actually guilty of any wrongdoing is costly to the employer and likely to be reversed in the grievance procedure, and plant morale suffers if employees are unjustly disciplined.

⁸ The potential importance of this right to the individual employee is great. One commentator estimates that more than 75 percent of all reported cases concerning employee enforcement of contracts arise from discharge situations. Summers, *Individual Rights in Collective Agreements—A Preliminary Analysis*, N.Y.U. 12TH CONFERENCE ON LABOR 63, 83 (1959). *See O. PHELPS, DISCIPLINE AND DISCHARGE IN THE UNIONIZED FIRM* 8, 16-17 (1959). For the employee, discipline is a critical issue; his termination may not only end accumulated seniority but also affect possibilities of reemployment. L. STESSIN, *EMPLOYEE DISCIPLINE* vii (1960).

⁹ 168 N.L.R.B. 361, 66 L.R.R.M. 1296 (1967), *enforcement denied*, 408 F.2d 142 (5th Cir. 1969).

employee and a steward that the steward be present at a post-suspension meeting called to investigate the employee's conduct. At the meeting, the employee signed a confession, and his suspension was affirmed by the employer. The Board ruled that the employer had violated section 8(a)(5) by dealing directly with the employee over the terms of his employment rather than with the union as the bargaining agent selected by the employees under section 9(a).¹⁰ The Board held that union attendance was required because the purpose of the meeting was not investigatory—discipline had been considered from the outset.¹¹

Under this approach, the union's right to be represented by its steward depends on the nature of the meeting.¹² A disciplinary meeting is viewed as concerned with a possible change in employee status; the employer is therefore bargaining with the employee regarding his terms of employment. At an investigatory meeting, where the employer is merely gathering facts or learning about an incident in the plant, the employee's future status is not an issue. The Fifth Circuit accepted the Board's test¹³ but held that there was no evidence supporting the Board's determination that the meeting was disciplinary. If an interview "dealt only with eliciting facts and not with the consequences of the facts revealed, its subject matter was not within the scope of compulsory collective bargaining."¹⁴

10 *Id.* at 362, 66 L.R.R.M. at 1297. The Board relied on the union's status as collective bargaining agent and not on the proviso to section 9(a) that gives the union the right to attend the adjustment of employee grievances. *Id.* at 362 n.3, 66 L.R.R.M. at 1297. A few arbitrators have used the section 9(a) proviso to justify union presence at disciplinary meetings, arguing that an employee summoned to a meeting regarding his job becomes "aggrieved" once his behavior is challenged by the employer and that a "difference" or "complaint" has therefore arisen under the contract's grievance clause. *Waste King Universal Prods. Co.*, 46 Lab. Arb. 283, 286-87 (1966); *Caterpillar Tractor Co.*, 44 Lab. Arb. 647, 650 (1965); *Food Employers Council, Inc.*, 40 Lab. Arb. 1100, 1101 (1963); *Braniff Airways, Inc.*, 27 Lab. Arb. 892 (1957). This analysis is questionable, because at the time of summons it is difficult to show an existing grievance. *Electric Motors & Specialties, Inc.*, 149 N.L.R.B. 1432, 1440, 57 L.R.R.M. 1513 (1964) (trial examiner's decision); *Chevron Chem. Co.*, 60 Lab. Arb. 1066, 1070 (1973); *Masonite Corp.*, 54 Lab. Arb. 633, 638 (1970).

11 168 N.L.R.B. at 362, 66 L.R.R.M. at 1297.

12 See *Lafayette Radio Electronics Corp.*, 194 N.L.R.B. 491, 78 L.R.R.M. 1693 (1971); *Illinois Bell Tel. Co.*, 192 N.L.R.B. 834, 78 L.R.R.M. 1109 (1971); *Wald Mfg. Co.*, 176 N.L.R.B. 839, 73 L.R.R.M. 1486 (1969), *enforcement granted on other grounds*, 426 F.2d 1328 (6th Cir. 1970); *Dayton Typographic Serv., Inc.*, 176 N.L.R.B. 357, 72 L.R.R.M. 1073 (1969); *Texaco, Inc., Sales Terminal*, 179 N.L.R.B. 976, 72 L.R.R.M. 1596 (1969); *Jacobe-Pearson Ford, Inc.*, 172 N.L.R.B. 594, 68 L.R.R.M. 1305 (1968); *Chevron Oil Co.*, 168 N.L.R.B. 574, 66 L.R.R.M. 1353 (1967); *Texaco, Inc., Producing Div.*, 168 N.L.R.B. 361, 66 L.R.R.M. 1296 (1967), *enforcement denied*, 408 F.2d 142 (5th Cir. 1969).

13 *Texaco, Inc., Producing Div. v. NLRB*, 408 F.2d 142, 145 (5th Cir. 1969).

14 *Id.* This statement disregards the company's apparent motive in imposing provisional discipline and subsequently holding a conference to decide whether the discipline should

The Board's subsequent efforts to define the distinction between investigatory and disciplinary meetings did not produce a clear standard. In *Texaco, Inc., Los Angeles Sales Terminal*,¹⁵ for example, an employee had been suspended for refusing to operate allegedly defective equipment. The employer's denial of his request for union representation at a subsequent meeting was approved by the trial examiner, who held that the meeting was designed to allow the employee to present his side of the dispute and was therefore investigatory.

Affirming without opinion the trial examiner's dismissal of the complaint, the Board seemed to accept his conclusion that since the employer was not "precommitted" to discipline, the meeting was not disciplinary.¹⁶ This standard clearly requires a case-by-case review of the behavior and intent of the employer,¹⁷ with conjectural inferences from ambiguous actions. Under this test, neither the employer nor the employee can be confident that his judgment of the situation will be confirmed by the Board and the court.¹⁸

The Board's attempt to restrict the right to disciplinary meetings reflects concern that a broad application of the right to union presence in employer-employee meetings would unduly disrupt employer operations. Intervention in even the most routine conferences between the employer and individual workers would disrupt established personnel practices.¹⁹ Employers would be unable to keep informed on plant operations if unions were always present to shield their members from criticism.²⁰ An excessively broad right might also interfere with the parties' section 9(a) rights to contract regarding disciplinary procedures.²¹

be affirmed or modified. The "consequences" of employee misconduct surely were at issue in the meeting, since its result was an affirmation of the suspension.

¹⁵ 179 N.L.R.B. 976, 72 L.R.R.M. 1596 (1969).

¹⁶ *Id.* at 986 (trial examiner's decision).

¹⁷ The trial examiner also noted that the employee did not have reasonable cause to believe that the meeting was disciplinary. *Id.* at 987. The employee's reasonable belief did not become important, however, until later cases. See text and note at notes 27-29 & 95 *infra*.

¹⁸ The trial examiner in *Texaco, Inc., Sales Terminal* tried to summarize the Board's test. An employee could claim the right to union representation "when management's course of conduct with respect to some job or plant situation provides *objective* manifestations sufficient *reasonably* to justify the conclusion that a disciplinary reaction, regarding the concerned worker or workers, will be forthcoming." *Id.* at 983 (emphasis in original).

¹⁹ *Wald Mfg. Co.*, 176 N.L.R.B. 839, 846, 73 L.R.R.M. 1486 (1969) (trial examiner's decision), *enforcement granted on other grounds*, 426 F.2d 1328 (6th Cir. 1970); *Chevron Oil Co.*, 168 N.L.R.B. 574, 578, 66 L.R.R.M. 1353 (1968) (trial examiner's decision).

²⁰ *Texaco, Inc., Producing Div. v. NLRB*, 408 F.2d 142, 145 (5th Cir. 1969).

²¹ *Texaco, Inc., Sales Terminal*, 179 N.L.R.B. 976, 984, 72 L.R.R.M. 1596 (1969) (trial examiner's decision), *citing Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 217 (1964) (Stewart, J., concurring).

B. The Employee's Right under Section 7 as Protected
by Section 8(a)(1)

In 1972 the Board began to rely on sections 7 and 8(a)(1) to establish employees' right to union representation at disciplinary meetings.²² As in the section 8(a)(5) cases, the Board did little to explain the statutory foundation; specifically, it did not explain why such union assistance qualified as a "concerted activity" under section 7.²³ Although many employee activities that fit the literal terms of the section are unprotected because of the historical meaning and purpose of the section,²⁴ the Board relied on a literal reading, asserting that since requesting steward attendance is enlisting the support of another member of the bargaining unit, it is a concerted activity.²⁵ The Board distinguished cases in which it had relied on section 9(a) as involving the right of the union, rather than the right of the individual employee, to seek union assistance.²⁶

Under the Board's section 7 approach, employers cannot discipline employees who insist on union representation even where the union's right to bargain is not involved. If an employee has reasonable grounds to believe that discipline will be an issue in a meeting, an employer cannot penalize him for refusing to attend without a steward.²⁷ The

²² See cases cited note 5 *supra*. With the exception of *Texaco, Inc., Sales Terminal*, 179 N.L.R.B. 976, 72 L.R.R.M. 1596 (1969), *Texaco, Inc., Producing Div.*, 168 N.L.R.B. 361, 66 L.R.R.M. 1296 (1967), *enforcement denied*, 408 F.2d 142 (5th Cir. 1969), and *Jacobs-Pearson Ford, Inc.*, 172 N.L.R.B. 594, 68 L.R.R.M. 1305 (1968), there was no discussion before 1972 of the possible existence of a section 7 right to union representation.

²³ See note 4 *supra*.

²⁴ For example, section 7 does not protect illegal activities. See *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 846 (7th Cir. 1973), *citing* *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942) (mutiny), and *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (violent sitdown strike). Nor does the section protect acts of disloyalty to the employer, even though employees may have acted in concert, *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953). But see *NLRB v. Washington Alum. Co.*, 370 U.S. 9 (1962). The section is not limited, however, to activities that constitute "economic pressure." See text and note at note 35 *infra*.

²⁵ As the Board explained in *Mobil Oil*:

Thus it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.

196 N.L.R.B. at 1052, 80 L.R.R.M. at 1191.

²⁶ See text and note at note 10 *supra*. See also 37 NLRB ANN. REP. 91-92 (1972).

²⁷ *Mobil Oil Corp.*, 196 N.L.R.B. 1052, 80 L.R.R.M. 1188, *enforcement denied*, 482 F.2d 842 (9th Cir. 1973); *Quality Mfg. Co.*, 195 N.L.R.B. 197, 198, 79 L.R.R.M. 1269 (1972), *enforcement denied in part*, 481 F.2d 1018 (4th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W.

Board said that the reasonableness of the employee's refusal would be judged objectively,²⁸ but Member Kennedy noted in dissent that each review of employer action would require a determination based on the subjective fears of the employee.²⁹

The Board thus failed to articulate the statutory basis for its reliance on section 7, to define adequately when a meeting is disciplinary, or to examine how the right would affect employer operations. These failures may explain the rejection of this right by the three courts of appeals that have considered the question.³⁰ The Fourth Circuit, for example, emphasized the Board's failure to explain its reliance on the provisions of section 7.³¹ Without a statutory rationale for the right, the court was swayed by what it termed the "prerogative" of the employer to conduct investigatory interviews without interference. It also noted that the Board had not reconciled its position with Congress's intent to promote a free enterprise economy and preserve the employer's control over his operations.³² The Fifth Circuit also followed this reasoning in refusing to find a right to representation.³³

3340 (U.S. Nov. 12, 1973) (No. 765). The employer remained free, of course, to impose discipline without holding a meeting.

²⁸ *Quality Mfg. Co.*, 195 N.L.R.B. 197, 198 n.3, 79 L.R.R.M. 1269, 1271 n.3 (1972).

²⁹ *Mobil Oil Corp.*, 196 N.L.R.B. 1052, 1054, 80 L.R.R.M. 1188, 1192 (1972), *enforcement denied*, 482 F.2d 842 (9th Cir. 1973). Member Kennedy's repeated dissents from the doctrine are also based on a fundamental disagreement with the Board position. *See id.* at 1053, 80 L.R.R.M. at 1191; *Quality Mfg. Co.*, 195 N.L.R.B. 197, 200, 79 L.R.R.M. 1269, 1272 (1972). *See also* *New York Tel. Co.*, 203 N.L.R.B. No. 180, 83 L.R.R.M. 1353, 1355 (1973); *Service Tech. Corp.*, 196 N.L.R.B. 845 n.1, 80 L.R.R.M. 1187 (1972) (concurring). Union representation at disciplinary meetings, he asserts, is to be sought at the bargaining table, not within section 7. *Mobil Oil Corp.*, *supra* at 1056, 80 L.R.R.M. at 1194 (1972). Requiring employers to accept union presence amounts to imposition of a contract term, an act beyond the scope of the Board's authority. *Id.* He further notes that the Board has neither described the steward's function at such meetings nor explained how he might safeguard the employee's interests. *Id.* at 1053, 80 L.R.R.M. at 1192.

³⁰ *See* cases cited at note 5 *supra*. Both the Fourth and Fifth Circuits held that the meetings at issue were investigatory and refused to accept the Board's conclusion that a section 7 right to union representation exists where the employee has reasonable grounds to fear the meeting will be disciplinary. *NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135, 1138 (5th Cir. 1973); *NLRB v. Quality Mfg. Co.*, 481 F.2d 1018, 1024 (4th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3340 (U.S. Nov. 12, 1973) (No. 765). Where an employer is bargaining with an employee at a disciplinary meeting, the Fifth Circuit would probably find a section 8(a)(5) violation. *See* note 33 *infra*.

³¹ *NLRB v. Quality Mfg. Co.*, 481 F.2d 1018, 1025 (4th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3340 (U.S. Nov. 12, 1973) (No. 765).

³² *Id.*

³³ *NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135, 1138 (5th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. (U.S. Mar. 26, 1974) (No. 1363). The court said that its result might be different if there were an open disciplinary purpose to the meeting, "so that grievance hearings later on would merely put the seal on the employer's prejudgment." *Id.* This is precisely the danger of not allowing union presence whenever discipline is an issue. *See*

The Seventh Circuit criticized the Board for failing to evaluate the employee's interest in freedom from arbitrary discharge or to weigh it against the employer's interest in maintaining his authority. The court found that permitting union representation would create crippling delays for a "cost-conscious, competitive business,"³⁴ and stated that section 7 was meant to protect only activities that constitute "economic pressure" for effective union organization and therefore does not create a right to representation at disciplinary meetings.³⁵

Confronted with an ill-defined right of potentially great breadth, these courts were not unreasonable in fearing excessive conferencing and government intervention, especially given the obvious analogy to criminal procedure already under consideration by some commentators.³⁶ The alternatives were viewed as less complex and less open to abuse—the right to union presence in disciplinary meetings could be sought at the bargaining table,³⁷ and an employee could always use the grievance machinery to protect his job.³⁸

Silard, *Rights of the Accused Employee in Company Disciplinary Investigations*, N.Y.U. 23RD CONFERENCE ON LABOR 217, 230 (1970).

³⁴ Mobil Oil Corp. v. NLRB, 482 F.2d 842, 846-47 (7th Cir. 1973).

³⁵ *Id.* at 847. This is a very narrow view of the scope of section 7. Employee protest that does not constitute "economic pressure," such as the presentation of grievances or complaints, has been held protected by section 7. Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357 (4th Cir. 1969) (employee petitions); NLRB v. Bowman Transp. Inc., 314 F.2d 497 (5th Cir. 1963) (presentation of grievances); NLRB v. Moss Planing Mill Co., 206 F.2d 557 (4th Cir. 1953) (filing of wage claims); NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948) (protest over supervisors). See also text and notes at notes 46 & 65 *infra*. See generally Getman, *The Protection of Economic Pressure of Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1231 n.150 (1967).

³⁶ Some commentators and a few arbitrators have suggested that the safeguards of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), should be extended by analogy to employees interrogated by their employer. Silard, *supra* note 33, at 223-24. See *Thrifty Drug Stores Co., Inc.*, 50 Lab. Arb. 1253, 1260-63 (1968). But see *Weirton Steel Co.*, 50 Lab. Arb. 103 (1968). Although neither the Board nor the courts have dealt with such arguments, several trial examiners have dismissed them. *Lafayette Radio Electronics Corp.*, 194 N.L.R.B. 491, 494, 78 L.R.R.M. 1693, 1695-96 (1971); *Illinois Bell Tel. Co.*, 192 N.L.R.B. 834, 836, 78 L.R.R.M. 1109, 1110 (1971). Critics of this analogy have feared that the Board would use it to frustrate employer investigation of theft. Spelfogel, *Surveillance and Interrogation in Plant Theft and Discipline Cases*, N.Y.U. 21ST CONFERENCE ON LABOR 171, 172, 192 (1968). See generally Kadish, *The Criminal Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations*, in *LABOR ARBITRATION, PERSPECTIVES AND PROBLEMS, PROCEEDINGS OF THE 17TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* (1964).

The Supreme Court's protection of public employees threatened with discharge for resisting interrogation, see *Garrity v. New Jersey*, 385 U.S. 493 (1967), is not authority for application of criminal procedural rights to all disciplinary disputes, because there is no state action in discipline of an employee by a private employer. See Comment, *Private Police Forces: Legal Powers and Limitations*, 38 U. CHI. L. REV. 555 (1971).

³⁷ Mobil Oil Corp. v. NLRB, 482 F.2d 842, 846 (7th Cir. 1973).

This review of the precedents demonstrates that the issue of union presence at disciplinary meetings has not received satisfactory examination, largely due to the Board's uncertain statements of the reasons for its stance. Both the Board and the courts require a more complete and coherent basis for resolution of the issue. The facial meaning of sections 7 and 9(a) and the policies they were designed to serve must be examined to determine whether employees and unions can insist on the presence of a steward at disciplinary meetings.

II. SECTION 7 AND CONCERTED ACTIVITIES

Section 7 was intended to protect employees' rights to organize and to protest employer action.³⁹ Although not all labor activities are protected by the section,⁴⁰ it has been the duty of the Board, subject to judicial review, to determine when employers may restrict otherwise protected activity.⁴¹

The protections of section 7 are limited to concerted activity carried on for the mutual aid or protection of employees;⁴² mere "griping" or individual protest, if not accompanied by evidence that the grievance is supported by others, is not protected.⁴³ Recent decisions on section 7, particularly those that adopt the doctrine of "constructive concerted activities,"⁴⁴ indicate that inclusion of the right to union presence at disciplinary meetings is not a radical departure from the case law on the section.

A. Rights of the Employee Called to the Meeting

1. "*Constructive Concerted Activities.*" The Board and some courts have approved employee activities that are not immediately recognizable as concerted activities engaged in for the mutual aid or protection of other employees.⁴⁵ The leading case is *NLRB v. Interboro Con-*

³⁸ Cf. *NLRB v. J. Weingarten, Inc.*, 485 F.2d 1135, 1138 (5th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3544 (U.S. Mar. 26, 1974) (No. 1363).

³⁹ *NLRB v. Schwartz*, 146 F.2d 773, 774 (5th Cir. 1945).

⁴⁰ See note 24 *supra*.

⁴¹ See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 315-16 (1965).

⁴² See note 4 *supra*.

⁴³ *Indiana Gear Works v. NLRB*, 371 F.2d 273, 276 (7th Cir. 1967); *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 753 (4th Cir. 1949). This limitation may reflect a belief that individual complaints are not worthy of protection, would overburden the Board, or would undermine the authority of the bargaining agent. See Note, *The Requirement of "Concerted" Action under the NLRA*, 53 COLUM. L. REV. 514, 517 (1953).

⁴⁴ See cases cited at note 45 *infra*; Comment, *Constructive Concerted Activity and Individual Rights: The Northern Metal-Interboro Split*, 121 U. PA. L. REV. 152 (1972) [hereinafter cited as *Constructive Concerted Activity*].

⁴⁵ See *Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971); *NLRB v. Selwyn Shoe Mfg. Corp.*,

tractors, Inc.,⁴⁶ where the Second Circuit held that discharge of an employee for complaining that the employer was not paying overtime or providing necessary safety gear as required by the contract violated section 7. The court found that concerted activity exists when a single employee attempts to enforce his understanding of the collective bargaining agreement. The rationale for this interpretation is that the individual employee is relying on an agreement made by and for the benefit of the entire bargaining unit. He is not merely expressing a personal gripe; his voice is that of all those in the unit covered by the contract, some of whom may also have the same complaint.⁴⁷

This reasoning is the basis of the Second Circuit's later decision that to be protected the employee's activity must be based on at least a reasonable construction of the contract term;⁴⁸ an unreasonable interpretation would be merely an individual gripe.⁴⁹ The employee's activity is concerted because he acts, by implication, for other employees in pressing for the rights created by the contract.

Reliance on the contract also establishes that the activity is carried on for mutual aid or protection. By seeking to ensure adherence to the contract, the employee is both advocate and example. The attempted implementation of the contract will benefit the entire unit.⁵⁰ The attempt to enforce contractual rights also increases the collective strength of the union which negotiated the contract. Therefore, even if an employee is the only one affected by an employer policy, he is still acting "in concert" when he attempts reform.⁵¹ Contract rights lose their vitality if an employee is reluctant to proceed alone; his protest may encourage others to do the same in the future.⁵²

428 F.2d 217 (8th Cir. 1970); *NLRB v. Interboro Contractors Inc.*, 388 F.2d 495 (2d Cir. 1967); *J.A. Ferguson Constr. Co.*, 172 N.L.R.B. 1494, 68 L.R.R.M. 1578 (1968); *Bunney Bros. Constr. Co.*, 139 N.L.R.B. 1516, 51 L.R.R.M. 1532 (1962). *Contra*, *NLRB v. Buddies Supermks.*, 481 F.2d 714 (5th Cir. 1973); *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3rd Cir. 1971). The Ninth Circuit, while not rejecting the principle, has required that the individual be acting for the benefit of fellow employees when he invokes rights under the contract. *See NLRB v. C & I Air Conditioning, Inc.*, 486 F.2d 977, 978 (9th Cir. 1973) (dictum); *NLRB v. H.C. Smith Constr. Co.*, 439 F.2d 1064 (9th Cir. 1971), *enforcing* 174 N.L.R.B. 1173, 70 L.R.R.M. 1462 (1969).

⁴⁶ 388 F.2d 495 (2d Cir. 1967).

⁴⁷ *Id.* at 500.

⁴⁸ *NLRB v. J. Langenbacher Co., Inc.*, 398 F.2d 459, 463 (2d Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969); *cf. NLRB v. H.C. Smith Constr. Co.*, 439 F.2d 1064 (9th Cir. 1971).

⁴⁹ *See* Comment, *Constructive Concerted Activity*, *supra* note 44, at 159.

⁵⁰ *Id.* at 166; *cf. Signal Oil & Gas Co. v. NLRB*, 390 F.2d 338, 343 (9th Cir. 1968); *B & M Excavating, Inc.*, 155 N.L.R.B. 1152, 1155, 60 L.R.R.M. 1466 (1965), *enforced*, 368 F.2d 624 (9th Cir. 1966).

⁵¹ *See NLRB v. Century Broadcasting Corp.*, 419 F.2d 771, 780 (8th Cir. 1969).

⁵² *B & M Excavating, Inc.*, 155 N.L.R.B. 1152, 60 L.R.R.M. 1466 (1965), *enforced*, 368 F.2d 624 (9th Cir. 1966).

Union representation at disciplinary meetings would fulfill a similar function. The employee's ability to insist on union attendance identifies the interest of the bargaining unit with his plight and alerts the unit to its shared interest in any discipline imposed. Granting such assistance to an employee confronted with employer discipline protects the interest of the entire unit in freedom from arbitrary discipline and encourages others to insist on similar protection.

The constructive concerted activities cases treat disputes in which a contract term is at issue. Although many disciplinary cases hinge on the interpretation of a contract term, some are purely factual disputes. Even if an employee contests only the factual allegations, however, resolution of the case may affect other employees. The quantum of proof that the employer considers sufficient to support disciplinary action is of concern to the entire bargaining unit. A slow accretion of custom and practice may come to control the handling of disciplinary disputes. If, for example, the employer adopts a practice of considering foreman's unsubstantiated statements sufficient to support disciplinary action, employee protection against unwarranted punishment is affected.⁵³ The presence of a union steward allows protection of this interest by the bargaining representative.

2. *Incipient Concerted Activities.* Courts have recognized that organized protest would be stifled if employers could penalize employees for soliciting or encouraging organized protest. The Seventh Circuit has thus ruled that concerted activity is present if the employee has attempted to obtain valid group support.⁵⁴ The Third Circuit's narrower view of concert—agreement in fact⁵⁵—has been criticized as an unrealistic view of the dynamics of employee protest.⁵⁶ Section 7 must protect incipient as well as ripened concerted activity, so as to prevent employers from halting protest before it gains sufficient momentum to be effective.⁵⁷

Even if union presence at the disciplinary meeting is not full concerted activity, it is an incipient form of activity under the Seventh Circuit's approach. Post-discipline grievance procedures unquestionably constitute concerted activity. The presence of the steward increases the likelihood that the union will pursue the employee's com-

⁵³ See note 80 *infra*.

⁵⁴ *Indiana Gear Works v. NLRB*, 371 F.2d 273, 276 (7th Cir. 1967). Some types of support are, of course, not permitted. See note 63 *infra*.

⁵⁵ *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3rd Cir. 1971).

⁵⁶ See Comment, *Constructive Concerted Activity*, *supra* note 44, at 166, 172.

⁵⁷ The Third Circuit has recognized the problem of inhibiting employee protest before it has resulted in action. See *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3rd Cir. 1969), *cert. denied*, 397 U.S. 935 (1970).

plaint through the grievance procedure,⁵⁸ and the employee will be more effective within the grievance procedure if the steward has witnessed the disciplinary meeting.⁵⁹ An employer's refusal to permit union attendance at disciplinary meetings thus frustrates the incipient concerted activity of grievance resolution.

B. Rights of Other Members of the Unit

Some courts have either rejected or not yet dealt with the constructive concerted activities doctrine.⁶⁰ Other interpretations of section 7, however, suggest that attendance of a union steward at a disciplinary meeting is concerted activity, and that the other employees in the unit have the right to demand, through the union, the presence of a steward.

Employee protests designed to show support for a grievant and simultaneously to focus attention on the dispute have been held protected even though only a single employee is threatened by employer action.⁶¹ These cases have found mutual aid or protection in the assurance such protests afford all employees that they can rely on their fellow workers should they become targets of discipline.⁶² For example, four

⁵⁸ A union does not have an absolute duty to process employee grievances through the grievance procedure, and the meeting is the steward's first opportunity to judge the worth of the employee's claim. See note 100 *infra*.

⁵⁹ A steward not familiar with the facts revealed at the disciplinary meeting might be handicapped in his subsequent representation of the employee. By protecting the right of the steward to be present at this point, courts would be strengthening the ability of employees to prosecute grievances. See note 88 *infra*.

⁶⁰ See cases cited at note 45 *supra*. In *NLRB v. Buddies Supermarkets*, 481 F.2d 714, 719 (5th Cir. 1973), an employee was discharged for protesting the commission rate contained in his own individual contract. It is unclear whether the case really concerned "constructive" concerted activity; the court concluded that the employee was "gripping" about his individual contract. In *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3rd Cir. 1971), the court called the doctrine of "constructive" concerted activity a legal "fiction," and thus refused to reinstate a probationary employee who had been dismissed for complaining about the employer's failure to give him holiday pay under the contract.

⁶¹ See cases cited at notes 63-65 *infra*. One circuit has protected even a nonunion employee who voiced support for a strike in his plant. Although there was no suggestion of group action or harmony of interest, there was the possibility of reciprocal aid in the future. *Signal Oil & Gas Co. v. NLRB*, 390 F.2d 338, 343 (9th Cir. 1968). Statements by "noninterested" personnel ally such persons with the activities of the threatened party. *KPRS Broadcasting Corp.*, 181 N.L.R.B. 535, 73 L.R.R.M. 1404 (1970). See *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 582 (6th Cir. 1965). Union members have even been protected in protesting their firm's discriminatory hiring policies, although there would seem to be no immediate "mutual aid or protection" present under a literal reading of section 7. *Western Addition Community Organization v. NLRB*, 485 F.2d 917, 926 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3457 (U.S. Feb. 19, 1974) (No. 830); *NLRB v. Tanner Motor Livery, Ltd.*, 349 F.2d 1, 3 (9th Cir. 1965). Such activity may, however, be restricted if the interest in channeling reform through the bargaining agent is more compelling. *Id.* at 5.

⁶² The best statement of this concept is in Judge Learned Hand's opinion in *NLRB v. Peter C.K. Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942):

Circuits—including the Third and Fifth—have held that walkouts and work stoppages in support of a discharged employee are for “mutual aid or protection.”⁶³ Other cases have held that work stoppages protesting severe criticism of an employee by supervisory personnel⁶⁴ and protests over unsafe working conditions that affect only a single employee⁶⁵ similarly are concerted activity.

When a union steward attends a disciplinary meeting as the authorized representative of the other employees, he fulfills the same role that the employees themselves fulfill in a walkout or other protest. His presence is a declaration of the employees' solidarity with the person facing disciplinary action and expresses their concern that punishment not be inflicted unjustly. This demonstration of solidarity and concern is particularly important in the disciplinary context, because the effect of disciplinary action is immediate, personal, and often severe. Although the union presence is unlike walkouts or work stoppages in that it comes at a time when no employer action has yet been taken, it is correspondingly less disruptive than the latter forms of concerted activity. Steward presence may in fact prevent creation of the type of situation in which walkouts and work stoppages occur. Expression of solidarity and concern through union presence in disciplinary meetings should be as protected as similar expression through protests against disciplinary actions.

III. UNION REPRESENTATION AND SECTION 9(a)

Although the Board's recent decisions on disciplinary meetings have focused on employee rights under section 7, there is also a sound statutory basis under section 9(a) for the right of the union to be represented at such meetings. Union presence may be viewed as part of

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a “concerted activity” for “mutual aid or protection,” although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is “mutual aid” in the most literal sense, as nobody doubts.

⁶³ *NLRB v. Holcombe*, 325 F.2d 508, 511 (5th Cir. 1963); *Summit Mining Corp. v. NLRB*, 260 F.2d 894, 897 (3rd Cir. 1958); *Carter Carburetor Corp. v. NLRB*, 140 F.2d 714, 718 (8th Cir. 1944); see *LTV Electrosystems, Inc. v. NLRB*, 408 F.2d 1122, 1126-27 (4th Cir. 1969) (dictum). The protesting employees might also be viewed as cogrievants. See Comment, *Constructive Concerted Activity*, *supra* note 44, at 167; cf. *Trailmobile Div., Pullman, Inc. v. NLRB*, 407 F.2d 1006 (5th Cir. 1969). Such activities may be unprotected, however, if contrary to a valid no-strike clause. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956) (dictum); *NLRB v. R.C. Can Co.*, 328 F.2d 974, 979 (5th Cir. 1964) (dictum).

⁶⁴ *NLRB v. Phaostron Instrument & Electronic Co.*, 344 F.2d 855, 858 (9th Cir. 1965).

⁶⁵ *Morrison-Knudsen Co., Inc. v. NLRB*, 358 F.2d 411, 413 (9th Cir. 1966).

the general duty of the union, as bargaining agent, to enforce the provisions of the collective bargaining agreement and resolve "any question arising thereunder."⁶⁶ The union's right to bargain with the employer on wages, hours, and working conditions does not cease with the signing of the agreement. Bargaining is a continuing relationship that requires each party to meet to resolve issues arising during the tenure of the contract.⁶⁷ Union presence at disciplinary meetings is a part of this continuing duty, because what occurs at the meeting is bargaining over the job rights of the individual employee involved.⁶⁸

The right of the union to be present at disciplinary meetings is reinforced by its right under section 9(a) to information it needs to perform the bargaining function.⁶⁹ The union has the right to this information both to prepare demands for negotiations on new agreements and to facilitate enforcement of the current contract.⁷⁰ Union presence at disciplinary meetings enables the union to promote employee interests in future contract negotiations by alerting it to problems in disciplinary rules and procedures. Union access to the meetings is also valuable in the union's later prosecution of employee grievances, a part of the bargaining agent's duty that continues for the duration of the collective bargaining agreement.⁷¹ Courts have recognized that a union would have "to grope blindly through the very stages of the grievance procedure unless adequate information were preliminarily available,"⁷² and have not required the union to resort to the grievance machinery to obtain such information.⁷³ Union presence at disciplinary meetings would provide the union with that type of information.

⁶⁶ 29 U.S.C. § 158(d) (1970) [NLRA § 8(d)] (definition of collective bargaining).

⁶⁷ *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 436 (1967); *Conley v. Gibson*, 355 U.S. 41, 46 (1957).

⁶⁸ See text and note at note 14 *supra*.

⁶⁹ See Bartosic & Hartley, *The Employer's Duty to Supply Information to the Union—A Study of the Interplay of Administrative and Judicial Rationalization*, 58 CORNELL L. REV. 23, 40 (1973). It is generally agreed that the employer has a duty to furnish the union data on wages or plant operations in order to enable it to bargain effectively. *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716 (2d Cir. 1966); *Curtis-Wright Corp. v. NLRB*, 347 F.2d 61 (3rd Cir. 1965). That the union might get such information directly from the employees involved has not been considered an excuse for the employer's refusal to furnish such information. *Hekman Furniture Co.*, 101 N.L.R.B. 631, 31 L.R.R.M. 1116 (1952), *enforced*, 207 F.2d 561 (6th Cir. 1953).

⁷⁰ *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 438 (1967); *Sinclair Ref. Co. v. NLRB*, 306 F.2d 569 (5th Cir. 1962).

⁷¹ See *Ostrosky v. United Steelworkers of America*, 171 F. Supp. 782, 790 (D. Md. 1959), *aff'd*, 273 F.2d 614 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960).

⁷² *Curtis-Wright Corp. v. NLRB*, 347 F.2d 61, 71 (3rd Cir. 1965).

⁷³ *Sinclair Ref. Co. v. NLRB*, 306 F.2d 569, 574 (5th Cir. 1962).

IV. BALANCING THE EMPLOYER AND EMPLOYEE INTERESTS

Union presence at disciplinary meetings has been shown to be consistent with the language of the NLRA as construed in similar situations. Mere consistency with prior constructions, however, is not sufficient. The NLRA is cast in broad, generic language. Construction of the statute must be premised on the purposes and policies the legislation was intended to serve.

Critics of union presence at disciplinary meetings suggest that it will cause greater interference with plant operations and employer decision making than the NLRA was intended to allow.⁷⁴ A properly defined right to union presence, however, need not make any greater inroads on the employer's domain than have been tolerated in other situations involving important union and employee interests.⁷⁵

A. The Role of the Steward

The activities of the steward, although of different significance for the employee and the union, serve the purposes of both sections 7 and 9(a).

1. *Under Section 7.* An employee faced with possible discipline must be able to present his case effectively. A major tenet of industrial discipline is that identical infractions should result in equal punishment.⁷⁶ A steward, more familiar than the average employee with the contract, plant rules, and employer customs, can be of material assistance in assuring that the employee is not subjected to unusual discipline. The steward can help prevent intimidation of the employee by the employer⁷⁷ and can assist employees who are confused by their predicament or uneducated and unable to deal with the employer on equal terms.⁷⁸ The steward can also safeguard the interests of the other employees, both by informing them of employer decisions and by generally assuring fairness in the discipline process.⁷⁹

2. *Under Section 9(a).* Steward presence at the disciplinary meeting

⁷⁴ See text and note at note 33 *supra*; H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

⁷⁵ See note 82 *infra*.

⁷⁶ S. SLICHTER, J. HEALEY & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 625, 631 (1960) [hereinafter cited as S. SLICHTER *et al.*].

⁷⁷ Intimidation by employers or their agents in the course of disciplinary meetings is a real possibility. See *Sterling Optical Co.*, 72-2 CCH LAB. ARB. AWARDS ¶ 8422 (1972) (employee entrapped into signing confession of theft); *Thrifty Drug Stores Co., Inc.*, 50 Lab. Arb. 1253 (1968) (employee signed \$7,000 promissory note after admitting theft of goods worth one-tenth that sum); *Novo Indus. Corp.*, 41 Lab. Arb. 921 (1963) (employee who was "rehired" after quitting signed a document forfeiting 12 years of seniority).

⁷⁸ See Silard, *supra* note 33, at 230 n.27.

⁷⁹ See text and note at note 80 *infra*.

gives the union information that enables it to detect trouble spots to be treated in future contract negotiations. The union also gains detailed knowledge of a potential grievance and is therefore better able to identify and prosecute substantial grievance claims. The steward can also serve as an advocate in bargaining—for example, where the employer offers soft treatment to the employee if he admits to an infraction. As advocate, the steward ensures that the employee is fairly treated and that the result will be a proper precedent for future employer decisions on discipline.⁸⁰ His role is closely analogous to that accorded the union by the second proviso to section 9(a), which permits the presence of the union at the adjustment of grievances.⁸¹

B. Interference with Employer Interests

Employers have argued that union presence at disciplinary meetings would mean disruption of their operations and a challenge to their authority. Although this is possible, courts have found section 7 and 9(a) rights where the employee or union interests outweigh the interference with employer operations.⁸² In this situation, the interests of

⁸⁰ As one commentator noted in the context of the grievance procedure:

Grievances may relate to the establishment of new rates and the adjustment of old; to rulings on seniority, layoffs, and rehires; to discharges and other disciplinary measures; to merit-increases, transfers, promotions; to the operation of an incentive system and countless other measures. Whether they are cast in the form of an interpretation of an agreement or not, any adjustments made of these questions affect the whole plant. The rulings tend to become precedents and may eventually constitute a body of industrial common law supplementing the formal agreement.

Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 302 (1948).

⁸¹ This proviso prohibits direct bargaining between employer and employee in order to prevent the possible undermining of the union's position and possible jeopardy to the rights of other employees. Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 273 (1964).

⁸² The freedom of employees to seek reform is generally protected unless the employer can justify curtailing such activity. See *Robertshaw Controls Co. v. NLRB*, 386 F.2d 377, 382 (4th Cir. 1967); *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357, 358 (7th Cir. 1956). The courts have commonly employed a balancing test of employer and employee interests to determine whether an activity should be protected under the Act. See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

The duty to bargain under section 9(a) embraces subjects that might appear to be exclusive employer concerns, for example, granting merit increases, *NLRB v. J.H. Allison Co.*, 165 F.2d 766 (6th Cir.), cert. denied, 335 U.S. 814 (1948), establishing minimum rentals with outside parties, *Local 24, Teamsters Union v. Oliver*, 358 U.S. 283 (1959), and the contracting out of work in some cases, *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

Although employers speak of a "management rights" doctrine that emphasizes the necessity of unobstructed decision making in the direction of enterprise, courts have nevertheless considered employee interests in such cases. See Rabin, *The Decline and Fall of Fibreboard*, N.Y.U. 24TH CONFERENCE ON LABOR 237, 249-54 (1971). The courts have focused on whether the proposed subject is one amenable to collective bargaining. See

the employee and the union in union presence outweigh the possible interference with employer interests.

The employer has a significant interest in his power to investigate plant conditions or job performance, but the right of union representation would not unduly interfere with this interest. The steward would not act like counsel in a criminal case, instructing the employee what to do or say or warning him of possible self-incrimination.⁸³ An employee who, for example, refuses to answer questions relevant to employer operations would be subject to discharge.⁸⁴ The employer's interest in avoiding excessive conferencing may be satisfied by a clear definition of and limitation on the types of meetings at which steward presence is required.⁸⁵

Notwithstanding the apprehensions of employers, union representation at disciplinary meetings may bring them substantial benefits. Early union involvement will allow the steward to discourage the prosecution of frivolous grievances.⁸⁶ Early union review of employer decisions will also give the employer an opportunity to correct errors that might produce ill feeling among employees. At the time of the meeting neither party is locked into any position, but as a grievance proceeds, the ability to compromise diminishes.⁸⁷ The inadequacy of grievance procedures for fact finding affects both employers and unions.⁸⁸ Union representation could guarantee a better understanding of the infraction charged, and early, informal consideration of the merits of possible grievances might reduce the costs that the employer must bear in formalized grievance procedures.⁸⁹

Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960) (National Railway Labor Act).

⁸³ It must be noted, however, that an employer could justify exclusion of a steward only for flagrant obstruction of the meeting. See *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965) (presentation of grievances allows some leeway for impulsive behavior).

⁸⁴ See *Simoniz Co.*, 44 Lab. Arb. 658 (1964). But see *United Parcel Serv. Inc.*, 45 Lab. Arb. 1050 (1965).

⁸⁵ See text and notes at notes 90-98 *infra*.

⁸⁶ See *Caterpillar Tractor Co.*, 44 Lab. Arb. 647, 651 (1965) (Dworkin, Arbitrator).

⁸⁷ Gemrich, *The Grievance Procedure in the Administration of the Collective Bargaining Agreement*, in SYMPOSIUM ON LABOR RELATIONS, 1961, at 293, 301 (R. Slovenko ed. 1961).

⁸⁸ See S. SLICHTER *et al.*, *supra* note 76, at 646-47; Summers, *supra* note 8, at 85.

⁸⁹ Inadequate investigation of grievances by some unions has been considered a factor in the overload that plagues arbitration in some major industries. Ross, *Distressed Grievance Procedures and their Rehabilitation*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE, PROCEEDINGS OF THE 16TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 104, 107, 109 (1963). When the grievance procedure is overloaded, there is temptation for both employer and union to engage in horse trading of grievances, a result sometimes harmful to individual interests. *Id.* at 111.

C. Defining a Disciplinary Meeting

Recognition of the right to union presence at disciplinary meetings requires a clear identification of the characteristics of such a meeting. Fears have been expressed that union representation would cause excessive conferencing, disrupting employer operations by requiring stewards to halt work to attend.⁹⁰ The present unclear definition is undesirable because it creates disputes over when the steward must be called. These objections are not to the general idea of union presence at disciplinary meetings, but rather the specific form of implementation. Limitations can be imposed that would minimize these problems.

The Board's current test does not provide an administrable method for determining when an employee or the union can demand the presence of a steward, because it relies heavily on elusive determinations of intent. A test is needed that gives a reasonably accurate indication of the nature of the meeting without relying on elaborate inquiries into what might have been said or intended by the parties.

The union and the employee are primarily interested in having a steward present when the employer is likely to make a decision on the employee's culpability or take disciplinary action.⁹¹ Some of the present uncertainties can be eliminated by requiring the employer to give the employee and the union notice of the purpose of the meeting. If the notice indicates a disciplinary purpose, the employee's right will be clear. If the meeting is labelled investigatory but in fact is disciplinary, the employee attending the meeting without a steward will be entitled to revocation of the disciplinary action.

The test of whether a meeting is disciplinary should be its result. If discipline is imposed immediately or within a short time after the meeting, the meeting should be characterized as disciplinary. It might be argued that an employer could avoid the requirements of this rule by postponing discipline. Such an evasion, however, is very much against the employer's interests; an employer will not wish to retain a delin-

⁹⁰ Fears of interference with employer operations may be exaggerated. Several major collective bargaining agreements now provide for some form of representation at disciplinary meetings. See 1 B.N.A. COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS ¶ 21:22 (General Motors Corp. & UAW § 76A); *Id.* ¶ 27:6 (Goodyear Tire & Rubber Co. & Rubber Workers § V(5)); *Id.* ¶ 28:15 (U.S. Steel Corp. & Steelworkers § 101.2).

The parties might agree to apportion the costs of conferences involving stewards who are summoned from the shop floor, as is now done with the costs of processing grievances. About 51 percent of labor contracts provide for payment to stewards for presenting, investigating, and processing grievances. About one quarter of these place some ceiling on such paid activity. B.N.A. BASIC PATTERNS IN UNION CONTRACTS ¶ 51:5 (5th ed. 1961).

⁹¹ As in the criminal law field, it is often difficult to determine when a meeting is "accusatory." *Cf. Escobedo v. Illinois*, 378 U.S. 478, 492 (1964). See also Silard, *supra* note 33, at 231 n.28.

quent employee on the payroll or to delay hiring and training a replacement.⁹² The result test, like the Board's current test, focuses on employer intent but relies on a much more administrable indicator of intent and encourages the employer to be honest about the nature of the meeting.

The result test would solve many of the problems created when the employer claims that the meeting began as an investigation but became disciplinary in light of information revealed by initial inquiries. The employer would be required to judge for himself the likelihood of a disciplinary result and summon the steward if his suspicion had focused on the employee. Disciplinary action taken after a meeting that began as an investigation would be analyzed as though discipline had been contemplated from the beginning.⁹³ Even a modest risk of nullification of the disciplinary action is likely to outweigh the inconvenience of bringing in the steward; the employer will therefore be motivated to allow the steward whenever discipline seems possible.⁹⁴

Much of the uncertainty and administrative awkwardness of the Board's current test results from the Board's protection of refusals to attend a meeting without a steward present. Where the employee reasonably believes the meeting will be disciplinary and is fired for refusing to attend without a steward, the Board has ordered reinstatement.⁹⁵ These prospective challenges to the employer's action force the Board to render decisions about the nature of meetings without the single most important indicator, the result. Prospective challenges require decisions on the reasonableness of the employee's apprehensions, the likelihood of disciplinary action, and other evanescent considerations. There is no adequate reason to entertain such challenges. Under the result test, if an employee is summoned to a meeting labeled investigatory and refuses to attend, he may be dismissed for insubordina-

⁹² Cost and impracticality would deter employers from eliciting necessary facts or admissions at an "investigatory" meeting and later holding a pro forma disciplinary meeting. This evasion is also open to detection by the Board through application of the timing standard.

⁹³ See Levitt, *Practical Problems in the Handling of Grievances and Labor Arbitrations*, 3 GA. L. REV. 411, 424 (1969). Even under the present test, disclaimers by the employer of any intention to discuss employee discipline does not foreclose the reasonableness of the employee's belief on the purpose of the meeting. See *Southern Cal. Edison Co.*, 61 Lab. Arb. 453, 463 (1973).

⁹⁴ The result test would, of course, apply to "prior" discipline. For example, where the employer summons an employee to a conference after imposing provisional discipline, the meeting should be considered disciplinary because the issue of the provisional discipline is present. Where the employer has charged an employee with a specific violation of company policy or has issued a reprimand that may go on the employee's record, there should be a strong presumption that the conference is disciplinary.

⁹⁵ See note 7 *supra*.

tion. He loses nothing by attending the meeting, however, because if discipline does result the Board will nullify it regardless of its propriety. The only inquiries are whether discipline resulted and whether a steward was present.⁹⁶

Elimination of prospective challenges would greatly reduce disruption of the employer's operation. Employees would not be able to refuse to attend meetings in the hope that the Board would later vindicate their decisions, and employers would be free to investigate plant conditions without a steward present, as long as they did not discipline the employee.

Disruption of operations would be further reduced through recognition of certain limits on the right to steward presence. Since the reason for the right to union presence is the possibility that discipline will be imposed, discussions with supervisory personnel or foremen who possess no power to authorize discipline should be excluded.⁹⁷ For extraordinary discipline problems the employer could also justify not summoning the steward. For example, in emergency situations involving sabotage, violence, or violations of safety rules that create immediate danger to others, the necessity for quick investigation and action would override the interest in employee protection.⁹⁸

D. Reconciling Conflicts Between Section 7 and Section 9(a) Rights

There are two possible conflicts in the interests of the employee and the union regarding attendance at a particular disciplinary meeting. First, if an employee requests a steward, the union should not be allowed to refuse. The union's duty of fair representation⁹⁹ includes

⁹⁶ Undue employer harassment under the guise of investigatory meetings would, of course, continue to be an unfair labor practice under section 8(a)(1).

⁹⁷ The Board has recognized the problems of permitting steward intervention into conversations with such supervisory personnel. *Quality Mfg. Co.*, 195 N.L.R.B. 197, 199, 79 L.R.R.M. 1269, 1271 (1972): "We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." The current U.S. Steel Corp. & Steelworkers contract incorporates such a limitation. See 1 B.N.A. COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, *supra* note 90, at ¶ 28:15.

Employers could avoid disciplinary meetings by automatically following the recommendations of such supervisors on disciplinary matters. This type of procedure, however, is an invitation to error and prejudice, with a good chance of reversal in the grievance procedure. The problems here are similar to the problems of summary discipline without any employer investigation of the alleged infraction. See note 7 *supra*.

⁹⁸ Cf. *Northwest Airlines, Inc.*, 56 Lab. Arb. 837, 841 (1971) (employer access to information on personnel is critical to operation of an enterprise involving public safety). The Board could also decide that full application of the right to representation in certain industries would be so impractical that it would frustrate other purposes of the Act and could restrict this right in such exceptional situations. Cf. *Food Store Employee's Union Local 347 v. NLRB*, 418 F.2d 1177 (D.C. Cir. 1969) (no solicitation rule in stores).

⁹⁹ See *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944); *Steele v. Louisville & N. Ry.*

the duty to provide assistance to an employee who has invoked his section 7 rights. The duty to provide union representation at a disciplinary meeting does not conflict with the right of the union to decline representation of unfounded claims at various levels of the grievance procedure, because the disciplinary meeting is the first opportunity for the steward to investigate the claim.¹⁰⁰

Second, the employee may desire to confront the employer alone, while the union wishes to intervene to protect the interests of the bargaining unit under section 9(a). The proviso in section 9(a) on union presence at the adjustment of grievances suggests by analogy that the union has a right to be present. Under section 9(a), although employees may prosecute their own grievances, the union must be given the opportunity to be present to guarantee that the employer's decision is neither contrary to the collective bargaining agreement nor an undesirable precedent for other employees.¹⁰¹ The union has a similar interest in protecting the whole unit through its presence at disciplinary meetings, and it is appropriate for that interest to override the individual employee's interest in private consultation. The employee might desire that the union be present only as a silent witness, but again the analogy to the proviso to section 9(a) suggests the right to a greater role.¹⁰² Even where the employee is hostile to union presence, the precedential value of discipline cases requires that the union be given full opportunity to argue its views. In such cases, however, the union would not be speaking for the employee, nor could it prevent him from presenting his case. Its voice would be only that of the bargaining unit.

V. WAIVER OF UNION PRESENCE

Recognition of the right to union presence at disciplinary meetings raises the question whether the union can waive in collective bargaining its right under section 9(a) or the employee's right under section 7. A related question is whether the employee or the union may choose to waive their rights in individual cases.

Co., 323 U.S. 192, 204 (1944) (National Railway Labor Act). This duty is owned to both the individual employee and the members of the bargaining unit in general.

¹⁰⁰ It is therefore not a situation like that in *Vacca v. Sipes*, 386 U.S. 171 (1967), where the steward could distinguish the value of claims and allocate union resources accordingly. Cf. *Local 12, United Rubber, C.L. & P. Wkrs. v. NLRB*, 368 F.2d 12, 17 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).

¹⁰¹ See Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731, 744 (1950). See also text and note at note 81 *supra*.

¹⁰² *Id.* at 744, 745; see *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 737 n.35 (1944) (National Railway Labor Act).

A. Waiver In Collective Bargaining

1. *The Employee's Section 7 Right.* Because of the individual employee's stake in union representation, the Board should be reluctant to permit a union to bargain away the employee's section 7 right.¹⁰³ In order to promote the peaceful settlement of labor disputes, national labor policy does allow unions to bargain away the right to strike,¹⁰⁴ but the right of the employee to seek union assistance at disciplinary meetings is not this type of right. Unlike waiver of the right to strike, sacrifice of this employee right serves no public interest.¹⁰⁵ In addition, the protection is a guarantee of procedural fairness and should not be open to bargaining to the same extent as economic benefits. Where economic benefits are traded away in the bargaining process, employees who would have preferred what was sacrificed over what was received suffer only a bad bargain. In contrast, if this procedural right is bargained away, employees who would have preferred to keep it will suffer an increased risk of unfair discipline.

2. *The Union's Section 9(a) Right.* The union should be able to bargain away its right despite the fact that in many cases it could be withdrawing protection from the employee.¹⁰⁶ The Board and the courts have ruled that a union may waive its rights to bargain over many issues, including its rights to employer information,¹⁰⁷ to be consulted about rate increases,¹⁰⁸ and to bargain over hiring and firing.¹⁰⁹

¹⁰³ Union waiver of employees' statutory rights should require a showing that the bargaining unit's rights and interests override the individual's interests. See *NLRB v. Magnavox Co.*, 94 S. Ct. 1099 (1974); *NLRB v. Granite State Joint Bd., Textile Wkrs. Local 1029*, 409 U.S. 213, 218 (1972) (Burger, C.J., concurring); Comment, *Validity of Restrictions on Employee Activities in Opposition to an Incumbent Union*, 41 U. CHI. L. REV. 190, 193, 196 (1973). If the Board does permit such a waiver, it should at least follow its standards for the waiver of other statutory rights and require that the waiver be "clear and unmistakable." See *Murphy Diesel Co. v. NLRB*, 454 F.2d 303 (7th Cir. 1971).

¹⁰⁴ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

¹⁰⁵ Cf. *Matter of Bethlehem Steel Co.*, 89 N.L.R.B. 341, 345-46, 25 L.R.R.M. 1564, 1567-68 (1950). But see *Western Elec. Co.* 198 N.L.R.B. No. 82, 80 L.R.R.M. 1705, 1707 (1972) (concurring opinion of Chairman Miller).

¹⁰⁶ Where a union has waived its rights under section 9(a) but has also instructed its members to exercise their section 7 right, this waiver would be of little importance. The contracting parties would recognize that these are separate items for the purpose of bargaining and would understand the practical effect of this difference within any given plant.

¹⁰⁷ See *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963); *International News Serv. Div. of the Hearst Corp.*, 113 N.L.R.B. 1067, 1071, 36 L.R.R.M. 1454, 1456 (1955).

¹⁰⁸ *Globe-Union, Inc.*, 97 N.L.R.B. 1026, 1041, 29 L.R.R.M. 1198, 1200 (1952).

¹⁰⁹ *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1942).

B. Waiver in Individual Cases

1. *The Employee's Section 7 Right.* Because the right to union representation under section 7 is that of the individual employee, he should be able to waive union assistance to the extent compatible with the union's exercise of its right under section 9(a).¹¹⁰ An employee given notice of the meeting can evaluate the need for such assistance. If he objects to the presence of a particular steward, perhaps out of fear of bias,¹¹¹ he could request that another available steward, or even a coworker, be permitted to accompany him.

Before inferring that a waiver has occurred, however, the Board must assure itself that the employee acted knowingly and voluntarily. The right being waived is designed to prevent intimidation by the employer. It would be incongruous to infer a waiver without a clear indication that the very tactics the right is meant to prevent were not used to coerce a surrender of protection.¹¹²

2. *The Union's Section 9(a) Right.* In cases that do not demand the union's presence at the meeting as part of its duty of fair representation,¹¹³ the union should be permitted to waive its right to have a steward attend. There is no danger of intimidation here, and the union must be given discretion to determine what cases merit its attention. This discretion is especially important if the union has agreed in collective bargaining to place limits on the frequency or total number of discretionary interventions in disciplinary meetings.¹¹⁴

CONCLUSION

The NLRB has found that both unions and employees have a right to union presence at disciplinary meetings. The failure of the Board to articulate an adequate foundation for these rights or to consider the effect of these rights on employer operations, however, has led to a rejection of the Board's position by the courts of appeals that have considered the issue. Sections 7 and 9(a) provide a sound statutory basis for the rights. Recognition of these rights, properly limited to situations where disciplinary action appears to have resulted from the meeting, need not disrupt employer operations. The benefits of the union's

¹¹⁰ See text and note at note 101 *supra*.

¹¹¹ Cf. *Service Technology Corp.*, 196 N.L.R.B. 845, 80 L.R.R.M. 1187 (1972) (steward conflict of interest).

¹¹² See note 78 *supra*.

¹¹³ See text and note at note 99 *supra*.

¹¹⁴ See note 90 *supra*. No limit could be placed, however, on the union's right to fulfill its duty of fair representation by attending in any case where the employee has requested a steward. See text and note at note 99 *supra*.

presence, to both the employee facing discipline and his coworkers, outweigh the possible effects on employer interests. Waivers of the employee's right to steward presence at disciplinary meetings must be narrowly construed both in collective bargaining and in individual cases. Any less protection would fail to give the employee's procedural rights the respect they deserve.

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