Washington and Lee Law Review

Volume 38 | Issue 2 Article 16

Spring 3-1-1981

X. Labor Law

In *Werner*, the Fourth Circuit recognized that Rule 407 merely codified the common law on subsequent repairs and was therefore a proper subject for judicial interpretation.[79] The court followed traditional common law reasoning to find that without the protection offered by Rule 407, drug manufacturers would be reluctant to take remedial measures after injuries. The *Werner* court narrowly construed the feasibility exception and refused to broaden the exception to include strict liability cases. The Fourth Circuit, however, failed to consider the consumer protection policy that led to the adoption of strict liability and incorrectly applied federal procedural law instead of state substantive law. Unless Congress acts to change the provisions of Rule 407, the Fourth Circuit is unlikely to allow admission of evidence of subsequent repairs unless the defendant first controverts feasibility.

JEFFREY C. PALKOVITZ

X. LABOR LAW

A. *Recognition of the "Purely Informational" Exception to Employer's Discharge Rights and the Union's "Duty to Investigate"*

Section 7 of the National Labor Relations Act (NLRA) protects the rights of employees to engage in concerted activities for their "mutual aid or protection."[1] Section 8(a)(1) of the NLRA states that an employer commits an unfair labor practice if it interferes with, restrains, or coerces employees in the exercise of their section 7 rights.[2] The National Labor Relations Board (Board) and the reviewing federal courts are responsible for determining which concerted activities[3] are protected by Section 7 and thus free from employer interference under section 8(a)(1). Strikes, including spontaneous work stoppages, are generally considered

Coop., 356 U.S. 525, 535 (1958). In fact, the *Erie* doctrine has never been invoked to void a federal procedure rule. Hanna v. Plumer, 380 U.S. 460, 470 (1965). Since Rule 407 does not expressly apply to strict liability, *see* text accompanying note 5 *supra*, the issue is not whether to void the Rule. The Fourth Circuit should not have extended the Rule to include strict liability because of the conflict with Maryland substantive policy. *See* note 77 *supra*.

[79] 628 F.2d at 856.

[1] 29 U.S.C. § 157 (1976).

[2] 29 U.S.C. § 158(a)(1) (1976).

[3] Literally, "concerted activity" describes uniform action by two or more individuals. *See* BLACK'S LAW DICTIONARY 262 (5th ed. 1979). Under the National Labor Relations Act (NLRA), "concerted activity" refers both to employees' actions and the legal status of those actions. *See* Note, *Concerted Activity Under Section 7 of the National Labor Relations Act*, 1955 U. ILL. L.F. 129, 129-32. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW 298-301 (1978) [hereinafter cited as GORMAN].

protected activity.[4] Some strikes, however, may be unprotected because they have unlawful objectives,[5] a tortious or criminal nature,[6] or contravene statutory labor[7] or other[8] policies.

Strikes which violate no-strike provisions[9] of collective bargaining agreements[10] are generally considered unprotected activity.[11] The NLRA

[4] NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-17 (1962). In *Washington Aluminum Co.*, eight employees walked off the job because the employer's machine shop was extremely cold. *Id.* at 12. The Supreme Court found that the employees had acted in concert in protesting their employer's failure to provide adequate heat. *Id.* at 14-15. The employer's discharge of the employees violated § 8(a)(1) of the NLRA by interfering with employee rights under § 7 to act in concert for mutual protection. *Id.* at 17; *accord*, Richard Shubert Assocs., 222 N.L.R.B. 867, 872, 91 L.R.R.M. 1411, 1412 (1976) (walking off job to protest employer's insistence upon employees remaining at outdoor work stations despite icy conditions held protected activity).

[5] *See* Koretz & Rabin, *The Development and History of Protected Concerted Activity*, 24 SYRACUSE L. REV. 715, 716-17 (1973) [hereinafter cited as Kortez & Rabin] (citing cases for proposition that strike with unlawful objective is unprotected). Section 8(b) of the NLRA provides that a significant range of economic pressure devices used by unions constitute unfair labor practices. 29 U.S.C. § 158(b) (1976). The activities include jurisdictional strikes, secondary boycotts, and strikes for recognition despite the Board's certification of another union as bargaining representative. *See* Kortez & Rabin, *supra*, at 717. The activities prohibited by § 8(b) are not protected by § 7. *See* Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 325 (1951).

One commentator has proposed that employees should never be discharged for engaging in concerted activities to obtain mutual aid or benefit unless their conduct was unlawful and the employees knew, or should have known, of the unlawful nature of that conduct. Schatski, *Some Observations Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEXAS L. REV. 378, 379 (1969).

[6] *See* Koretz & Rabin, *supra* note 5, at 717 (citing cases for proposition that strike of tortious and criminal nature is unprotected); COX, BOK & GORMAN, CASES AND MATERIALS ON LABOR LAW 936 (8th ed. 1977) (same); *e.g.*, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 252 (1939) (strikers' activity held unprotected where employees violated state-court injunction, engaged in prolonged sitdown strike, forcibly seized plant, and destroyed employer's property).

[7] *See* Koretz & Rabin, *supra* note 5, at 717-18 (citing cases for proposition that strike which contravenes basic NLRA policy is unprotected).

[8] *See* Koretz & Rabin, *supra* note 5, at 719-24 (citing cases for proposition that adoption of improper means of achieving otherwise legitimate objective may render concerted action unprotected); *e.g.*, Elk Lumber Co., 91 N.L.R.B. 333, 26 L.R.R.M. 1493 (1950) (discharge proper of workers who slowed down pace when employer changed payment method from piece-work basis to straight hourly rate).

[9] No-strike provisions generally fall into two categories. They are either unconditional bans on strikes, absolutely restraining the right to strike during the life of the contract, or conditional bans, requiring the employees to refrain from striking only until a certain condition has been met or a procedure exhausted. LAB. REL. REP. EXPEDITOR 131 (1975).

[10] A collective bargaining agreement regulates terms and conditions of employment between an employer and a labor union. *See* GORMAN, *supra* note 3, at 540-41. The agreement constitutes a "generalized code to govern a myriad of cases." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960).

[11] NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939); United Elec., Radio & Mach. Workers Local 1113 v. NLRB, 223 F.2d 338, 342 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956); Joseph Dyson & Sons, Inc., 72 N.L.R.B. 445, 447, 19 L.R.R.M. 1187, 1188 (1947); *see* Koretz & Rabin, *supra* note 5, at 717.

encourages parties to delineate their respective rights in a collective bargaining agreement.[12] To assure that production is not interrupted, the employer bargains for a no-strike provision in the agreement.[13] The union's quid pro quo for conceding a no-strike clause to the employer is the establishment of an internal arbitration procedure[14] or the employer's waiver of its right to lock out employees to enforce company demands.[15] If a no-strike provision is not expressly included in the agreement,[16] the courts may imply a no-strike clause if the labor agreement contains a broad grievance-arbitration provision.[17] Since the negotiation of a collective bargaining agreement is a basic goal of the NLRA,[18] an activity which violates a provision of a collective bargaining agreement contravenes the policy of the NLRA and is generally unprotected.[19] A no-strike provision therefore makes a subsequent strike unprotected activity,[20] and the employer may properly discharge strikers without committing an unfair labor practice.[21]

---

[12] 29 U.S.C. § 151 (1976). The overriding policy of the NLRA includes the encouragement of the "practice and procedure of collective bargaining." *Id.*

[13] A no-strike provision is the principal advantage which an employer can reasonably expect from a collective bargaining agreement. S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947). Such agreements contribute to the normal flow of commerce and the maintenance of regular production schedules. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956).

[14] *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960); BNA, THE DEVELOPING LABOR LAW 534-35 (C. Morris ed. 1971). Express arbitration provisions supply a non-legal internal method of resolving contract disputes. Complaints are typically brought to a low-level supervisor and, if still unresolved, are heard by higher-level supervisors or ultimately an arbitrator. *See* GORMAN, *supra* note 3, at 541-43. Unions insist on the establishment of an internal arbitration procedure, requiring the employer to submit all employee grievances to arbitration, to protect the employees from the relative strength of the employer. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-82 (1960).

[15] Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956). An employer "locks out" its employees when, for tactical reasons, it refuses to utilize those employees for the performance of available work. GORMAN, *supra* note 3, at 355.

[16] In 1975, express no-strike provisions appeared in approximately 90% of all collective bargaining agreements. LAB. REL. REP. EXPEDITOR 131 (1975).

[17] Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 105-06 (1962). The presence of a broad arbitration provision gives rise to an implied union obligation not to strike over any dispute subject to arbitration. *Id.* The union can retain the right to strike about an arbitrable grievance only by explicit reservation. *Id.*; *see* GORMAN, *supra* note 3, at 613-14; Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672, 690 (1967).

[18] *See* note 12 *supra.*

[19] *See* notes 9-11 *supra.*

[20] NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939); *see* Packer's Hide Ass'n v. NLRB, 360 F.2d 59, 61 (8th Cir. 1966); UMW v. NLRB, 257 F.2d 211, 215 (D.C. Cir. 1958); NLRB v. Kaiser Aluminum & Chem. Corp., 217 F.2d 366, 368-69 (9th Cir. 1954). Strikes in violation of a no-strike provision are not unlawful; rather, they are considered lawful but unprotected. W. & M. CONNOLLY, WORK STOPPAGES AND UNION RESPONSIBILITY 204 (1977).

[21] NLRB v. Rockaway News Supply Co., 345 U.S. 71, 80 (1953); Food Fair Stores, Inc. v. NLRB, 491 F.2d 388, 395 (3d Cir. 1974). Courts have consistently upheld the right of a

Although no-strike provisions are grounded firmly in the bargaining process, courts have recognized that certain classes of strikes should be protected even though they violate no-strike provisions. Courts have determined that protected activities include strikes in protest of unfair labor practices,[22] dangerous working conditions,[23] and fundamental breaches of an employer's obligation.[24] Discharging employees for engag-

---

company to discharge strikers for violations of a no-strike provision. *See* cases cited in Fairweather, *Employer Actions and Options in Response to Strikes in Breach of Contract*, 18 N.Y.U. CONF. LAB. 129, 173-76 (1966). No-strike clauses establish the employee's uninterrupted work as a condition of employment. Atkinson v. Sinclair Refining Co., 370 U.S. 238, 246 (1962). If the employees breach that condition by striking, their employer may treat them as having severed their relationship with the company and discharge them. *Id.*; NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939).

[22] Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 283-84 (1956). A strike which flows from an employer's unfair labor practice is protected unless the employees specifically waive their right to an unfair labor practice strike in the no-strike clause. *Id.* at 271-72. In *Mastro*, the employer had engaged in a series of unfair labor practices to dominate the employee's selection of a bargaining agent. *Id.* at 278. Since union selection is central to the right of free organization and collective bargaining, the court found that the strike should be protected. *Id.* at 280-83; *see* 7 VILL. L. REV. 489, 491-93 (1962). However, strikes are protected only where the unfair labor practice committed by the employer is serious. Arlan's Dep't Store, 133 N.L.R.B. 802, 804, 48 L.R.R.M. 1731, 1735 (1961). In *Arlan's*, a strike in response to an employer's unfair labor practice was found to be unprotected where the unfair labor practice was isolated and the product of a clash of personalities. *Id.* at 808, 48 L.R.R.M. at 1735. The Board recognized that adequate redress was available under the grievance and arbitration provisions of the contract. *Id.* The Board has seldom applied the restriction set forth in *Arlan's*. GORMAN, *supra* note 3, at 306.

[23] *See* Fruin-Colnon Constr. Co., 330 F.2d 885, 892 (8th Cir. 1964). Section 7 protects strikes over safety issues when the collective bargaining agreement does not contain a no-strike provision. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962); Union Boiler Co., 213 N.L.R.B. 818, 822, 87 L.R.R.M. 1268, 1268-69 (1974), *enforced*, 90 L.R.R.M. 3057 (4th Cir. 1975). When a no-strike provision binds the employees, § 502 of the Labor Management Relations Act (LMRA) operates to protect strikes over safety hazards. 29 U.S.C. § 143 (1976); *see* Philadelphia Marine Trade Ass'n v. NLRB, 330 F.2d 492, 495 (3d Cir.), *cert. denied*, 379 U.S. 833 (1964); NLRB v. Knight Morley Corp., 251 F.2d 753, 759 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958). Section 502 provides that employees' activity is protected when they stop working in good faith because of abnormally dangerous working conditions. 29 U.S.C. § 143 (1976).

Courts consider work stoppages over abnormally dangerous conditions to be beyond the scope of common no-strike provisions. *See* Atleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 59 MINN. L. REV. 647, 659 (1975). For the work stoppage to be protected, the working conditions must be shown to be abnormally dangerous based on objective evidence, rather than the mere subjective fear of the employees. Gateway Coal Co. v. UMW, 414 U.S. 368, 385-87 (1974); *see* Ashford & Katz, *Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and the Occupational Safety and Health Act*, 52 NOTRE DAME LAW. 802, 805-07 (1977); Note, *The Right to Strike Over Safety Issues*, 51 CHI.-KENT L. REV. 200, 204-07 (1974) (factors to consider in determining whether working conditions are abnormally dangerous).

[24] San Juan Lumber Co., 154 N.L.R.B. 1153, 1155, 60 L.R.R.M. 1102, 1103 (1965), *enforced on other grounds*, 367 F.2d 397 (9th Cir. 1966). In *San Juan Lumber*, employees were unable to cash employment checks due to their employer's insufficient funds during the previous year. *Id.* at 1161, 60 L.R.R.M. at 1102. The employees went on strike. *Id.* The

ing in protected activity is an unfair labor practice.[25]

In *Newport News Shipbuilding and Dry Dock Co. v. NLRB*,[26] the Fourth Circuit recognized a new exception to the employer's right to discharge striking employees under a no-strike provision.[27] The court considered whether the work stoppage in *Newport News* was "purely informational" in character and not a violation of the no-strike agreement and therefore protected activity.[28] In addition, the Fourth Circuit considered whether the union violated the duty of fair representation by agreeing arbitrarily to the employer's discharge of the strike's "ringleader" and by making threats of unequal representation to non-union employees.[29]

In *Newport News*, the dispute began when the company assigned construction employees to exposed working areas in severe winter weather.[30] Within an hour of reporting to work, all the employees congregated around a heating stove located in the work area and discussed the possibility of being sent home because of the weather.[31] Hubert South, acting as spokesman for the employees, asked the foreman whether they would be sent home.[32] The other employees remained gathered around the heating stove and did not work.[33] The foreman informed the employees that they would not be sent home and ordered them to return to work.[34] The employees complied.[35]

The company's Supervisor of Employee Relations determined that the employees' failure to work while congregated around the heating stove constituted a twenty-minute work stoppage in violation of the no-strike provision of the collective bargaining agreement.[36] He planned to

---

Board found that the employer's failure to issue paychecks covered by sufficient funds was a material breach of the contract, thus excusing the employee strike in violation of the no-strike provision. *Id.* at 1155, 60 L.R.R.M. at 1103; *see* note 81 *infra*. The fact that wages or bonuses are paid within a very short time after their contracted due dates does not excuse the employer's breach. *See* Androit Mfg. Co., 236 N.L.R.B. 1358, 1362, 98 L.R.R.M. 1578, 1579 (1978).

[25] NLRB v. International Van Lines, 409 U.S. 48, 52 (1972); *see* BNA, THE DEVELOPING LABOR LAW 13 (C. Morris ed. Supp. 1971-75).

[26] 631 F.2d 263 (4th Cir. 1980).

[27] *Id.* at 268-69.

[28] *Id.*; *see* text accompanying notes 62-65 *infra*.

[29] 631 F.2d at 269-70; *see* text accompanying notes 72-76 *infra*.

[30] 631 F.2d at 265.

[31] *Id.* at 265-66. Article XI of the collective bargaining agreement provided that the employer send the employees home when weather conditions prohibited working in the open area. *Id.* at 265. The head of the lead trade was given the authority for making the determination. *Id.* If the weather conditions prohibited working, the employees would receive a "bad weather passout" and would be sent home. *Id.*

[32] *Id.* at 266.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* Article V of the collective bargaining agreement prohibited "any strike (including sympathy strike), picketing, slowdown or intentional interference with operation."

discharge all of the employees involved.[37] The supervisor and the union delegate reached a compromise, however.[38] Only South, the non-union "ringleader," was discharged.[39] The other employees received a written warning on their records and were docked for three-tenths of an hour of pay.[40] The union delegate agreed to the employer's discharge of South before hearing South's explanation.[41] The delegate based his decision almost entirely upon the employer's description of the incident.[42] After the employer decided to discharge South, the delegate failed to request a two-day "cooling-off period" before the discharge would become final.[43] In addition, the union failed to appeal South's grievance with the company and refused to respond to his inquiries about the matter.[44]

Following the incident, the union attempted to solicit union membership among non-union employees.[45] In the course of their solicitation, union agents told non-union employees that the employees would not receive representation equal to that provided union employees unless they joined the union.[46] The union agents implied that South would have received better representation if he had belonged to the union.[47]

South filed unfair labor practice charges against the company and the union,[48] alleging violations of sections 8(a)(1)[49] and 8(b)(1)(A)[50] of the NLRA. The Board concluded that the company violated section 8(a)(1) by

---

The agreement stated that any employee engaging in such prohibited activity was subject to suspension or discharge. *Id.* at 267 n.7.

[37] *Id.* at 266.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* The delegate did not hear South's explanation of the incident until just prior to informing him of his discharge. Newport News Shipbuilding and Dry Dock Co., 236 N.L.R.B. 1470, 1471, 98 L.R.R.M. 1465, 1466 (1978).

[42] 631 F.2d at 266. The union delegate did interview two of the employees involved. *Id.*

[43] *Id.* The bargaining agreement provided the union the opportunity to request a two-day "cooling-off period" before a discharge would become final. The agreement stated that a request for the "cooling-off period" would be granted without exception. 236 N.L.R.B. at 1478.

[44] 631 F.2d at 266. If the union had appealed South's grievance, the dispute probably would have been settled through the company's internal arbitration procedure rather than through the Board proceeding. *See* note 14 *supra.*

[45] 631 F.2d at 266.

[46] *Id.* The union agents told one employee that they would "stand up and go to bat" for him if he was a union member. *Id.* The agents told another non-union employee that they would not represent him "as much" as they could a union member. *Id.*

[47] *Id.*

[48] 236 N.L.R.B. at 1474.

[49] 29 U.S.C. § 158(a)(1) (1976); *see* text accompanying note 1 *supra.*

[50] 29 U.S.C. § 158(b)(1)(A) (1976). A labor organization commits an unfair labor practice if it restrains or coerces employees in the exercise of rights guaranteed in § 7. *Id.* Section 8(b)(1)(A) was enacted to parallel the sanctions imposed on the employer by § 8(a)(1). *See* Note, *Fair Representation and Union Discipline*, 79 YALE L.J. 730, 732 (1970).

discharging South and reprimanding the other employees.[51] While the Board found that the employees had engaged in a work stoppage,[52] the Board reasoned that the stoppage was for a "purely informational" purpose and was not an attempt to pressure the company into sending the employees home.[53] The Board held that the work stoppage constituted protected activity, and therefore, the company's disciplinary measures against South and other employees were unlawful.[54]

The Board also concluded that the union interfered, restrained, and coerced South in his exercise of section 7 rights and thereby violated section 8(b)(1)(A) of the NLRA.[55] The Board reasoned that the union represented South arbitrarily by agreeing to his discharge without consulting him or investigating the incident and by refusing to appeal his grievance.[56] In addition, the Board determined that union agents' statements threatening to deny non-union members equal representation violated Section 8(b)(1)(A).[57]

The Board ordered the employer to reinstate South, reimburse him for any lost earnings, and expunge the written warnings issued to the other employees.[58] The Board permitted the employer to dock the employees' pay for the time they were not working.[59] In addition, the Board held the union jointly and severally liable with the employer for South's loss of pay, because the union's failure to represent South properly was a contributing factor to his unlawful discharge.[60] The Board also directed the union to represent non-union members fairly and cease its threats to represent them unfairly.[61]

On review, the Fourth Circuit denied enforcement of the Board's determination that the company violated section 8(a)(1).[62] The court did

---

[51] 236 N.L.R.B. at 1471, 98 L.R.R.M. at 1466.

[52] *Id.* The work stoppage lasted for a period of about twenty minutes. *Id.* The administrative law judge previously held that, due to the extenuating circumstances, the employees' activity could not be classified as a work stoppage. *Id.* at 1477.

[53] *Id.* at 1471, 98 L.R.R.M. at 1466. The Board indicated that no-strike provisions apply only to employee conduct which attempts to bring pressure on the employer. *Id.*; *see* District 1199-E, Nat'l Union of Hosp. and Health Care Employees, 229 N.L.R.B. 1010, 1011, 95 L.R.R.M. 1214, 1215 (1977) (employees' conduct was not intended to bring pressure on the employer and therefore cannot be regarded as a strike).

[54] 236 N.L.R.B. at 1471, 98 L.R.R.M. at 1466.

[55] *Id.*

[56] *Id.* In view of the union's contemporaneous threat of less favorable treatment to other non-union members, Board Member Truesdale found that the union's handling of South's discharge was not merely perfunctory, inept, or careless, but was arbitrary action so grounded in bad faith as to constitute a breach of the union's duty of fair representation. *Id.* at 1471 n.9, 98 L.R.R.M. at 1467.

[57] *Id.* at 1472, 98 L.R.R.M. at 1466.

[58] *Id.*

[59] *Id.* at 1471 n.7, 98 L.R.R.M. at 1466.

[60] *Id.*; *see* King Soopers, Inc., 222 N.L.R.B. 1011, 1020, 91 L.R.R.M. 1292, 1294 (1976).

[61] 236 N.L.R.B. at 1473.

[62] 631 F.2d at 268. The Board's order is not self-executing. If the Board wishes to en-

not apply the "purely informational" exception because no information was actually disseminated during the time the employees were not working.[63] Instead, the employees were waiting for a management decision.[64] Since the court did not apply the exception, the employees' conduct was not protected, and therefore, the Fourth Circuit held that the employer's disciplinary measures did not constitute an unfair labor practice.[65]

The Fourth Circuit also considered South's charge that the union violated its duty of fair representation.[66] The duty of fair representation imposes an obligation upon the union to represent fairly all the employees in the bargaining unit,[67] regardless of whether they are members of the union.[68] The union breaches the duty of fair representa-

---

force an order against a party, it must convert its order to a court order by petitioning a federal court of appeals under § 10(e) of the NLRA. 29 U.S.C. § 160(e) (1976); *see* GORMAN, *supra* note 3, at 10-11.

[63] 631 F.2d at 269. The dissent argued that courts must give considerable deference to the Board's application of the NLRA. *Id.* at 270 (Hall, J., concurring in part and dissenting in part); *see* N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 236-37 (1963). Since the Board's finding of a "purely informational" work stoppage was supported by substantial evidence, the dissent reasoned that the court should enforce the Board's order. 631 F.2d at 270 (Hall, J., concurring in part and dissenting in part).

[64] 631 F.2d at 269.

[65] *Id.* The Fourth Circuit also held that it was proper for the company to discharge South, the leader of the unauthorized work stoppage, while merely disciplining the other employees. *Id.*; *see* Poloron Products, Inc., 177 N.L.R.B. 435, 437, 71 L.R.R.M. 1577, 1579 (1969); Unkovic, *Enforcing the No-Strike Clause*, 21 LAB. L.J. 387, 395 (1970). The company could not lawfully differentiate in its discipline, however, if the basis for the differentiation was protected activity. *See, e.g.*, Precision Castings Co., 233 N.L.R.B. 183, 183-84, 96 L.R.R.M. 1540, 1542 (1977) (an employer who singles out for discharge strikers holding union office violates § 8(a)(3)).

[66] 631 F.2d at 269-70.

[67] Letter Carriers, Branch 6000 v. NLRB, 595 F.2d 808, 811 (D.C. Cir. 1979). The duty of fair representation was first recognized in a case arising under the Railway Labor Act. Steele v. Louisville & N. R.R., 323 U.S. 192, 199 (1944). The Supreme Court later recognized that the NLRA also imposed a duty of fair representation. Syres v. Oil Workers Local 23, 350 U.S. 892 (1955), *rev'g* 223 F.2d 739 (5th Cir. 1955).

Under § 9(a) of the NLRA, a union chosen by a majority of employees in a bargaining unit has the right to act as the exclusive bargaining agent for all the employees in that unit. 29 U.S.C. § 159(a) (1976). The "bargaining unit" includes those employees whose jobs have a sufficient commonality of needs and interests to form an election constituency for the purpose of deciding whether to elect a majority union representative. *See* GORMAN, *supra* note 3, at 66. Bargaining unit employees do not have to be union members. *Id.* Individual employees have no separate negotiating rights and must look exclusively to that union for protection of their interests. 29 U.S.C. § 159(a) (1976); Letter Carriers, Branch 6000 v. NLRB, 595 F.2d at 811.

[68] Richardson v. Communications Workers, 443 F.2d 974, 980 (8th Cir. 1971) (union wrongfully induced company to discharge employee and failed to process his grievance because he was not member of union); Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191, 199 (4th Cir. 1963) (disparate treatment based on union membership cannot be tolerated); Hughes Tool Co. v. NLRB, 147 F.2d 69, 74 (5th Cir. 1945) (union wrongfully refused to handle grievance for bargaining-unit member of minority union); United

tion when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.[69] The courts apply the preceeding three standards independently and will find that a union breached its duty of fair representation if the union has violated any one standard.[70] A breach of the duty of fair representation constitutes an unfair labor practice prohibited by section 8(b)(1)(A) of the NLRA.[71]

In *Newport News*, the Fourth Circuit held that the Board's determination of a section 8(b)(1)(A) violation was supported by substantial evidence.[72] The court reasoned that the union failed to fulfill the duty of fair representation by agreeing to South's discharge without consulting him or substantially investigating the incident.[73] The court found, however, that the union was not required to reimburse South for back-

---

Steelworkers, Local 937 (Magma Copper Co.), 200 N.L.R.B. 40, 43, 81 L.R.R.M. 1445, 1445 (1972) (union wrongfully refused to process grievances for employees who were not union members). *See also* Jacobs, *The Duty of Fair Representation: Minorities, Dissidents and Exclusive Representation*, 59 BOSTON U.L. REV. 857, 864 (1979).

[69] Vaca v. Sipes, 386 U.S. 171, 190 (1967).

[70] 386 U.S. at 190. After the Supreme Court's decision in *Vaca*, circuits have been divided on whether bad faith conduct on the part of the union is required in every case, or whether discriminatory or arbitrary conduct alone would suffice to constitute a breach of duty. *Compare* Jackson v. TWA, Inc., 457 F.2d 202, 204 (2d Cir. 1972) ("factual malice" required) *and* Local 13, ILWU v. Pacific Maritime Ass'n, 441 F.2d 1061, 1067 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972) (choice motivated by good faith may fall within conduct allowed union) *with* Ruzicka v. General Motors Corp., 523 F.2d 306, 309 (6th Cir. 1975) (arbitrary or discriminatory union action need not be motivated by bad faith to amount to unfair representation) *and* Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972) (without any hostile motive of discrimination and in good faith, union action may nonetheless be so arbitrary as to violate duty). *See generally* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEXAS L. REV. 1119, 1124 (1973) [hereinafter cited as Clark].

In contrast to the subjective notion of bad faith, the use of the term "arbitrary" in *Vaca* suggests an objective standard against which a union's conduct is to be measured. *See* Comment, *Post*-Vaca *Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units*, 19 VILL. L. REV. 886, 888 (1974) [hereinafter cited as *Post*-Vaca *Standards*]. In *Griffin v. UAW*, the Fourth Circuit reasoned that the repeated references to "arbitrary" in *Vaca* represented a calculated broadening of the standard of the duty of fair representation. 469 F.2d at 183; *see Post*-Vaca *Standards*, *supra*, at 896. In *Griffin*, the Fourth Circuit imposed an affirmative obligation on the union to provide an explanation for its actions. 469 F.2d at 183; GORMAN, *supra* note 3, at 714.

[71] 386 U.S. at 177-78; Miranda Fuel Co., Inc., 140 N.L.R.B. 181, 185, 51 L.R.R.M. 1584, 1587 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). In *Miranda*, the Board found that the union's duty as the employee's exclusive representative under § 9(a) gave rise to a corresponding right to the employees under § 7 to be represented fairly when they are bargaining collectively through their exclusive representative. 140 N.L.R.B. at 185; 51 L.R.R.M. at 1587. Thus, if a union arbitrarily fails to represent the bargaining unit members, it violates their § 7 rights and § 8(b)(1)(A). *Id.*; *see* Comment, *Refusal to Process a Grievance, The NLRB, and the Duty of Fair Representation: A Plea for Pre-Emption*, 26 U. PITT. L. REV. 593, 604 (1965); Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U.L. REV. 1096, 1103-05 (1974).

[72] 631 F.2d at 269.

[73] *Id.*

pay.[74] Since the employer had proper justification for discharging South, the court stated that South would not have received backpay even if the union had represented him in a more competent fashion.[75] The Fourth Circuit also enforced the Board's order that the union cease and desist from making threats of unequal representation to non-union members.[76]

Although courts other than the Fourth Circuit have not recognized the "purely informational" exception,[77] several courts and the Board have recognized other exceptions to the employer's right to discharge striking employees under a no-strike provision.[78] These recognized exceptions are based on the well-established contractual principle that one party's breach of a material provision of a labor contract justifies nonperformance by the other party.[79] Employer practices which constitute a material breach of a collective bargaining agreement include engaging in

---

[74] *Id.*

[75] *Id.* at 269-70; *see* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976). If the employer had wrongfully discharged South, damages against the union for loss of employment would be recoverable only to the extent that the union's refusal to handle grievances added to the difficulty and expense of collecting from the employer. Czosek v. O'Mara, 397 U.S. 25, 29 (1970); *see* Note, *The Duty of Fair Representation*, 20 CATH. U.L. REV. 271, 303 (1970).

[76] 631 F.2d at 270. Courts have established that a union violates § 8(b)(1)(A) of the NLRA by threatening to deny equal representation to employees who do not join the union. *See, e.g.*, Trico Workers Union, 246 N.L.R.B. No. 83, 102 L.R.R.M. 1621, 1622 (1979) (violation where union steward told employee that steward could not represent employees whose names were on a list of those who had not paid union dues); Newport News Shipbuilding and Dry Dock Co., 233 N.L.R.B. 1443, 1451-52, 97 L.R.R.M. 1304 (1977) (violation where article in newsletter by union representative stated that he "was not going to waste much time" representing non-union members).

[77] The Fourth Circuit is the first circuit court of appeals to recognize the "purely informational" exception. The Board created the exception in Empire Steel Mfg. Co., 234 N.L.R.B. 530, 97 L.R.R.M. 1304 (1978). In *Empire Steel*, an employee representative called a meeting during the lunch period to discuss a recent employee injury and his meeting with management regarding the injury. *Id.* at 531, 97 L.R.R.M. at 1305. Because the meeting extended ten minutes past the end of the lunch hour, the employee representative was later discharged. *Id.* The Board held that the discharge was improper. *Id.* at 533, 97 L.R.R.M. at 1305. The Board reasoned that it would be "over-reaching" to treat the interruption as a violation of the no-strike provision, in light of the "purely informational," non-pressuring character of the meeting and the fact that § 7 rights "are not be be causally dealt away." *Id.* at 532-33.

[78] *See* notes 22-24 *supra.*

[79] San Juan Lumber Co., 154 N.L.R.B. 1153, 1165, 60 L.R.R.M. 1102, 1103 (1965), *enforced on other grounds*, 367 F.2d 397 (9th Cir. 1966); *see* cases cited in United Elec., Radio and Mach. Workers Local 1113 v. NLRB, 223 F.2d 338, 341 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956). The general contractual principle that one party need not perform if the other party materially refused to do so, applies to labor contracts. 223 F.2d at 341; *see* RESTATEMENT OF CONTRACTS § 274 (1932). Courts originally found that an employee strike in violation of a no-strike provision was a material breach justifying the employer's subsequent recission of the contract. *See* 223 F.2d at 341; United Biscuit Co. v. NLRB, 128 F.2d 771, 775 (7th Cir. 1942). Courts later applied this reasoning to unlawful acts of the employer, finding that such acts justified the employee's breach of a no-strike provision. *See* note 80 *infra.*

unfair labor practices, failing to perform obligations under the contract, and maintaining hazardous conditions.[80] When an employer materially breaches the labor contract, the employees are excused from their obligations under a no-strike provision.[81] Because an employer engaged in a form of unlawful conduct which provoked a strike, the courts will deny the employer the contract benefits to which he would otherwise be entitled.[82]

The "purely informational" exception is clearly inconsistent with the reasoning behind the other exceptions to the employer's right to discharge strikers for violating a no-strike provision.[83] The "purely informational" exception does not depend upon the employer's unlawful action to justify the employees' breach of the no-strike provision.[84] Instead, the exception gives employees an independent right to stop work briefly to listen, so long as the employees' action does not put pressure on the employer.[85]

The Fourth Circuit in *Newport News* indicated that only in specific circumstances can a court apply the "purely informational" exception to justify an employee's breach of the no-strike clause. The employees are only permitted to stop work while information is being disseminated.[86] In

---

[80] San Juan Lumber Co., 154 N.L.R.B. 1153, 1165, 60 L.R.R.M. 1102, 1103 (1965), *enforced on other grounds*, 367 F.2d 397 (9th Cir. 1966). Originally, the Board and the courts did not base the protection of strikes in response to abnormally dangerous conditions and unfair labor practices on the employer's unlawful action. Instead, courts protected strikes over abnormally dangerous conditions because of the safety protection provided in § 502 of the LMRA. *See* note 23 *supra*. Courts protected strikes over unfair labor practices to protect employee rights under § 7 of the NLRA. *See* note 22 *supra*. The Board, however, recognized the common contractual principles underlying all the exceptions in formulating the exception to the employer's right to discharge employees under a no-strike provision in *San Juan Lumber*. 154 N.L.R.B. at 1164-65. The Board noted that the employees' strike may be justified by an employer's breach of its contractual obligation to pay the employees, just as a strike is justified when an employer has committed an unfair labor practice or maintained abnormally dangerous conditions. *Id.*

[81] 154 N.L.R.B. at 1165, 60 L.R.R.M. at 1103.

[82] *Id.*

[83] In *Empire Steel*, the employer argued that the employee meeting was not covered by § 7 because it was "purely informational." 234 N.L.R.B. at 532. The Board appears to have created the "purely informational" exception specifically to refute that argument. *See id.* at 532 n.5.

[84] The work stoppages in *Empire Steel* and *Newport News* were in response to an employee injury and cold weather respectively. 631 F.2d at 265-66; 234 N.L.R.B. at 531. The lack of employee intent to have the action regarded as a "strike" supports the argument that the work stoppages were not in response to an employer's unlawful activity.

[85] 631 F.2d at 269.

[86] *Id.*; 234 N.L.R.B. at 532, 97 L.R.R.M. at 1305. "Information" has been defined as "matters of employee concern in the context of the workplace." 234 N.L.R.B. at 532. The Board has indicated that the "purely informational" exception applies to the dissemination of information by an employee representative or the union. *See* National Vendors, Inc., 244 N.L.R.B. No. 167, 102 L.R.R.M. 1277, 1277 (1979) (union); 234 N.L.R.B. at 532 (employee representative). The Fourth Circuit implied in *Newport News* that the exception can apply

addition, the purpose of the employees' work stoppage cannot be to bring pressure upon the employer.[87] Courts applying the "purely informational" exception must be convinced that the employees' section 7 rights should not be sacrificed because of a brief noncoercive work stoppage.[88] The "purely informational" exception thus prevents an employer from abusing the no-strike provision and firing employees who engage in very brief work stoppages without the intention to strike.[89]

Although the "purely informational" exception applies in limited circumstances, the criteria that justify the court's application of the exception are not conducive to consistent application. Since the courts will be required to engage in subjective determinations of whether the strike was noncoercive and based solely on informational inquiries, the exception will be subject to abuse.[90] Applied broadly, the "purely informational" exception threatens to destroy the practical importance of negotiation in the collective bargaining process.[91] The employer has surrendered his right to lockout[92] or has established an internal arbitration procedure[93] to gain the assurance that his business will be free from the production problems and chaos associated with strike activity.[94] The union has the opportunity during contract negotiations to ensure that employees' section 7 rights are protected.[95] By permitting the employees

---

to information disseminated by the employer, so long as the information is actually being communicated at the time of the work stoppage. 631 F.2d at 269.

[87] 631 F.2d at 269; 234 N.L.R.B. at 532, 97 L.R.R.M. at 1305; *see* note 52 *supra*.

[88] 234 N.L.R.B. at 532; *see* N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) (§ 7 should not be interpreted and applied in "restricted fashion"); Trustees of Boston Univ., 224 N.L.R.B. 1385, 1388, 93 L.R.R.M. 1450 (1976) (§ 7 rights permit some leeway for compulsive behavior).

[89] *See, e.g.*, Anheuser-Busch Inc., 239 N.L.R.B. 207, 207-08, 99 L.R.R.M. 1548 (1978) (fifteen minute deference of work assignment did not amount to work stoppage of type contemplated by no-strike provision, due to brief duration and lack of interference with production).

[90] The Fourth Circuit's decision in *Newport News* indicates the subjective nature of determining whether the employees intended to pressure the employer through their work stoppage. *See* 631 F.2d at 266 n.4 (some evidence in *Newport News* that employees intended to pressure employer into sending them home); Brief for Petitioner at 21 (same).

In addition, the subjective nature of the "purely informational" exception poses considerable risks to the employee who strikes in violation of a no-strike provision. As with the other exceptions, the employee who strikes must wait until the Board determines whether the strike fits the "purely informational" exception before he knows whether the strike is protected or not. *See, e.g.*, NLRB v. Fruin-Colnon Constr. Co., 330 F.2d 885, 892 (8th Cir. 1964). Due to the lack of significant judicial recognition of the "purely informational" exception, an activity which an employee believes to be "purely informational" may later be found to be unprotected.

[91] *See* text accompanying notes 92-96 *infra*.

[92] *See* note 15 *supra*.

[93] *See* note 14 *supra*.

[94] *See* note 13 *supra*. In *Newport News*, the employer surrendered his right to lockout and agreed that employee grievances would be submitted to the grievance-arbitration procedure in the collective bargaining agreement. 631 F.2d at 267 n.7.

[95] *See* text accompanying notes 10 and 12 *supra*.

to stop working without sanction despite the explicit terms of the negotiated collective bargaining agreement, the court's reliance on the "purely informational" exception weakens the employers' incentive to agree to a no-strike provision and thereby increases the potential for labor unrest.[96]

The Fourth Circuit's application of the duty of fair representation to the union's arbitrary conduct in agreeing to South's discharge without investigating the incident is an unprecedented expansion of the duty.[97] Prior to *Newport News*, the Fourth Circuit applied the duty of fair representation to the union's obligation to process meritorious grievances.[98] The court could have found that the union violated the duty when it failed to appeal South's grievance.[99] The court, however, specifically based the breach of the duty of fair representation on the union's failure to investigate the incident leading to South's discharge.[100] The Fourth Circuit apparently recognized that the duty of fair representation applies to all union decisions which affect the rights of the employees it represents, not solely to the union's remedial obligation to process meritorious grievances.[101] Since the individual employees have surrendered their individual negotiating rights to the union to act as their agent in all aspects of employer relations, the union's responsibility to represent fairly all employees in the bargaining unit should not be limited to grievance proceedings.[102]

The duty of fair representation assures that individual rights will not be forfeited when the union and the employer reach a disposition regarding a given matter.[103] Unions are not foreclosed from reaching an

---

[96] The Supreme Court has recognized the imperative need to enforce no-strike clauses. In Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 407 (1976), the Court stated that the employer would be deprived of his bargain and of the benefits of the national labor policy encouraging private resolution of disputes if the federal courts could not issue injunctions to enforce implied no-strike clauses.

[97] *See* text accompanying notes 98-102 *infra*. The Fourth Circuit determined that the union breached the duty of fair representation because of its arbitrary conduct, not because of any unequal treatment accorded South based on his non-union status. *See* note 68 *supra*. The Board in *Newport News* had refused to adopt the administrative law judge's conclusion that the union failed to process South's grievance because he was not a union member. 236 N.L.R.B. at 1471 n.8, 98 L.R.R.M. at 1466.

[98] Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972).

[99] *See* text accompanying notes 44 and 56 *supra*.

[100] 631 F.2d at 269.

[101] *Id.*

[102] By electing the union as their majority representative, the individual employees effectively waived their individual negotiating rights. *See* note 67 *supra*. In return, courts impose upon the union a duty to refrain from acting in an arbitrary manner toward the employees. Vaca v. Sipes, 386 U.S. 171, 190 (1967). The *Vaca* Court did not limit the union's duty to represent the employees fairly to grievance proceedings. *Id. But see* GORMAN, *supra* note 3, at 706 (duty only applies to union's bargaining and grievance-processing activities, since duty is derived from the union's power as exclusive representative in those areas).

[103] *See* note 106 *infra*.

agreement with the employer.[104] A union may be confronted with circumstances that require a choice between the interests of a single employee and the interests of the other employees, or those of the union, as a whole.[105] If a union chooses to align itself with management in making a decision contrary to the interests of a member of the bargaining unit, however, the union's decision must not be arbitrary, discriminatory, or in bad faith.[106] Only by acting consistently with the duty of fair representation does the union strike an equitable balance between employee rights and the union's collective strength.[107] As the Fourth Circuit correctly recognized in *Newport News*, the union's failure to investigate an incident prior to agreeing to the discharge of an employee constituted arbitrary conduct.[108] Thus, the Fourth Circuit imposed an affirmative "duty to investigate" on the union.

---

[104] Unions need discretionary powers to negotiate effectively with powerful employers on behalf of its members. *See, e.g.*, Vaca v. Sipes, 386 U.S 171, 191 (1967) (union accorded considerable discretion in handling and settling grievances). *See generally* Clark, *supra* note 70, at 1120. The union may reach an agreement with the employer that does not provide perfect equality of benefits for all employees. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953); Union News Co. v. Hildreth, 295 F.2d 658, 666 (6th Cir. 1961). In *Ford Motor Co.*, the union accepted a provision in the collective bargaining agreement which gave employees credit for pre-employment military service. 345 U.S. at 334. The Supreme Court held that the union did not violate the duty of fair representation even though the provision worked to the disadvantage of the other employees. *Id.* at 338. In *Union News*, the employer proposed to discharge all of its employees to rid itself of a problem with shortages in cash receipts. 295 F.2d at 660. The union investigated the matter and prevailed upon the employer to lay off only half of the employees, the layoffs to become final if the cash shortages ended. *Id.* at 661. The layoffs became final. *Id.* The Sixth Circuit held that the union had acted in the collective interest of those whom it represented by agreeing to the discharge of half the employees. *Id.* at 666. *But see* note 106 *infra*.

[105] *See* Curth v. Faraday, Inc., 401 F. Supp. 678, 681 (E.D. Mich. 1975) (local union did not act arbitrarily in deciding not to arbitrate based on futility of case and union's precarious financial condition). *See also* Levy, *The Collective Bargaining Agreement as Limitation on Union Control of Employee Grievances*, 118 U. PA. L. REV. 1036, 1054 (1970).

[106] Vaca v. Sipes, 386 U.S. 171, 190 (1967). The *Vaca* recognition of the arbitrary standard places tighter restrictions on union-employer agreements. *See* note 70 *supra*. Several commentators have noted that the union conduct in *Union News*, 295 F.2d at 660-61; *see* note 104 *supra*, would have been found arbitrary after *Vaca*. *See* GORMAN, *supra* note 3, at 713; Comment, *Protection of Individual Rights in Collective Bargaining: The Need for a More Definitive Standard of Fair Representation Within the* Vaca *Doctrine*, 14 VILL. L. REV. 484, 492-93 (1969). *See also* Local 13, ILWU v. Pacific Maritime Ass'n, 441 F.2d 1061, 1068 (9th Cir. 1971) (holding that union may not expressly or tacitly agree with employer to exchange individual employee's grievance for some other benefit).

[107] *See* notes 68-71 *supra*.

[108] 631 F.2d at 269. Courts have previously recognized the importance of investigation on the part of the union in determining whether to process an employee's grievance. *See* Miller v. Gateway Transp. Co., 616 F.2d 272, 277 (7th Cir. 1980); Lowe v. Pate Stevedoring Co., 558 F.2d 769, 770-71 n.2 (5th Cir. 1977); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970). In *Lowe*, the Fifth Circuit held that the union breached the duty of fair representation when it failed to investigate, upon request, an employee's discharge for assaulting a supervisor. 558 F.2d at 771 n.2. The Court rejected the union's defense that an investigation was not necessary

While the Fourth Circuit explored new concepts in the two issues posed by *Newport News*, the value of the court's discussions as future authority are vastly different. The court's recognition and classification of the "purely informational" exception to the employer's right to discharge employees under a no-strike provision is inconsistent with the reasoning of prior exceptions.[109] While the exception was held not applicable to the facts of *Newport News*, the Fourth Circuit's decision opens the door for possible abuses from which a no-strike provision was originally intended to protect the employer.[110] On the other hand, the court's recognition of the union's duty to investigate an incident before agreeing to the discharge of an employee is consistent with previous decisions[111] and adds new substance to the union's duty of fair representation.

DANA S. CONNELL

B. Section 8(a)(5) of the NLRA: The Employer's Narrow Duties to Bargain Regarding Strikebreaker Bonuses and to Provide Information Regarding Non-Bargaining Unit Employees

Section 7 of the National Labor Relations Act (NLRA) protects the right of employees to engage in concerted activities for their mutual aid or protection.[1] Section 8(a)(1) of the NLRA provides that an employer commits an unfair labor practice when it interferes with the employee rights guaranteed in section 7.[2] An employer that violates the general prohibition of section 7, and thus section 8(a)(1), may also commit one of the more specific unfair labor practices outlined in sections 8(a)(2) through 8(a)(5) of the NLRA.[3] Section 8(a)(5) of the NLRA provides that

since such employee action is universally recognized as "just cause" for discharge. *Id.* at 773. In *De Arroyo*, the First Circuit held that the union acted arbitrarily because it never investigated or made any judgment concerning the merits of plaintiff's grievance. 425 F.2d at 284. *See also* GORMAN, *supra* note 3, at 718 (union must make full investigation, give grievant opportunity to participate, and must develop colorable arguments).

[109] *See* text accompanying notes 77-85 *supra*.

[110] *See* text accompanying notes 90-96 *supra*.

[111] *See* text accompanying notes 108 *supra*.

[1] 29 U.S.C. § 157 (1976).

[2] 29 U.S.C. § 158(a)(1) (1976).

[3] 29 U.S.C. § 158(a)(2)-(5) (1976); *see* R. GORMAN, BASIC TEXT ON LABOR LAW 132 (1976) [hereinafter cited as GORMAN]. Section 8(a)(1) is a blanket provision. When any of the specific unfair labor practices enumerated in §§ 8(a)(2)-(5) are committed, § 8(a)(1) is also violated. A violation of § 8(a)(1), however, does not necessarily entail a violation of §§ 8(a)(2)-(5). Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491, 493-94 (1967).

an employer commits an unfair labor practice by refusing to bargain collectively with the employees' representative.[4] An employer that fails to meet at reasonable times and confer in good faith with the employees' representative regarding wages, hours, and other terms and conditions of employment violates the duty to bargain under section 8(a)(5).[5]

A strike is generally considered concerted activity under section 7, since strikes are the major means that unions have to enforce employees' collective bargaining rights.[6] An employer that offers inducements to non-striking employees may violate section 8(a)(1) if his action so favors the non-striking employees as to destroy the employees' right to strike guaranteed by section 7.[7] The employer's conduct may not violate section 8(a)(1), however, if the business justification for his action is found to outweigh the interference with employees' section 7 rights.[8]

---

[4] 29 U.S.C. § 158(a)(5) (1976). Specific unfair labor practice sections also prohibit employer domination of labor unions, employer discrimination against union membership, and employer discrimination against employees who file charges or give testimony under the NLRA. 29 U.S.C. § 158(a)(2)-(4) (1976).

[5] 29 U.S.C. § 158(d) (1976); *see* GORMAN, *supra* note 3, at 399-401.

[6] NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-17 (1962); *see* Koretz & Rabin, *The Development and History of Protected Concerted Activity*, 24 SYRACUSE L. REV. 715, 715-16 (1973). Strikes have been accorded special deference in the enactment of federal labor laws. NLRB v. Erie Resistor Corp., 373 U.S. 221, 233-35 (1963); *accord*, NLRB v. Rubatex Corp., 601 F.2d 147, 149 (4th Cir.), *cert. denied*, 444 U.S. 928 (1979).

[7] *See* text accompanying notes 59-60 *infra*. The Board may find a violation of § 8(a)(1) it if finds that the probable result of the employer's action will be to display to the employees that they can obtain benefits without union representation. Bartlett-Collins Co., 230 N.L.R.B. 144, 167, 96 L.R.R.M. 1581 (1977).

[8] Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268-69 (1965); *see, e.g.*, NLRB v. Union Carbide Corp., 440 F.2d 54, 56-57 (4th Cir.), *cert. denied*, 404 U.S. 826 (1971) (discharge of non-striking employees that refused to cross picket line to prevent large scale defection not adequate justification); Robertshaw Controls Co. v. NLRB, 386 F.2d 377, 380, 383 (4th Cir. 1967) (decision to remove portion of operation to new plant based solely on economic factors and thus adequate justification). Business justifications are also important in considering claims of employer discrimination against union membership under § 8(a)(3), but the analysis differs from that employed in a § 8(a)(1) claim. Unlike § 8(a)(1), § 8(a)(3) requires that the employer have an actual motive to discriminate against union membership. 380 U.S. at 311; NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-28 (1963). The Supreme Court has recognized that the employer's "anti-union animus" may be implied. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967). Anti-union animus need not be proved where the employer's conduct is inherently destructive of the employee's right to strike or engage in collective bargaining, or where the employer's conduct has only a slight effect on employee rights but serves no substantial and legitimate business ends. *Id.* The burden is on the employer to show that his conduct was economically justified and had only a slight effect on employee rights in order to require the Board to prove "anti-union animus" before it may find a § 8(a)(3) violation. *See, e.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967) (employer failed to prove it could not reinstate strikers because of need to adapt to changes in business conditions); 388 U.S. at 34 (employer failed to prove legitimate motive for granting vacation pay only to non-strikers); Portland Willamette Co. v. NLRB, 534 F.2d 1331, 1334-35 (9th Cir. 1976) (employer proved that protection of its credibility was legitimate business motive for implementing proposal to make retroactive payments to those on payroll as of certain date).

In addition to the possible section 8(a)(1) violation, the employer may violate his duty to bargain under section 8(a)(5) if he fails to notify the union before granting the bonus.[9]

The duty to bargain also imposes upon the employer an obligation to provide relevant information to a union in response to the union's request.[10] The employer's compliance with the union's requests for information is necessary for the union to discharge its duty of representing its members.[11] Courts have formulated a "relevance" standard to determine what information the employer must furnish to the union.[12] If the Board finds that the union has requested information relevant to the union's duties, the employer must comply with the union's request or he will commit a section 8(a)(5) violation.[13]

Some types of information are intrinsically necessary to a union's ability to fulfill its statutory duty as bargaining representative.[14] If the requested information concerns the employees who are members of the bargaining unit, the information is presumptively relevant.[15] The

---

[9] *See, e.g.*, NLRB v. Rubatex Corp., 601 F.2d 147, 150 (4th Cir. 1979) (employer violated § 8(a)(5) by failing to bargain about bonus prior to its implementation); Bartlett-Collins Co., 230 N.L.R.B. 144, 175, 96 L.R.R.M. 1581, 1581 (1977) (unilateral furnishing of free work gloves to non-strikers indicated intention not to bargain with union and violates § 8(a)(5)). An employer violates § 8(a)(5) when it changes the wages or other terms and conditions of employment without first giving the employees' bargaining representative notice and an opportunity to bargain about the changes. NLRB v. Katz, 369 U.S. 736, 742-43 (1962). An employer may make changes in wages or working conditions with which a union does not agree only after good faith bargaining on the proposed alterations has resulted in an impasse. NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217, 224-25 (1949); Korn Indus., Inc. v. NLRB, 389 F.2d 117, 120-21 (4th Cir. 1967).

[10] NLRB v. Acme Indus. Co., 385 U.S. 432, 435-36 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956); *see* Note, *The Employer's Obligation to Furnish Information to a Labor Union*, 13 N.Y.U. INTRA. L. REV. 54, 56 (1958). The union is also obligated to furnish the employer with relevant information upon the employer's request. *See* Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB, 598 F.2d 267, 270-71 (D.C. Cir. 1979).

[11] San Diego Newspaper Guild Local 95 v. NLRB, 548 F.2d 863, 866-67 (9th Cir. 1977); *see* NLRB v. Southland Cork Co., 342 F.2d 702, 705-06 (4th Cir. 1965). Without necessary information, the union would be unable to perform its duties properly as bargaining agent and no bargaining could take place. *See* BNA, THE DEVELOPING LABOR LAW 309-10 (Morris ed. 1971); 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 (1972) [hereinafter cited as Bartosic & Hartley].

[12] NLRB v. Acme Indus. Co., 385 U.S. 432, 435-36 (1967); United Aircraft Corp. v. NLRB, 434 F.2d 1198, 1204 (2d Cir. 1970), *cert. denied*, 401 U.S. 933 (1971). If the information requested is not relevant to legitimate union needs, the company's failure to provide it is not a violation of § 8(a)(5). Emeryville Research Center, Shell Dev. Co. v. NLRB, 441 F.2d 880, 883 (9th Cir. 1971).

[13] Curtiss-Wright Corp. v. NLRB, 347 F.2d 61, 69 (3d Cir. 1965); *see* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1422-27 (1958).

[14] IT&T Corp. v. NLRB, 382 F.2d 366, 372 (3d Cir. 1967), *cert. denied*, 389 U.S. 1039 (1968); Curtiss-Wright Corp. v. NLRB, 347 F.2d at 69; *see* notes 15-17 *infra*.

[15] Prudential Ins. Co. v. NLRB, 412 F.2d 77, 84 (2d Cir.), *cert. denied*, 396 U.S. 928

employer bears the burden of showing that the requested information is not relevant.[16] When the union requests information concerning employees outside the bargaining unit, however, the union has the burden of showing that the requested information is relevant to bargainable issues.[17]

In *S&W Motor Lines, Inc. v. NLRB*,[18] the Fourth Circuit reviewed a National Labor Relations Board (Board) ruling that an employer violated both sections 8(a)(1) and 8(a)(5) when the employer awarded a bonus to employees who continued to work during a strike.[19] In the same action, the Fourth Circuit considered whether the employer's refusal to comply with the union's request for information regarding employees who were not members of the bargaining unit[20] constituted a failure to bargain.[21]

In *S&W Motor Lines*, the union and the employer were parties to a collective bargaining agreement scheduled to expire on August 19, 1976.[22] The union and the employer met for contract negotiations at in-

---

(1969); Curtiss-Wright Corp. v. NLRB, 347 F.2d at 69; Timkin Roller Bearing Co. v. NLRB, 325 F.2d 746, 750 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964). Originally, courts held that only information generally relating to wages of bargaining unit employees was presumptively relevant. 347 F.2d at 69; 325 F.2d at 750. In recent decisions, the courts have found that unions also have a presumptive right to the addresses of bargaining unit employees. 412 F.2d at 84. The addresses are presumptively relevant due to the union's fundamental need to communicate with its members. *Id.*; *see* Bartosic & Hartley, *supra* note 11, at 35-38.

[16] Curtiss-Wright Corp. v. NLRB, 412 F.2d at 84; Boston Herald-Traveler Corp. v. NLRB, 223 F.2d 58, 62 (1st Cir. 1955). Where the information is presumptively relevant, *see* text accompanying notes 14-15 *supra*, relevance should be determined under a discovery-type standard rather than a trial-type standard. *See* Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB, 598 F.2d 267, 271 (D.C. Cir. 1979) (information must be disclosed if it has any bearing on subject matter of case); Proctor & Gamble Mfg. Co. v. NLRB, 603 F.2d 1310, 1315 (8th Cir. 1979) (information must be disclosed unless clearly irrelevant). Under the Federal Rules of Civil Procedure governing discovery, "relevant" is synonymous with "germane." *See* FED. R. CIV. P. 26(b)(1); C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2008 (1970).

[17] NLRB v. Western Elec., Inc., 559 F.2d 1131, 1133 (8th Cir. 1977) (union failed to show information regarding salaried non-unit employees transferred into bargaining unit was relevant); San Diego Newspaper Guild Local 95 v. NLRB, 548 F.2d 863, 868 (9th Cir. 1977) (union failed to show information regarding employees being trained to replace union members in event of strike was relevant); NLRB v. Rockwell-Standard Corp., 410 F.2d 953, 957 (6th Cir. 1969) (union met burden of showing information regarding employees at building to which employer transferred work done by union members at another building was relevant); IT&T Corp. v. NLRB, 382 F.2d 366, 371 (3d Cir. 1967) (union failed to show seniority information regarding non-unit employees transferred into the bargaining unit was relevant).

[18] 621 F.2d 598 (4th Cir. 1980).

[19] *Id.* at 601-02.

[20] A bargaining unit is a group of jobs which the Board has established as an election constituency for the purpose of determining whether the job holders wish to have union representation. *See* GORMAN, *supra* note 3, at 66.

[21] 621 F.2d at 602-03.

[22] S&W Motor Lines, Inc., 236 N.L.R.B. 938, 940, 98 L.R.R.M. 1488 (1978). On June 10,

tervals from early August to late September.[23] The employer laid off a large number of its employees, both within and outside the bargaining unit, in August and September.[24] The employer told the state Employment Security Commission that the bargaining unit employees were laid off as the result of a "labor dispute."[25] Under North Carolina law, employees laid off because of a labor dispute cannot receive unemployment compensation.[26] The union believed, however, that the employer gave a different reason for the layoff of employees that were not members of the bargaining unit so that those employees would be entitled to unemployment compensation.[27] To resolve the discrepancy, the union requested on September 15th that the employer produce the name, social security number, address, and layoff date of each non-bargaining unit employee laid off in the previous two weeks.[28] The union also requested that the employer provide copies of the layoff letters that he sent to bargaining unit employees for the previous six weeks.[29] Although the employer complied with the union's request for the information concerning the bargaining unit employees, the employer refused to provide the information about non-bargaining unit employees.[30]

The contract negotiations proved unsuccessful and, on October 16, 1976, the union went on strike.[31] The employer then unilaterally[32] instituted a $50 per trip bonus payment to non-striking truck drivers[33] to compensate the drivers for working under the difficult conditions of the picketers' harassment.[34] All of the non-striking drivers were members of

---

1976, the union contacted the employer indicating its desire to negotiate changes in the collective bargaining agreement which was about to expire. *Id.* On June 16, 1976, the employer notified the union that it wanted to terminate the collective bargaining agreement. *Id.*

[23] *Id.* The parties conducted contract negotiations on August 9, 18, and 27, and on September 2, 24, and 30. *Id.* The employer stressed his poor financial condition and his inability to afford the increased benefits proposed by the union. *See* Brief for NLRB at 4.

[24] 236 N.L.R.B. at 950.

[25] *Id.*

[26] *Id.* North Carolina's Employment Security statute provides that a person who is out of work partially or totally because of a labor dispute is ineligible for unemployment compensation benefits. *See* N.C. GEN. STAT. § 96-14(5) (1975).

[27] 236 N.L.R.B. at 950.

[28] *Id.*

[29] *Id.*

[30] *Id.* The employer did not think the union was entitled to information concerning employees who were not members of the bargaining unit. *Id.*; *see* text accompanying note 17 *supra*.

[31] 236 N.L.R.B. at 940.

[32] *Id.* at 951. The employer failed to negotiate with the union before implementing the bonus and in later negotiations maintained that the non-striking employees were not receiving a bonus. *Id.* at 951 n.23.

[33] 621 F.2d at 601. The employer paid approximately $70,000 in bonuses from January to August of 1977 with some drivers earning as much as $450 per month in bonuses. 236 N.L.R.B. at 951.

[34] 621 F.2d at 601. Unidentified persons had cut brake air lines on the employer's truck

the bargaining unit and several were union members.[35]

The union filed a charge with the Board alleging that the employer's conduct violated sections 8(a)(1) and 8(a)(5) of the NLRA.[36] The Board determined that the employer's payment of the bonuses violated section 8(a)(1)[37] and that the employer's failure to bargain with the union concerning the payments violated section 8(a)(5).[38] The Board also determined that the employer's refusal to provide the information regarding the non-bargaining unit employees violated section 8(a)(5).[39]

The Fourth Circuit enforced the Board's order in *S&W Motor Lines* with several important modifications.[40] The court enforced the Board's finding of a section 8(a)(1) violation because the evidence presented before the administrative law judge permitted a finding that the

---

trailers. 236 N.L.R.B. at 940. The employer also alleged that non-striking drivers were shot at and forced off the road while driving for the company. *See* Brief for Petitioner at 14.

[35] 621 F.2d at 601.

[36] *Id.* at 599.

[37] 236 N.L.R.B. at 951-52; 98 L.R.R.M. at 1488. In determining that the bonus payments violated § 8(a)(1), the National Labor Relations Board (Board) relied on NLRB v. Aero-Motive Mfg. Co., 195 N.L.R.B. 790, 79 L.R.R.M. 1496 (1972), *enforced*, 475 F.2d 27 (6th Cir. 1973). 236 N.L.R.B. at 951. The Board found that the bonus payments would be illegal even if they were given solely to provide additional compensation to employees who risked personal harm. *Id.*, 98 L.R.R.M. at 1488. The Board considered the crucial issue to be whether the objective impact of the payment was to alert employees to the fact that nonstrikers did, and presumably would in the future, receive special benefits which strikers will not receive. *Id.*; *see* 195 N.L.R.B. at 792, 79 L.R.R.M. at 1498-99.

[38] 236 N.L.R.B. at 952, 98 L.R.R.M. at 1488. The Board found that the employer must bargain with the union even if the union could not be expected to agree to the bonus payments. *Id.* The Board noted that if the employer had conferred with the union prior to its decision to implement the payments, the union might have been able to persuade the employer to not issue the illegal payments. *Id.*

In its brief before the Fourth Circuit, the Board also indicated that the company's willingness to pay the bonus was evidence that the employer could afford to pay some increases in employee benefits. Brief for NLRB at 32; *see* notes 23 and 33 *supra*. The Board speculated that if this concession had been conveyed directly to the union through negotiatons, it might have initiated movement at the bargaining table which could have shortened the strike. Brief for NLRB at 32-33.

[39] 236 N.L.R.B. at 950-51. The Board held that the information regarding employees who were not members of the bargaining unit was relevant because it was essential to the union's representation of the bargaining unit employees in their unemployment compensation claims. *Id.*; *see* text accompanying notes 25-27 *supra*. The Board noted that the employer failed to submit any evidence to show that the union intended to use the information to the detriment of non-unit employees. 236 N.L.R.B. at 951.

[40] 621 F.2d at 603. The enforced portions of the Board's order included a directive to the employer to cease and desist from offering rewards for physical acts against strikers, from offering bonuses to drivers, and from encouraging employees to form their own unions. *Id.* at 599-600. In addition, the employer was instructed to reinstate the strikers. *Id.* at 600. The company was required to pay to each reinstated truck driver the same per trip bonus paid to non-striking drivers until the total bonus paid the individual equalled the average amount earned by the non-striking drivers during the strike or until such bonuses were negotiated to agreement with the union. *Id.* at 600-01.

employer interfered with the employees' collective bargaining rights.[41] Accordingly, the court upheld the Board's imposition of a large fine on the employer, requiring the employer to pay the striking truck drivers the same per trip bonuses paid the non-striking drivers.[42] The Fourth Circuit disagreed, however, with the Board's determination of a section 8(a)(5) violation and held that the employer did not fail to bargain with the union.[43] Since a strike was in progress, the court reasoned that any attempt by the employer to negotiate with the union regarding the special payments to non-striking workers would have been futile.[44]

The Fourth Circuit also considered the extent of the employer's duty to provide information to the union. The court did not enforce the Board's finding of a section 8(a)(5) violation.[45] Since the union failed to show a need for the requested information, the Fourth Circuit reasoned that the employer did not violate section 8(a)(5) by refusing to provide information concerning non-bargaining unit employees.[46] Where the collective bargaining agreement had expired and negotiations for a new agreement were not proceeding well, the court found it necessary to consider the possibility that the union had improper motives in requesting the information.[47] The court noted that the alleged purposes for which the union requested the information did not require the names, addresses, and social security numbers of individual employees.[48]

In considering whether the unilateral grant of the $50 bonus payment violated sections 8(a)(1) and 8(a)(5), the Fourth Circuit relied on its recent opinion in *NLRB v. Rubatex Corp.*[49] In *Rubatex*, an employer was

---

[41] 621 F.2d at 601; *see* text accompanying notes 59-63 *infra*.

[42] 621 F.2d at 600-01; *see* note 40 *supra*.

[43] 621 F.2d at 602; *see* text accompanying notes 64-69 and 74-79 *infra*.

[44] 621 F.2d at 602. The Fourth Circuit noted several factors associated with the strike which made any attempts at bargaining futile. The employer was struggling to keep operating in the face of (1) customer uneasiness over the uncertainty of service and (2) the sabotage of equipment and other harassment reasonably attributed by the employer to the strikers. *Id.* The union had refused to relinquish its right to strike during meaningful contract negotiations which caused a decline in employer's business. *See* Brief for Petitioner at 11.

[45] 621 F.2d at 602-03. Other courts have given great weight to the Board's determination of whether requested information must be supplied to the union in a particular case. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153-54 (1956); San Diego Newspaper Guild Local 95 v. NLRB, 548 F.2d 863, 869 (9th Cir. 1977).

[46] 621 F.2d at 603.

[47] *Id.* The employer in *S&W Motor Lines* had experienced sabotage of equipment and other harassment. *Id.* at 602; *see* note 34 *supra*.

[48] 621 F.2d at 603. The union was concerned with the disparity created when the employer attempted to deny laid-off bargaining unit members unemployment compensation and, at the same time, provide laid-off employees who were not members of the bargaining unit the same benefits. *Id.* The Fourth Circuit held that the names, addresses, and social security numbers of the non-bargaining unit members were not necessary to establish any disparity of treatment. *Id.*

[49] 601 F.2d 147 (4th Cir.), *cert. denied*, 444 U.S. 928 (1979). In *Rubatex*, the Fourth Circuit relied on NLRB v. Aero-Motive Mfg. Co., 195 N.L.R.B. 790, 79 L.R.R.M. 1496 (1972), *en-*

able to continue operations throughout a strike with the aid of thirteen union members who chose to work.[50] The strike eventually ended and a new agreement was executed.[51] A month after the termination of the strike, the company unilaterally paid a bonus to all employees who worked during the strike, including the thirteen union members.[52] The employer did not make payments to the union employees who participated in the strike.[53]

The Fourth Circuit held in *Rubatex* that the employer's action violated both sections 8(a)(1) and 8(a)(5).[54] Because the bonus clearly demonstrated that special rewards will go to employees who choose to refrain from protected strike activity, the court found that the payments inhibited the free exercise of the employees' right to strike contrary to section 8(a)(1).[55] The court also found that the employer's failure to bargain with the union prior to granting the bonus violated section 8(a)(5).[56] The court noted that the employer had a duty to bargain about the post-strike payments, even though the bargaining efforts would have been futile.[57] The court reasoned that the employer's notice to the union would have brought the illegal payments to the union's attention and perhaps have motivated the employer to seek alternatives in an effort to avoid litigation.[58]

In deciding the section 8(a)(1) claim, the Fourth Circuit in *S&W Motor Lines* noted that payments made during the strike were not per se illegal,[59] while payments made after a strike, as in *Rubatex*, were per

---

forced, 475 F.2d 27 (6th Cir. 1973). 601 F.2d at 150. In *Aero-Motive*, the Board determined that awarding a bonus to non-strikers after a new collective bargaining agreement had been signed was an unfair labor practice. 195 N.L.R.B. at 792.

[50] 601 F.2d at 149.

[51] *Id.*

[52] *Id.* Of the thirteen Rubatex employees receiving bonuses, nine who worked during the entire strike received $100 each, and four who worked proportionately less time received $25 each. *Id.*

[53] *Id.*

[54] *Id.* at 149-51. The Fourth Circuit found that the Board's remedy, which required payment of an equivalent bonus to the striking employees, was not an abuse of the Board's discretion. *Id.* at 151. The employer was required to pay $100 to each striker and $75 to those non-strikers who received only $25. *Id.*

[55] *Id.* at 150.

[56] *Id.* at 150-51.

[57] *Id.* at 150. The employer in *Rubatex* was sure that the union would not agree to the payments, since the payments had the effect of inhibiting the future right of the employees to strike. *Id.*

[58] *Id.* The Fourth Circuit in *Rubatex* relied heavily on *Aero-Motive* for the proposition that union notification of the bonus payments would have encouraged non-litigatious alternatives. *Id.* In *Aero-Motive*, the Board recognized that voluntary settlements are a vital part of collective bargaining that should be encouraged. 195 N.L.R.B. at 793. The duty to bargain enables bargaining agents to detect illegalities in apparently legal actions. *Id.* at 792.

[59] 621 F.2d at 602. Inducements made during a strike may have the effect of destroying the union's power to strike and therefore violate § 8(a)(1). *See, e.g.*, NLRB v. Beverage-Air

se illegal.[60] Although the court acknowledged that the Board's finding of a section 8(a)(1) violation was fairly debatable, the Fourth Circuit recognized that the scope of review for a section 8(a)(1) violation is limited.[61] The Board is primarily responsible for weighing any business justification for the employer's conduct against the alleged invasion of employee rights.[62] The court enforced the Board's finding because the finding was supported by substantial evidence.[63]

In refusing to uphold the Board's finding of a section 8(a)(5) violation, the court distinguished *S&W Motor Lines* from *Rubatex*.[64] Unlike *Rubatex*, the bonus payments in *S&W Motor Lines* were given during the strike.[65] Since the strike was still in progress at the time the payments were given, the Fourth Circuit reasoned that the employer should not be forced to bargain where negotiation is not conceivable.[66]

Co., 402 F.2d 411, 419 (4th Cir. 1968) (prohibiting employer from supplying free cigarettes and lunches to non-striking employees); Bartlett-Collins Co., 230 N.L.R.B. 144, 166-67, 96 L.R.R.M. 1581, 1581 (1977) (prohibiting employer from distributing free work gloves to non-striking employees); Chanticleer, Inc., 161 N.L.R.B. 241, 252, 63 L.R.R.M. 1237, 1239 (1966) (prohibiting employer's wage increases to non-striking employees and striker replacements). *See generally* Schwartz & Bernstein, *Discipline and Discharge of Employees for Engaging in Unlawful Work Stoppages* in STRIKES, STOPPAGES AND BOYCOTTS 285 (1977). Inducements made during a strike, however, may not violate § 8(a)(1) where the employer's business justifications outweigh any invasion of employee rights. *See* Omaha Typographical Union No. 190 v. NLRB, 545 F.2d 1138, 1143-44 (8th Cir. 1976); Sign and Pictorial Union Local 1175 v. NLRB, 419 F.2d 726, 736 (D.C. Cir. 1969); Pilot Freight Carriers, Inc., 223 N.L.R.B. 286, 298, 92 L.R.R.M. 1246, 1248-49 (1976). In *Omaha Typographical*, bonus payments given only to employees who were not members of the bargaining unit did not violate § 8(a)(1), since the payments neither prevented members of the bargaining unit from going on strike nor coerced their early return. 545 F.2d at 1143-44. In *Sign and Pictorial* and *Pilot Freight*, emergency or safety justifications were found to outweigh any invasion of the employees' right to strike. *See* 419 F.2d at 736 (payment of $25 bonus to non-strikers for action in wake of hurricane threatening company's business was justified); 223 N.L.R.B. at 298, 92 L.R.R.M. at 1248-49 (permitting non-striking owner-operator truckdrivers to use employer's equipment and work in pairs to protect themselves and their equipment was justified).

[60] 621 F.2d at 602. Bonus payments announced and given after a strike are per se violations of § 8(a)(1), since the only effect of the payments is to inhibit the future right of employees to strike. *See* NLRB v. Swedish Hosp. Med. Center, 619 F.2d 33, 35 (9th Cir. 1980) (one-day vacation granted to non-strikers following resolution of strike); NLRB v. Rubatex, 601 F.2d 147, 150 (4th Cir. 1979) (bonus payments granted to non-strikers following resolution of strike); Aero-Motive Mfg. Co., 195 N.L.R.B. 790, 792, 79 L.R.R.M. 1496, 1498-99 (1972), *enforced*, 475 F.2d 27 (6th Cir. 1973) (same). Since the payments are not given until after the strike, they cannot be justified on the basis of economic necessity or emergency. 601 F.2d at 150.

[61] 621 F.2d at 601.

[62] NLRB v. Great Dane Trailers, 388 U.S. 26, 33-34 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236-37 (1963); *see* cases cited in NLRB v. C.K. Smith & Co., Inc., 569 F.2d 162, 166 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978).

[63] 621 F.2d at 601; *see* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

[64] 621 F.2d at 602.

[65] *Id.*

[66] *Id.* The Fourth Circuit stated that if the strike was over, the employer's notification could have positive effects. *Id.*; *see* note 58 *supra*.

The Fourth Circuit also noted that since the payments were made during the strike, they were not per se violative of section 8(a)(1) and may have been justified by the employer's economic or emergency concerns.[67] The Fourth Circuit reasoned that the employer should not be required to foresee how the Board would ultimately resolve a debatable section 8(a)(1) charge.[68] The court concluded that when bonus payments are made during a strike and the potential section 8(a)(1) charge is fairly debatable, the employer should be relieved of any duty to bargain about the bonus.[69]

While the Fourth Circuit denied the union's section 8(a)(5) charge in *S&W Motor Lines*, the court upheld the Board's remedy for the section 8(a)(1) violation.[70] Thus, as in *Rubatex*, the court required the employer in *S&W Motor Lines* to pay bonuses to the striking employees equivalent to those given to the non-striking employees.[71] The penalty promises to be substantial, since the employer has admitted to paying $70,000 in bonuses to non-striking employees in one eight-month period.[72] Given the deterrent effect of this penalty on employer bonuses to non-striking employees, the failure of the court to require the employer to bargain is insignificant.[73]

Nonetheless, the Fourth Circuit recognized that, in limited situations, the union's need to bargain on behalf of the employees may be outweighed by the employer's right to keep his business operating[74] and by the debilitating effect mandatory bargaining would have on that right.[75] Courts have previously determined that unilateral action during

---

[67] 621 F.2d at 602; *see* notes 59 and 60 *supra*.

[68] 621 F.2d at 602.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 601. In *Rubatex*, the employer granted the bonuses to non-striking employees on a per-employee basis. 601 F.2d at 149. The court instructed the employer to make up the difference by paying each employee the flat sum, or the difference between the flat sum and what he had been given. *Id.* at 151; *see* note 54 *supra*. In *S&W Motor Lines*, the employer granted bonuses on a per trip basis. 621 F.2d at 601. The court awarded bonuses to be determined individually, contingent on the number of trips the striking employee makes following the decision. *Id.*; *see* note 40 and text accompanying note 41 *supra*.

[72] 236 N.L.R.B. at 951; *see* note 33 *supra*.

[73] *See, e.g.*, NLRB v. Swedish Hosp. Med. Center, 619 F.2d 33, 35 (9th Cir. 1980) (court elected not to determine validity of § 8(a)(5) claim after finding § 8(a)(1) violation).

[74] *See* Inter-collegiate Press v. NLRB, 486 F.2d 837, 846 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974) (use of economic coercion permissible if employer has established substantial business justification); NLRB v. Southern Coach & Body Co., 336 F.2d 214, 218-19 (5th Cir. 1964) (unilateral reclassification of employees during strike is proper if necessary to continue operation); Hawaii Meat Co. v. NLRB, 321 F.2d 397, 400 (9th Cir. 1963) (unilateral decision to subcontract delivery services during strike is proper if necessary to keep plant operating).

[75] Requiring bargaining can effectively deprive an employer of his ability to cope with a strike situation. Hawaii Meat Co. v. NLRB, 321 F.2d at 400. While the employees' right to strike should not be interfered with, the employer should not be forced to lose his business during extensive negotiation sessions with the union. *Id.* Courts have expressly recognized

a strike in response to certain situations, such as physical emergencies[76] and the fulfillment of basic human needs,[77] did not violate section 8(a)(5).[78] The Fourth Circuit in *S&W Motor Lines* found that the futility of bargaining over arguably legal bonus payments made during a strike also justifies the employer's failure to contact the union prior to awarding the payments.[79]

The Fourth Circuit's decision should not, however, be read to indicate judicial disapproval of the importance of the employer's duty to bargain. The employer's duty to bargain is premised on the effect the employer's failure to bargain would have on employee confidence in the union[80] and the potential mutual benefits obtained from avoiding industrial strife by bargaining.[81] When a strike is in progress, the futility of bargaining over arguably legal payments which are necessary to the employer's business justifies the employer's failure to bargain.[82] Post-strike payments or payments made during a strike with only specious justification are patently illegal, however, and the potential for correction through bargaining tips the scales toward a section 8(a)(5) violation if the employer makes the payments without first notifying the union.[83]

In determining that the employer was not required to comply with the union request for information regarding the non-bargaining unit employees, the Fourth Circuit required the union to make an affirmative

---

the employer's right to bypass bargaining for economic reasons in certain situations. *See, e.g.*, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938) (employer has no duty to bargain during strike about hiring striker replacements); M.R. & R. Trucking Co. v. NLRB, 434 F.2d 689, 696 (5th Cir. 1970) (common carrier has no duty to bargain during strike about hiring striker replacements).

[76] *See* Sign and Pictorial Union Local 1175 v. NLRB, 419 F.2d 726, 736 (D.C. Cir. 1969) (unilateral payment of $25 bonus to non-strikers for action in wake of hurricane threatening company's business was justified).

[77] *See* United Steelworkers Local 5571 v. NLRB, 401 F.2d 434, 438 (D.C. Cir.), *cert. denied*, 395 U.S. 946 (1968) (unilateral provision for free food and beverages justified, since regular food service would not cross picket lines).

[78] The Supreme Court noted that the Board should accept certain circumstances as excusing or justifying unilateral action. NLRB v. Katz, 369 U.S. 736, 747-48 (1962).

[79] 621 F.2d at 602.

[80] Unilateral action can have a psychological as well as an economic effect by undermining employee's confidence in the union's authority. *See* Leeds & Northrup Co. v. NLRB, 391 F.2d 874, 877 (3d Cir. 1968); NLRB v. Mrs. Fay's Pies, 341 F.2d 489, 492 (9th Cir. 1965).

[81] *See* note 58 *supra*.

[82] 621 F.2d at 602.

[83] The Fourth Circuit's decision in *S&W Motor Lines* should not be overextended into a rule stating that an employer can always give bonus payments during a strike without consulting the union. In *S&W Motor Lines*, the employer was faced with economic difficulties and harassment from strikers. 621 F.2d at 602; *see* note 44 *supra*. These employer problems operated as both potential justifications in defense of the § 8(a)(1) claim and as reasons why bargaining would almost certainly be futile. 621 F.2d at 602; *see* text accompanying notes 66-69 *supra*. In situations involving a clear § 8(a)(1) violation, or strong reasons why bargaining might be successful, the Fourth Circuit may find a duty to bargain.

showing of a "need to know."[84] The majority's "need to know" requirement is consistent with the holdings of other courts that require the union to make an affirmative showing of relevance.[85] The relevance requirement may be satisfied by an initial, but not overwhelming, demonstration.[86] The Fourth Circuit's "need to know" requirement suggests that the information is relevant only if the union proves it needs to know the information to discharge its duty as employee representative.[87] The majority's view is well-reasoned because only when "relevant" is read to mean "necessary" can the union's request for information be consistent with the underlying rationale of the employer's duty to furnish information.[88] The dissent's approach would allow a court to find the relevancy requirement satisfied by a showing of factual circumstances that demonstrate the reasons why the union might have needed the information,[89] thereby giving unions virtually unlimited access to employer data.[90]

The Fourth Circuit indicated that the protection of employees who are not members of the bargaining unit is one justification for requiring the union to prove a "need to know", since the necessity of the information to the union's duty of representation may not be readily apparent to the employer.[91] Other courts have gone a step further and found that even if the union proves that the requested information is relevant, circumstances might justify an employer's refusal to furnish the informa-

---

[84] 621 F.2d at 603.

[85] *See, e.g.*, NLRB v. Brazos Elec. Power Coop., Inc., 615 F.2d 1100, 1101 (5th Cir. 1980) (relevance shown); NLRB v. Goodyear Aerospace Corp., 388 F.2d 673, 674 (6th Cir. 1968) (per curiam) (same); Greensboro News Co., 244 N.L.R.B. No. 117, 102 L.R.R.M. 1164 (1979) (same). *See also* San Diego Newspaper Guild Local 95 v. NLRB, 548 F.2d 863, 868-69 (9th Cir. 1977) (relevance not shown); IT&T Corp. v. NLRB, 382 F.2d 366, 371 (3d Cir. 1967) (same); General Motors Corp., 243 N.L.R.B. No. 19, 101 L.R.R.M. 1461 (1979) (same).

[86] San Diego Newspaper Guild Local 95 v. NLRB, 548 F.2d at 868-69. *See also* Prudential Ins. Co. v. NLRB, 412 F.2d 77, 84 (2d Cir. 1969) (requiring special showing of pertinence). The "need to know" requirement is not overly burdensome for the union. 548 F.2d at 868-69.

[87] 621 F.2d at 603; *see* Bartosic & Hartley, *supra* note 11, at 40-41.

[88] *See* Note, *A Union's Right to Company Information for Use in Collective Bargaining—The Ninth Circuit Approach*, 4 RUTGERS-CAMDEN L.J. 362, 372 n.73 (1973) (where information is not presumptively relevant, union's need for information is evidence of relevance); Bartosic & Hartley, *supra* note 11, at 40-41.

[89] 621 F.2d at 606 (Hall, J., dissenting). Judge Hall argued that the relevancy of the requested information in *S&W Motor Lines* was satisfied by factual circumstances, such as the contemporaneous Commission hearing, the numerous claims of unfair labor practices, and the heading of the union letter requesting the employee data. *Id.* at 605-06. Judge Hall asserted that while these factual circumstances do not technically meet the relevancy standard, they do prove the validity of the request and satisfy the protection purpose of the relevancy requirement. *Id.* at 606.

[90] *See* San Diego Newspaper Guild Local 95 v. NLRB, 548 F.2d 863, 868 (9th Cir. 1977) (explaining consequences if court finds union entitled to information upon showing of mere concoction of general theory of information's usefulness to union).

[91] 621 F.2d at 603.

tion.[92] If an employer can show a clear and present danger[93] to the non-bargaining unit employees because of striking employees' harassments and threats, he can legitimately refuse to release the information.[94] While such a defense was neither necessary[95] nor available[96] to the employer in *S&W Motor Lines*, non-bargaining unit employees may avail themselves of the protection in a case where the union actually proves a "need to know."

In *S&W Motor Lines*, the Fourth Circuit analyzed two different elements of the employer's duty to bargain collectively in good faith. In considering both the employer's duty to inform the union of bonus payments to non-strikers and his duty to furnish employee information, the Fourth Circuit articulated the circumstances in which the union has the burden to prove that the employer should be required to bargain. In the bonus context, the court required that the employer notify the union of the payments only where the union could offer valuable input regarding patently illegal payments.[97] The court also held that information regarding non-unit members should be provided to a union only when the union proved a "need to know."[98] Thus, the Fourth Circuit's decision in *S&W Motor Lines* represents a careful, narrow approach to the employer's duty to bargain.

DANA S. CONNELL

---

[92] Relevant information need not always be disclosed. *See* GORMAN, *supra* note 3, at 416. If the employer can demonstrate that the reason behind the union's request for financial data is to harass or publicly embarrass the company, the employer will not be required to disclose the information. NLRB v. Robert S. Abbott Pub. Co., 331 F.2d 209, 213 (7th Cir. 1964). The employer may also defend against the disclosure of relevant information by demonstrating its sensitive nature or the danger that the union will use the information to harass employees. *See* Detroit Edison Co. v. NLRB, 440 U.S. 301, 318 (1979) (employer not required to furnish union with employee aptitude test scores due to sensitive nature of testing information); text accompanying notes 93-94 *infra*.

[93] United Aircraft Corp. v. NLRB, 434 F.2d 1198, 1207 (2d Cir. 1970), *cert. denied*, 401 U.S. 933 (1971).

[94] *See, e.g.*, Shell Oil Co. v. NLRB, 457 F.2d 615, 620 (9th Cir. 1972) (employer not required to furnish names and addresses where danger of harassment and of violence against non-union employees); Sign and Pictorial Union Local 1175 v. NLRB, 419 F.2d 726, 738 (D.C. Cir. 1969) (refusal to permit union to examine records justified by harassment, threats, and assaults visited upon strike replacements); Decaturville Sportswear Co. v. NLRB, 406 F.2d 886, 889-90 (6th Cir. 1969) (employer not required to furnish names and addresses in view of employee's right to privacy and freedom from harassment at home). *See* Irving & DeDeo, *The Right to Privacy and Freedom of Information: The NLRB and Issues Under the Privacy and the Freedom of Information Act*, 29 N.Y.U. CONF. ON LAB. 49, 77 (1976).

[95] Since relevance was not shown in *S&W Motor Lines*, the court did not need to consider circumstances which might have justified a refusal to furnish the information. *See* text accompanying notes 91-94 *supra*.

[96] *See* S&W Motor Lines, Inc., 236 N.L.R.B. 938, 951 (1978) (respondent submitted no evidence that union intended to use information to detriment of non-bargaining unit employees).

[97] *See* text accompanying notes 66-69 *supra*.

[98] *See* text accompanying notes 84-88 *supra*.