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X. Labor Law

court's oversight indicates the court's willingness to apply the *Younger* doctrine to almost any situation, civil or criminal, so long as a pending state proceeding exists. Consequently, if a state proceeding of any type is pending, a complainant will not be able to bring a section 1983 action and have his action heard before a federal court regardless of whether the state proceeding adequately protects the individual's due process rights.

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X. LABOR LAW

A. Concerted Activities: Judicial Interpretation of Section 7 of the NLRA

The National Labor Relations Act (NLRA)[1] establishes the basic rights of employees in private industry[2] by guaranteeing the right to labor organization and collective bargaining.[3] Section 7 of the NLRA guarantees the right of employees to engage in "concerted activities" for collective bargaining purposes or other mutual aid or protection.[4] Sec-

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[1] 29 U.S.C. §§ 151-169 (1976).

[2] *See* 2 KHEEL, LABOR LAW §.9A.01 (1981) [hereinafter cited as KHEEL]. The National Labor Relations Act (NLRA) does not apply to public sector employees. *See* 9 KHEEL, *supra*, §§ 43.01 & 43.02. Public sector employees work for either federal, state or local governments. *Id.* Many jurisdictions provide public sector employees the right to organize and bargain collectively through statutory enactment or judicial action. *Id.* § 44.01(3); *see* McLaughlin v. Tilendis, 398 F.2d 287, 288-89 (7th Cir. 1968) (first case to hold that public employees have constitutional right to join, form, and assist unions).

[3] 29 U.S.C. §§ 151, 157 & 158 (1976). The NLRA declares in § 1 that a goal of national labor policy is to grant workers the opportunity to have full freedom of association, self organization and representation for mutual aid or protection. 29 U.S.C. § 151 (1976). The purpose of the NLRA is to eliminate inequality of bargaining power between employees and employers in order to minimize industrial strife. *Id.*; *see* Note, *The Requirement of "Concerted" Action Under the NLRA*, 53 COLUM. L. REV. 514, 526 (1953) [hereinafter cited as *"Concerted" Action*]. By granting workers the right to organize Congress provided employees with bargaining power in the form of numerical strength so that employees and employers could negotiate and settle labor disputes without the need for judicial intervention. *See* Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 323 (1951) [hereinafter cited as Cox]; *"Concerted" Action, supra*, at 526-27. The NLRA also created the National Labor Relations Board (NLRB) as the administrative authority for enforcement of the Act. 29 U.S.C. §§ 153-156 (1976). The NLRB has the authority to prevent any person from engaging in unfair labor practices. 29 U.S.C. § 160(a); *see* text accompanying notes 22-24 *infra*.

[4] 29 U.S.C. § 157 (1976). The basic intent of § 7 of the NLRA is to enable employees to work together without fear of retaliation by employers. *See* Valley Mould & Iron Corp. v. NLRB, 116 F.2d 760, 764 (7th Cir. 1940), *cert. denied*, 313 U.S. 590 (1941). In drafting § 7,

tion 8(a)(1) serves as an enforcement mechanism of section 7 by forbidding employers to restrain, coerce, or interfere with employees in the exercise of their statutorily conferred rights.[5] Section 8(a)(1) is only applicable, however, if the complaining employee was engaging in a protected activity at the time of the employer's interference.[6] A court's interpretation of the term "concerted activity," therefore, is crucial in cases involving alleged acts of unfair labor practices under section 7.[7]

Picket lines and strikes are the most obvious examples of section 7 concerted activity.[8] Concerted activity, however, encompasses other individual and group activities that further legitimate employee interests.[9] An employee's action constitutes concerted activity for the purposes of

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Congress recognized that labor's cause is often advanced on fronts other than union representation or collective bargaining. Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978). Congress recognized this fact by incorporating the broad language, "mutual aid or protection" into the NLRA. *Id.* A labor organization, therefore, is not a prerequisite for employees to receive § 7 protections. NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948).

By use of the term concerted activity in § 7, however, Congress required that there be a "group" aspect to every activity undertaken to further employee interests. *See* text accompanying notes 35-36 *infra*. Without the group aspect, an activity will not constitute a § 7 protected action. *See* Cox, *supra* note 3, at 320. Two possible reasons exist for the concerted requirement. First, employee bargaining power might lose its effectiveness if employees split into several factions. *"Concerted" Action*, *supra* note 3, at 527. It is desirable, therefore, to assure that employees act together as a collective unit. *Id.* Second, the effectiveness of the collective bargaining process depends, in part, on the fact that an employer has an identifiable and responsible opponent with whom to negotiate disputes. *Id.* Requiring employees to act as a group provides employers with an organized and identifiable opponent. *Id.*

[5] 29 U.S.C. § 158(a)(1) (1976).

[6] Cox, *supra* note 3, at 320; *see* note 4 *supra* (protected activity discussed).

[7] Cox, *supra* note 3, at 320.

[8] *See* International Longshoremen's Ass'n Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 200-01 (1970) (union's peaceful picketing to protest lower than average wage rates constituted protected activity under § 7); NLRB v. Erie Resistor Corp., 373 U.S. 221, 231 (1963) (employer according super seniority to workers replacing strikers was unfair labor practice that interfered with employees' protected right to strike).

[9] *See* 2 KHEEL, *supra* note 2, § 9A.04(1). The common dictionary definitions of "concerted" include "mutually contrived or planned" and "agreed on." WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 55 (2d ed. 1940). The § 7 concerted activity requirement suggests, therefore, that more than one person must contribute to an activity before that activity will acquire "concerted" status. *See* Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 306 (4th Cir. 1980). The judicial applications of § 7, however, have not adhered rigidly to a dictionary meaning of the term concerted activity. *See* Note, *Constructive Concerted Activity and Individual Rights: The* Northern Metal-Interboro *Split*, 121 U. PA. L. REV. 152, 153 (1972) [hereinafter cited as Interboro *Split*]; text accompanying notes 34-40 *infra*. Courts generally attempt to interpret "concerted activity" in accordance with the policies underlying the NLRA. *See* notes 3 & 4 *supra*. Individual action, therefore, can acquire concerted status if that action furthers the interests of employees as a group. Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) (concerted activity existed when single employee circulated petition complaining of working conditions in attempt to enlist support of co-workers); *see* text accompanying notes 35-36 *infra*.

the NLRA if the action comprises a lawful,[10] work-related grievance[11] that furthers group interests[12] and seeks a specific result or remedy.[13] The critical question presented by section 7 cases is whether an employee's activity furthers legitimate group interests.[14] In *Krispy Kreme Doughnut Corp. v. NLRB*,[15] the Fourth Circuit Court of Appeals considered the group interest question in a review of a National Labor

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[10] 2 KHEEL, *supra* note 2, § 9A.04(1). Conduct otherwise constituting concerted activity will not receive protection under the NLRA if the conduct is unlawful. Mt. Vernon Tanker Co. v. NLRB, 549 F.2d 571, 574-75 (9th Cir. 1977). Violent conduct does not merit § 7 protection. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 252 (1939). Conduct that constitutes breach of a contract is also outside the scope of § 7. NLRB v. Sands Mfg. Co., 306 U.S. 332, 344 (1939).

[11] 2 KHEEL, *supra* note 2, § 9A.04(1). Generally, courts take a liberal attitude in determining whether employee activity is sufficiently work-related to receive § 7 protection. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-15 (1962) (no requirement that concerted activity be union related); Kaiser Engineers v. NLRB, 538 F.2d 1379, 1384-85 (9th Cir. 1976) (no requirement that concerted activity take place on employer's premises); Electromec Design & Dev. Co. v. NLRB, 409 F.2d 631, 634 (9th Cir. 1969) (no requirement that concerted activity occur during working hours); Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 752 (4th Cir. 1949) (no requirement that concerted activity occur in collective bargaining context). Courts have found grievances to be work-related in myriad situations. *See, e.g.*, Eastex, Inc. v. NLRB, 437 U.S. 556, 573-76 (1978) (union distribution of bulletins urging support for national minimum wage increases was concerted activity); 538 F.2d at 1384-85 (employee involvement in legislative lobby opposing proposed changes in immigration policy was concerted activity); NLRB v. J. G. Boswell Co., 136 F.2d 585, 595 (9th Cir. 1943) (employee engaged in concerted activity when she voiced sympathy towards another employer's striking workers); Ft. Wayne Corrugated Paper Co. v. NLRB, 111 F.2d 869, 873-74 (7th Cir. 1940) (employee engaged in concerted activity when he aided another employer's workers to organize). The general rule of these cases is that, to be work-related, activities need only reasonably affect conditions of employment. *Cf.* G & W Elec. Specialty Co. v. NLRB, 360 F.2d 873, 876-77 (7th Cir. 1966) (no concerted activity when one employee attempted to initiate movement to control abuses in an employee-established credit union since employer had no control over union's affairs).

[12] 2 KHEEL, *supra* note 2, § 9A.04(1); *see* text accompanying notes 34-39 *infra*.

[13] 2 KHEEL, *supra* note 2, § 9A.04(1). In NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-15 (1962), the Supreme Court held that § 7 does not require notice to the employer of an activity undertaken to correct a grievance, even in the absence of a regular grievance procedure, provided that the employer is reasonably aware of employee dissatisfaction. *Id.* Courts do require, however, that employees engage in action with a specified result in mind. *Compare* 370 U.S. at 14 *with* NLRB v. Jamestown Veneer & Plywood Corp., 194 F.2d 192, 194 (2d Cir. 1952). In *Washington Aluminum Co.*, the employees staged a walkout to protest the inadequate heating of the shop in which they worked. 370 U.S. at 10. The employees did not plan the walkout which happened to occur on a particularly cold winter day. 370 U.S. at 14-15. The Supreme Court implied, however, that in view of past repeated complaints about the cold working conditions, it was clear that the employees had a specific result in mind when they left the shop. *See id.* at 14-15. In *Jamestown*, on the other hand, the Second Circuit upheld the discharge of four employees who abruptly walked off the job after receiving layoff notices. 194 F.2d at 194. The court found that the action did not contemplate a specific result, and that the employees left the job because they resented receiving the layoff notices. *Id.*

[14] *See* 2 KHEEL, *supra* note 2, § 9A.04(1); text accompanying notes 35-36 *infra*.

[15] 635 F.2d 304 (4th Cir. 1980).

Relations Board (NLRB) order requiring the reinstatement of an employee who claimed that the company had discharged him in violation of section 8(a)(1) of the NLRA.[16]

The Krispy Kreme Company discharged employee Terry Boggs for his careless attitude towards safety and his preoccupation with filing workmen's compensation claims.[17] Boggs had filed four workmen's compensation claims for injuries sustained while on the job in his two years of employment with Krispy Kreme.[18] Krispy Kreme's belief that Boggs' claims were of "dubious validity,"[19] the reflection made by the claims upon the quality of conditions in Boggs' working environment, and Boggs' failure to heed company advice about the inappropriateness of filing a workmen's compensation claim for his latest injury precipitated a company investigation of his employment record.[20] The investigation revealed that Boggs was overly concerned with filing workmen's compensation claims related to injuries brought on by his disregard for safety standards.[21]

Boggs objected to his discharge on the grounds that Krispy Kreme fired him as a means to restrain the exercise of what Boggs considered to be a protected activity under section 7, and appealed to the NLRB to handle his case.[22] The NLRB subsequently issued a complaint against

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[16] *Id.* at 305; *see* text accompanying notes 3-5 *supra* and note 22 *infra*. The *Krispy Kreme* court reviewed an NLRB order that required the Krispy Kreme Company to reinstate Boggs with back pay. 635 F.2d at 305. The question before the court was whether to enforce the NLRB's order. *See id.*

[17] 635 F.2d at 305.

[18] *Id.* In *Krispy Kreme*, Boggs filed four workmen's compensation claims in two years, and each claim involved a relatively unusual injury. *Id.* The first incident occurred when Boggs used a sledgehammer to loosen sugar stored in a bin. *See* Brief of Petitioner at 8, 635 F.2d 304 (4th Cir. 1980) [hereinafter cited as Brief of Petitioner]. A blow of the hammer dislodged a piece of the metal bin which struck Boggs in the nose. *Id.* Boggs' second claim arose when he sustained injuries as a result of entangling his arm in a stair rail. *Id.* The third injury occurred when Boggs fell over backwards in a swivel chair. *Id.* at 9. The fourth incident related to the chest pains Boggs allegedly sustained after he spent time blasting flour dust from the ceiling and fixtures of a working room designated for inspection. *Id.* at 10. Some dispute existed as to whether Boggs' flour blasting duties caused his chest pains. *Id.* Flour blasting is a routine process to remove flour dust and other material from workrooms by means of a compressed airhose. *Id.* In addition to these four claims, Boggs missed work for a four month period after sustaining injuries in an automobile accident that was not work-related. *Id.* at 8.

[19] 635 F.2d at 305; Brief of Petitioner, *supra* note 18, at 4.

[20] 635 F.2d at 305.

[21] *Id.*

[22] *See id.* at 306. Congress created the National Labor Relations Board (NLRB) as an administrative agency to enforce the provisions of the NLRA. 29 U.S.C. §§ 153-156 (1976). The office of General Counsel of the NRLB has the authority to investigate unfair labor practices, to decide whether particular charges warrant the issuance of complaints, and to direct the prosecution of any complaints, including any court proceedings to enforce or review NLRB decisions. *See* NLRB Rules and Regulations, 29 C.F.R §§ 100.735.2, 101.2-101.16 (1981); A. Cox, D. Bok & R. Gorman, Cases and Materials on Labor Law 104

Krispy Kreme alleging that the company had discharged Boggs in violation of section 8(a)(1) of the NLRA.[23] An Administrative Law Judge (ALJ)[24] found that the reason for Boggs' discharge was his intention to file a workmen's compensation claim and that Boggs' refusal to refrain from filing his claim, upon the request of a company official, fell within the scope of section 7 protected activities.[25] The ALJ, therefore, concluded that Krispy Kreme violated section 8(a)(1) of the NLRA.[26] The NLRB affirmed these findings and ordered Krispy Kreme to reinstate Boggs with back pay.[27] The company appealed to the Fourth Circuit.[28]

On appeal, the Fourth Circuit considered whether Boggs was engaging in a protected activity at the time of his termination.[29] The court noted that some courts regard concerted activity as a term of art rather than a literal description requiring actual participation by more than one

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(9th ed. 1981) [hereinafter cited as LABOR LAW]. The General Counsel may issue a complaint only upon a formal charge of an unfair labor practice. 29 C.F.R. §§ 101.2-101.4; LABOR LAW at 105. Any person, employer or labor organization may file such charges in the office of the General Counsel for the region in which the alleged unfair practice occurred. 29 C.F.R. § 101.2; LABOR LAW at 105. Upon the filing of a charge, a field examiner conducts a thorough investigation to determine the validity of each charge. 29 C.F.R. § 101.4; LABOR LAW at 105. At the end of the preliminary investigation, the Regional Director may drop the case, attempt settlement, enter a cease-and-desist order, or commence formal proceedings by filing a complaint. 29 C.F.R. §§ 101.6-101.9; LABOR LAW at 105-06. Regional directors have authority to issue complaints in all cases not involving novel or complex issues. 29 C.F.R. § 101.8; LABOR LAW at 107. The complaint specifies the alleged violations of the NLRA as well as the time and place of hearing. 29 C.F.R. § 101.8; LABOR LAW at 107. The respondent has the right to answer the charges prior to the hearing. 29 C.F.R. § 101.8; LABOR LAW at 107. The hearing is before an Administrative Law Judge (ALJ), usually in the city or town where the alleged unfair labor practice occurred. 29 C.F.R. § 101.10; LABOR LAW at 107. The hearing proceeds in the same manner as does litigation in the federal district courts. 29 C.F.R. § 101.10; LABOR LAW at 107; *see* 29 U.S.C. § 160(b) (1976). The ALJ is thus the first official to hear labor disputes. 29 C.F.R. §§ 102.34 & 102.6; LABOR LAW at 107. The ALJ then files a decision with the NLRB containing proposed findings of fact and recommendations for disposition of the case. 29 C.F.R. § 101.11; LABOR LAW at 108. Counsel for any party may make exceptions within twenty days after the ALJ files his decision. 29 C.F.R. § 101.11; LABOR LAW at 108. The NLRB then renders a decision based on the complete record of each case. 29 C.F.R. § 101.12; LABOR LAW at 108. Board orders carry no sanctions, but the NLRB may enforce its decision by filing a petition in a federal court of appeals. 29 C.F.R § 101.14; LABOR LAW at 109. Similarly, the respondent can seek review of the NLRB's decision by filing a petition in a federal court of appeals. 29 C.F.R. § 101.14; LABOR LAW at 109. In reviewing an order of the NLRB, courts must accept the findings of fact if substantial evidence supports those findings. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-91 (1951).

[23] 635 F.2d at 306.

[24] *See* note 22 *supra* (discussing function of Administrative Law Judge in NLRB grievance procedures).

[25] 635 F.2d at 306.

[26] *Id.*

[27] *Id.*; *see* Krispy Kreme Doughnut Corp., 245 N.L.R.B. 1053, 1053-54, 102 L.R.R.M. 1492 (1979); note 22 *supra*.

[28] 635 F.2d at 305.

[29] *Id.*

employee.[30] A single employee's action thus may qualify as a concerted activity.[31] The *Krispy Kreme* court, however, drew a distinction between an individual action intended to enlist the support of other employees, and an action for the benefit of employees in a theoretical sense.[32] In making the distinction, the court discussed two judicial interpretations of what constitutes concerted activity.[33] One interpretation establishes the "element or purpose" rule.[34] Before an employee's action can attain protected status under the element or purpose rule, some element of collectivity to that action must exist, or at the very least, there must be a showing that the purpose of the particular activity contemplated collective action.[35] In addition, the purpose of the activity must be a legitimate, work-related goal for the mutual aid or protection of the employees.[36] The second interpretation is the "constructive concerted ac-

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[30] *See id.* The Fourth Circuit in *Krispy Kreme* accepted as undisputed the NLRB's conclusion that Boggs' failure to forego filing a workmen's compensation claim precipitated his discharge. *Id.*; Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1160 (5th Cir. 1980); *see* note 9 *supra* and note 34 *infra*.

[31] 635 F.2d at 306; *see* note 9 *supra*.

[32] 635 F.2d at 307-08; Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969).

[33] 635 F.2d at 307-09.

[34] *Id.* at 308; *see* Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 684-85 (3d Cir. 1964). The *Mushroom* case is an example of the "element or purpose" method of determining what type of individual employee action constitutes concerted activity. *Id.* In *Mushroom*, an employee had been advising his colleagues that their union contract entitled all company drivers to benefits that they were not receiving. *Id.* at 684. The company fired the employee when a rumor of the employee's actions reached management. *Id.* The employee contested his discharge, claiming his advice constituted an attempt to gain support for a group movement that would seek enforcement of the employees' contractual rights. *See id.* The Third Circuit could not justify the employee's dialogues as actions that contemplated group activity. *Id.* at 684-85. The court explained that preliminary conversations could qualify as concerted activities only if the object of discussion was actually to initiate group action in the interest of all fellow employees. *Id.* at 685. The Third Circuit did not believe that the employee's actions satisfied this requirement. *Id.* The court made clear, however, that the mere fact that an individual acted alone does not preclude automatically that he was acting for the mutual aid or protection of his co-workers. *Id.*; *accord*, Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1160 (5th Cir. 1980); Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969).

[35] 330 F.2d at 684-85; Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1160 (5th Cir. 1980); *see* note 9 *supra*.

[36] 330 F.2d at 684-85; *see* 2 KHEEL, *supra* note 2, § 9A.04(1). Courts generally have recognized legitimate safety concerns as purposes that will give an activity protected status. *See* Wheeling-Pittsburgh Steel Corp. v. NLRB, 618 F.2d 1009, 1017 (3d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981) (employees who protested unsafe working conditions had proper purpose); Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320, 327 (7th Cir. 1976) (employees who protested inadequacy of supervision directly affecting their safety had proper purpose); *cf.* Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) (employees who protested inadequate working conditions when employer refused permission for employee to drive home co-worker who had just received notice of wife's death had proper purpose). Generally, courts do not extend protected status to activities that do not

tivity" approach.[37] The constructive concerted activity rule extends the coverage of section 7 and the element or purpose rule to include the activity of an individual who acts pursuant to a collective bargaining agreement without requiring precise proof of existent mutual concern on the part of other employees.[38] The collective bargaining agreement serves as sufficient evidence of mutual interest to allow courts following the constructive concerted activity rule to infer the necessary element of collectivity in the action of a single employee.[39] The rationale for extending the element or purpose rule to encompass individual action that attempts to implement the terms of a collective bargaining agreement is that such action is merely an extension of the concerted activity that was necessary originally to draft the provisions of the agreement.[40]

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have a proper purpose. *See, e.g.*, Indiana Gear Works v. NLRB, 371 F.2d 273, 276-77 (7th Cir. 1967) (no proper purpose when employee prepared and displayed cartoons in protest of relatively insignificant increases contained in new wage and benefit package); Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 753 (4th Cir. 1949) (employee circulating petition calling for removal of supervisor did not have proper purpose when evidence showed petition was form of retaliation for reprimand issued by supervisor). In addition, courts are unlikely to grant protected status to individual activity involving wage disputes. *See* Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 29 (7th Cir. 1980) (employee's general complaints about job rates and overtime did not constitute concerted activity); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 717 (5th Cir. 1973) (employee's refusal to sign new contract that reduced commission rates did not constitute concerted activity since all other workers had accepted contract's terms); 371 F.2d at 276 (employee's cartoon drawings protesting ridiculousness of a wage increase did not amount to concerted activity). *But see* NLRB v. Ben Pekin Corp., 452 F.2d 205, 207 (7th Cir. 1971) (janitor's action in trying to secure pay raise was concerted activity).

[37] *See* NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967). *Interboro* advocates the constructive concerted activity approach for purposes of determining what type of individual activity constitutes concerted activity. In *Interboro* an employee made several legitimate complaints about his employer's lack of adherence to safety standards required by a collective bargaining agreement. *Id.* at 497-98. The employee's complaints precipitated his discharge as a troublemaker. *Id.* at 498. The NLRB determined that the employee's complaints constituted concerted activity since he voiced his concerns in an effort to secure compliance with the collective bargaining agreement. *Id.* at 499; *see* Interboro *Split*, *supra* note 9, at 158. The *Interboro* court agreed that compliance affected the rights of all employees and thus extended the meaning of concerted activity to encompass individual actions done even in the absence of proof of mutual interest on the part of fellow employees. 388 F.2d at 500. The collective bargaining agreement allowed the *Interboro* court to imply a mutual interest in the employee's actions on the part of his co-workers. *Id.* The Second Circuit later qualified the *Interboro* rule in NLRB v. John Langenbacher Co., 398 F.2d 459, 463 (2d Cir. 1968). In *Langenbacher*, the court held that under the *Interboro* rule, employees must have a "reasonable basis" for believing a certain interpretation of a collective bargaining agreement before a particular activity can attain concerted status. *See id.*

[38] ARO, Inc. v. NLRB, 596 F.2d 713, 716 (6th Cir. 1979); NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 978-79 (9th Cir. 1973).

[39] *See* NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980) (collective bargaining agreement was essential basis for employee's claimed right to § 7 protection).

[40] ARO, Inc. v. NLRB, 596 F.2d 713, 716 (6th Cir. 1979); NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 978-79 (9th Cir. 1973).

The Fourth Circuit stated that the absence of a collective bargaining agreement in *Krispy Kreme* precluded the court from deciding the validity of the constructive concerted activity rule.[41] The court relied instead upon Fourth Circuit precedent that followed the element or purpose rule, and focused on the purpose of Boggs' activity in determining whether Krispy Kreme discharged Boggs improperly.[42] The *Krispy Kreme* court determined that the record did not suggest that Boggs contemplated group activity when he resisted his employer's request not to file a workmen's compensation claim.[43] No other Krispy Kreme employees participated in the dispute over filing a workmen's compensation claim.[44] In addition, Boggs gave no indication that he was representing the rights of other employees.[45] Finally, no contract or agreement indicated what the concerns of Boggs' fellow employees might be.[46] The Fourth Circuit held, therefore, that Boggs was not engaging in protected activity at the time of his discharge.[47] Accordingly, the court refused to enforce the NLRB's reinstatement order.[48]

In denying enforcement of the order, the Fourth Circuit reserved judgment on the validity of the constructive concerted activity rule.[49] Furthermore, the court refused to extend the constructive concerted activity rule to a situation in which there was no collective bargaining agreement, and thus no basis for implying group interest.[50] The court rejected the NLRB's argument that whenever an individual employee acts in a matter that arises out of an employment relationship, a presumption of common interest exists that the employer may later refute.[51] The

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[41] 635 F.2d at 309.

[42] *Id.* at 307-08; *see* Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969) (concerted activity when single employee circulated petition complaining of working conditions intending to enlist support of co-workers); Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 753 (4th Cir. 1949) (no concerted activity when employee circulated petition calling for removal of supervisor and evidence showed employee acted solely to vindicate himself for reprimand supervisor had issued).

[43] 635 F.2d at 308.

[44] *Id.*

[45] *Id.*

[46] *See id.* at 309; text accompanying notes 36-41 *supra.*

[47] 635 F.2d at 310.

[48] *Id.*

[49] *Id.* at 309. The *Krispy Kreme* court neither embraced nor rejected the constructive concerted activity rule, but stated that the absence of a collective bargaining agreement rendered unnecessary a decision on the appropriateness in the Fourth Circuit of the constructive concerted activity rule. *Id.*; *see* text accompanying notes 59, 61 & 67 *infra.*

[50] *See* 635 F.2d at 309-10; text accompanying notes 38-41 *supra.*

[51] 635 F.2d at 309. The NLRB's argument in *Krispy Kreme* that a presumption of common interest exists whenever an employee acts in a matter that arises out of an employment relationship conflicts with established authority requiring a showing that the activity's purpose is for mutual aid or protection. *See* Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964); notes 34 & 36 *supra*; *cf.* Kaiser Engineers v. NLRB, 538 F.2d 1379 (9th Cir. 1976). in *Kaiser*, several employee engineers lobbied Congress for retention of immigration quotas for foreign engineers. *Id.* at 1382. The Ninth Circuit held that the lobby-

Krispy Kreme court noted that the NLRB believed the presumption argument was particularly applicable to situations similar to Boggs' in which the employee's complaint relates to federal or state work safety or compensation statutes.[52] The Fourth Circuit observed, however, that concerted activity is an essential prerequisite for NLRB action.[53] Concerted activity becomes, in effect, a jurisdictional requirement[54] that the NLRB must meet in order to establish the basis for its authority to act.[55] The Fourth Circuit refused to extend the NLRB's authority on the basis of a theoretical presumption that all employees share mutual interests pursuant to a statutory scheme.[56]

No courts have accepted the theory that an individual employee's activity can receive protected status as a concerted activity on the basis of a theoretical presumption of mutual concern.[57] Few courts have accepted

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ing was a protected activity even though the lobbying effort involved no request for action on the part of the company. *Id.* at 1385. As members of the Civil Engineering Society, the engineers had a legitimate concern in a national policy that might have affected their job security. *Id.*

The NLRB has extended the meaning of concerted activity to include situations where no collective bargaining agreement exists as evidence of group concern or interest. *See* Self Cycle and Marine Distrib. Co., 237 N.L.R.B. 75, 76, 98 L.R.R.M. 1517 (1978). In *Self Cycle*, the NLRB found a concerted activity when an individual employee pursued an unemployment claim. *Id.* The lack of a collective bargaining agreement did not affect the determination. *Id.* at 75-76. The NLRB implied group concern by declaring that state compensation laws benefited all employees. *Id.* The NLRB required no further evidence of group concern. *Id.* A similar NLRB case is Alleluia Cushion Co., 221 N.L.R.B. 999, 1000, 91 L.R.R.M. 1131 (1975). In *Alleluia*, the NLRB extended § 7 coverage to an individual employee who, acting alone, filed an occupational safety complaint with a state agency. *Id.* The NLRB inferred mutual concern from the legislative scheme of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976). 221 N.L.R.B. at 1000.

[52] 635 F.2d at 309. In enacting the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678 (1976), Congress articulated a national policy in favor of workmen's compensation laws. 29 U.S.C. §§ 651 & 676 (1976). Section 27(a)(1) of the Act states that a worker's basic economic security requires an efficient system of workmen's compensation. *See* 29 U.S.C. § 676(a) (1976). Boggs' activity was aimed, conceivably, at furthering notions of economic security held by workers across the nation. *Cf.* Bethlehem Shipbuilding Co. v. NLRB, 114 F.2d 930, 937 (1st Cir. 1940). In *Bethlehem*, the court found that employees who appeared before state legislative committees to voice support over changes in the workmen's compensation laws had engaged in a concerted activity. *Id.* at 937. The holding of *Bethlehem* implies that Boggs' activity did have group support by virtue of every employee's conceivable interest in a state statute that provides for a workmen's compensation program. *But see* text accompanying note 65 *infra*.

[53] 635 F.2d at 310.

[54] *Id.*

[55] *Id.*; *see* 29 U.S.C. § 161 (1976).

[56] *See* 635 F.2d at 310. The *Krispy Kreme* court noted that establishing a presumption of group concern in all cases would not merely shift the burden of proving the concerted or nonconcerted nature of an activity from employee to employer, but would render the presumption irrebuttable, since the manner in which an employer could obtain evidence to rebut a presumption of group interest is very unclear. *Id.* at 309.

[57] *See id.* The *Krispy Kreme* court noted that the NLRB could not cite any circuit decision that supports the theory of presumed concerted activity. *Id. But see* Kaiser Engineers

the constructive concerted activity rule, although many courts discuss the rule's possible application.[58] Thus, the *Krispy Kreme* court was in line with the majority interpretation of concerted activity when it analyzed Boggs' claim according to the element or purpose rule.[59]

The Fourth Circuit logically applied the element or purpose rule to define Boggs' activity in *Krispy Kreme*.[60] The evidence in *Krispy Kreme* did not provide the minimal showing of group interest that the element or purpose rule requires.[61] Indeed, the court had no evidence on which to base a determination that other employees shared Boggs' concern about workmen's compensation claim filing rights.[62] Had the *Krispy Kreme* court been able to find the slightest evidence of group interest, Boggs' activity could have qualified as a concerted activity since the filing of a workmen's compensation claim appears to be a legitimate work-related activity.[63]

The Fourth Circuit appropriately concluded that the constructive concerted activity rule was not applicable in a situation in which no collective bargaining agreement exists to serve as the foundation for an inference of group interest.[64] The *Krispy Kreme* court reasonably rejected the NLRB's presumption argument on the grounds that the state-administered statute involved in Boggs' case did not provide a sufficient

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v. NLRB, 538 F.2d 1379, 1385 (9th Cir. 1976) (employees who lobbied for retention of immigration quotas for foreign engineers engaged in concerted activity even though lobbying effort involved no request for action on part of employer); note 51 *supra*.

[58] *See, e.g.*, ARO, Inc. v. NLRB, 596 F.2d 713, 716-17 (6th Cir. 1979); NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 978 (9th Cir. 1973); NLRB v. Northern Metal Co., 440 F.2d 881, 884-85 (3d Cir. 1971). Although the *ARO* court discussed the rationale of *Interboro*, it rejected the *Interboro* or constructive concerted activity rule on the facts of *ARO*. 596 F.2d at 716-18. A temporary employee, Williams, who obtained her job two weeks before the company hired a permanent worker complained that she had seniority rights for the permanent position. *Id.* at 714. The regular company policy was to discharge temporary employees before probationary workers. *Id.* at 715. Williams' complaints did not constitute concerted activity since the court determined that Williams was acting solely for her benefit. *Id.* at 718; *cf.* NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 978-79 (9th Cir. 1973) (no concerted activity even under collective bargaining agreement because employee did not refer to agreement in state grievance).

[59] *See* text accompanying notes 34-36 & 42-48 *supra*.

[60] *See* text accompanying notes 34-36 & 41-48 *supra*.

[61] *See* text accompanying notes 33-35 *supra*. Courts following the element or purpose rule decide the question of concerted activity on the basis of the factual setting of each case. For example, in Wheeling-Pittsburgh Steel Corp. v. NLRB, 618 F.2d 1009, 1017 (3d Cir. 1980), the court found concerted activity when substantial evidence existed that two discharged employees were acting as spokesmen for other employees. 618 F.2d at 1017; *cf.* NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1081-82 (8th Cir. 1977) (employee's verbal opinions about equal pay for women not concerted activity in absence of evidence indicating that other employees shared her concerns).

[62] *See* text accompanying notes 43-47 *supra*.

[63] *See* text accompanying notes 36 & 52 *supra*; 29 U.S.C. §§ 651-678, §§ 651 & 676 (1976) (Congress approved workmen's compensation system).

[64] *See* text accompanying notes 39-41 *supra*.

basis for implying group interest on the part of Boggs' fellow employees.[65] The presumption argument might be appropriate, however, in situations in which the evidence establishes a stronger basis for making an inference of group concern. For example, the presumption argument may be valid if the evidence of a particular case demonstrates that group interest arose after the employee activity took place or, if the statute providing the inference of group activity is a federally-legislated provision affecting employees on a nationwide and uniform basis. In such situations, a court could expand the constructive concerted activity rule to encompass the NLRB's presumption argument.[66]

If the *Krispy Kreme* case had involved a grievance related to a collective bargaining agreement, the Fourth Circuit might have adopted the constructive concerted activity rule as the logical extension of the element or purpose rule.[67] In future section 7 cases involving collective bargaining agreements the Fourth Circuit may expand the definition of concerted activity in accordance with the constructive concerted activity rule.[68] The Fourth Circuit is unlikely to adopt the presumption argument unless the court has more than a tenuous theoretical presumption upon which to base an extension of the NLRB's jurisdiction.[69]

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[65] *See* text accompanying notes 51-56 *supra*. The federal government has sanctioned workmen's compensation claims in OSHA, 29 U.S.C. §§ 651-678, §§ 651 & 676 (1976), but the individual state creates and administers the system of workmen's compensation insurance. Creating and administering a compensation system is each state's responsibility. *See* W. DITTMAR, WORKMEN'S COMPENSATION 8-10 (1959). States vary as to the manner in which the workmen's compensation claims process has developed. *See* McGarry, *A New Federal Remedy for the Protection of Employee Rights*, 31 LABOR L.J. 745, 746 (1980). Ten states provide employees with a remedy for wrongful discharge in workmen's compensation claims, either through statute or common law recognition of a cause of action. *Id.* Arguably, if all employees share a group interest in securing the right to file workmen's compensation claims, the states' reactions in providing a remedy for wrongful discharge in compensation cases would be more uniform. *But see* note 52 *supra*.

[66] *See* text accompanying notes 51-52 *supra*.

[67] *See* text accompanying note 41 *supra*. One commentator has discussed the constructive concerted activity rule as an extension of § 7 protection that includes action whose concerted nature is implicit rather than explicit. Interboro *Split*, *supra* note 9, at 159. The constructive concerted activity rule, therefore, avoids jeopardizing the rights of an individual employee acting alone because of a failure to invoke the union's grievance process and to act in concert in a literal sense. *Id.* at 160.

[68] *See* text accompanying notes 37-40 *supra*.

[69] *See* text accompanying notes 53-56 *supra*.

B. NLRB Exclusive Jurisdiction

The National Labor Relations Board (NLRB or the Board) has exclusive jurisdiction over unfair labor practice cases.[1] The Board's resolution of an unfair labor practice dispute preempts any state or federal court determination of that dispute.[2] Federal and state courts have concurrent jurisdiction with the Board, however, over collective bargaining contract cases even if the collective bargaining dispute involves unfair labor practices.[3] To determine for jurisdictional purposes whether a dispute is a contract dispute or an unfair labor practice, courts look to the conduct being regulated and not to the formal legal description.[4] To avoid inconsistent results between Board and court decisions, courts generally dismiss or stay their proceedings pending the Board's resolution of a similar dispute.[5] In *Peninsula Shipbuilders' Association v. NLRB*,[6] the Fourth Circuit confronted inconsistent determinations by the NLRB and

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[1] *See* 29 U.S.C. § 160(a) (1976). The National Labor Relations Act (NLRA or the Act) guarantees employees the right to join a labor organization, to bargain collectively, and to engage in other enumerated activities. *Id.* § 157. The NLRA provides that an employer's interference with the employee's collective bargaining rights under the NLRA is an unfair labor practice. *Id.* § 158(a). The NLRA created the National Labor Relations Board (NLRB or the Board) which has power to prevent and remedy unfair labor practices. *Id.* § 160(a). The NLRA granted to the Board exclusive jurisdiction over unfair labor practice disputes. *Id.*

[2] *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (state court jurisdiction must yield to Board's exclusive jurisdiction over unfair labor practices); Bova v. Pipefitters & Plumbers Local 60, 554 F.2d 226, 228 (5th Cir. 1977) (Board's exclusive jurisdiction over unfair labor practices preempts federal court's jurisdiction).

[3] *See* 29 U.S.C. § 185(a) (1976). Congress has delegated to federal courts concurrent jurisdiction with the Board over contract disputes between an employer and labor organization *Id. See* NLRB v. George E. Light Boat Storage, Inc., 373 F.2d 762, 767 (5th Cir. 1967) (federal courts have concurrent jurisdiction with Board over contract disputes even if dispute involves unfair labor practice); Local Union 499 of Int. Bro. of Elec. Workers v. Iowa Power & Light Co., 224 F. Supp. 731, 736 (S.D. Iowa 1964) (concurrent jurisdiction exists between Board and federal courts over collective bargaining contract disputes). State courts also have concurrent jurisdiction with the Board over contract disputes between employer and labor union. *See* William E. Arnold Co. v. Carpenter District Council, 417 U.S. 12, 16 (1974) (state court has concurrent jurisdiction over collective bargaining dispute involving unfair labor practice); Smith v. Evening News Ass'n, 371 U.S. 195, 200-01 (1962) (state court has concurrent jurisdiction over collective bargaining dispute involving unfair labor practice).

[4] *See* Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 292 (1971) (conduct being regulated determines whether state court has concurrent jurisdiction with Board).

[5] *See* Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183, 190-91 (4th Cir. 1948) (federal court action dismissed pending Board's resolution); Sheet Metal Workers Int'l Ass'n, Local No. 59 v. Employers Ass'n of Roofer & Sheet Metals, Inc., 22 F.R. Serv. 2d 993, 994 (D. Del. 1976) (district court action stayed pending unfair labor practice dispute before Board); International Bhd. of Boilermakers, Iron Shipbuilders & Combusion Eng'r Inc., 337 F. Supp. 1349, 1352 (D. Conn. 1971) (Board's motion to stay court action granted in interest of judicial economy).

[6] 663 F.2d 448 (4th Cir. 1981).

the United States District Court for the Eastern District of Virginia of a collective bargaining agreement interpretation that involved an unfair labor practice.

In 1975, the Newport News Shipbuilding and Drydock Company (Newport News Shipbuilding) and the Peninsula Shipbuilders' Association (PSA) entered into a collective bargaining agreement covering Newport News Shipbuilders' 19,000 employees.[7] In January, 1978 the Newport News Shipbuilding employees voted to replace PSA with the United Steelworkers Association (Steelworkers) as union bargaining agents.[8] PSA contested the outcome of the election, and the Steelworkers did not replace PSA as the bargaining agent until October 28, 1978, when the collective bargaining agreement expired.[9] During the ten months following the election, Newport News Shipbuilding management recognized PSA as the employees' bargaining agent and continued to deduct PSA dues from the paychecks of employees who had authorized the deductions.[10] During the ten month period, 214 employees sent letters to Newport News Shipbuilding to revoke their PSA dues deduction authorization.[11] When Newport News Shipbuilding informed PSA of its intention to honor the revocations, PSA threatened to sue Newport News Shipbuilding for breach of section 23.2 of the collective bargaining agreement.[12] Section 23.2 of the collective bargaining agreement required revocations to be on forms furnished by PSA.[13] As a result of PSA's threat to sue, Newport News Shipbuilding continued to deduct employees dues and remit dues to PSA.[14] PSA sent certified letters to the 214 employees who had attempted to revoke their dues deduction authorizations, informing the employees that under the collective bargaining agreement employees could use only PSA forms to stop the

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[7] *Id.* at 489-90. The collective bargaining agreement between PSA and Newport News Shipbuilding originally expired on June 30, 1978 but was extended until October 28, 1978. *Id.* at 490.

[8] *Id.*

[9] *Id.* In late 1979, the Fourth Circuit concluded that the Steelworkers had won the disputed election to represent Newport News Shipbuildings' employees. *See* Newport News Shipbuilding & Drydock Co. v. NLRB, 608 F.2d 108, 114 (4th Cir. 1979) (affirming Board's order that Steelworkers were employee's bargaining agent with Newport News Shipbuilding).

[10] 663 F.2d at 490.

[11] *Id.*

[12] *Id.* Section 23.1 of the collective bargaining agreement allowed an employer to deduct union dues from an employee's pay and pay the deduction to the union provided the employee voluntarily authorized the deduction in writing. *Id.* at 440 n.2. Section 23.2 of the collective bargaining agreement provided that the dues deduction authorization of an employee could end after one year or when the collective bargaining agreement terminated. *Id.* at 490 n.3. Section 23.2 of the collective bargaining agreement further required revocation of the dues deduction authorization be executed on a form furnished by PSA. *Id.* at 490 n.2.

[13] *Id.*

[14] *Id.* at 490.

deduction of union dues.[15] Fifty-six employees eventually revoked their dues on the proper forms.[16]

Before the PSA contract expired, the Steelworkers filed unfair labor practices charges against Newport News Shipbuilding and PSA.[17] The unfair labor practice charges alleged that through enforcement of section 23.2 of the collective bargaining agreement both Newport News Shipbuilding[18] and PSA[19] interfered with the employees' collective bargaining rights.[20] After the Steelworkers filed the Board action, Newport News Shipbuilding filed a declaratory action against PSA in the United States District Court for the Eastern District of Virginia.[21] The complaint requested that the court construe the collective bargaining agreement to determine the procedures necessary to revoke checkoff authorizations, and to decide whether Newport News Shipbuilding was entitled to indemnification for any claims that arose out of the administration of the collective bargaining agreement.[22] While the district court action was pending, the Board issued unfair labor practice complaints against Newport News Shipbuilding and PSA.[23] The Board then moved to intervene and stay the district court action pending the outcome of the unfair labor practice proceeding.[24] The district court permitted the Board to participate as amicus curiae, but denied the Board's motions to intervene and to stay the district court proceeding.[25] The district court held that Newport News Shipbuilding could continue checkoffs not revoked on PSA forms and that PSA should indemnify Newport News Shipbuilding for any claims that arose from administra-

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* The unfair labor practice charges in *Peninsula Shipbuilders'* asserted that Newport News Shipbuilding violated the NLRA by interfering with the employees' right to bargain collectively and by discouraging membership in the Steelworkers. *Id.*; *see* 29 U.S.C. §§ 158(a)(1), 158(a)(3) (1976).

[19] 663 F.2d at 490. The unfair labor charges alleged that PSA violated the NLRA by interfering with the employees' right to bargain collectively and by discouraging membership in the union. *Id.*; *see* 29 U.S.C. §§ 158(b)(1), 158(b)(2) (1976).

[20] 663 F.2d at 490.

[21] *Id.* at 490-91. Newport News Shipbuilding filed a declaratory action in district court for judicial construction of section 23.2 of the collective bargaining agreement against PSA, PSA's business manager, and the 158 employees who attempted to revoke their checkoff authorizations on non-PSA forms. *Id.*

[22] *Id.* at 491. The collective bargaining agreement between Newport News Shipbuilding and PSA required PSA to indemnify Newport News Shipbuilding against any claim that arose out of the administration of the agreement. *Id.* at 491 n.5. Since PSA agreed to assume any liability from the administration of the collective bargaining agreement, Newport News Shipbuilding did not participate in the Board's unfair labor practice action against both PSA and Newport News Shipbuilding. *Id.* at 491.

[23] *Id.* The Board originally dismissed the unfair labor practice charge against PSA. *Id.* at 491 n.6. After the Steelworkers successfully appealed the decision of the Board, the Board issued a complaint against PSA on July 2, 1979. *Id.*

[24] *Id.* at 491.

[25] *Id.*

tion of the collective bargaining agreement.[26] The district court did not decide the lawfulness of section 23.2 of the collective bargaining agreement under the National Labor Relations Act (NLRA or the Act), but only interpreted the requirements of that provision of the collective bargaining agreement.[27] Neither Newport News Shipbuilding nor PSA appealed the judgment.[28] The Board, however, appealed to the Fourth Circuit the district court's denial of intervention.[29]

Armed with the district court decision, PSA moved to dismiss on res judicata grounds the unfair labor practice charges before the Board.[30] The Administrative Law Judge (ALJ) held the district court decision was not binding on the Board proceedings and refused to dismiss the unfair labor practice charges.[31] The ALJ noted that the issue before the district court was contract interpretation, while the Board's action involved unfair labor practices.[32] Furthermore, the ALJ noted that the parties in the district court action did not represent adequately either the Board's or Steelworkers' interests.[33] The ALJ concluded that the district court findings regarding construction of the collective bargaining agreement were not binding on the Board action.[34]

The Administrative Law Judge held that both PSA[35] and Newport

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[26] *Id.* The 158 employees who attempted to revoke their dues on non-PSA forms were defendants with PSA in the district court's declaratory action. *Id.* Because the 158 employees failed to appear in the district court action, the district court found them in default. *Id.*

[27] *Id.* Since both PSA and Newport News Shipbuilding agreed that section 23.2 was lawful, the district court did not decide the lawfulness of section 23.2 under the NLRA. *Id.*

[28] *See id.*

[29] *See* Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n, 646 F.2d 117 (4th Cir. 1981). The Board could appeal the denial of intervention since it was a final order. *Id.* at 123. *See, e.g.*, Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 132 (1967) (denial of intervention constitutes final appealable order); County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980) (intervening party can appeal denial of intervention); Corby Recreation, Inc. v. General Elec. Co., 581 F.2d 175, 176 n.1 (8th Cir. 1978) (denial of intervention constitutes final appealable order).

[30] *See* Newport News Shipbuilding & Drydock Co. v. United Steelworkers & Peninsula Shipbuilders Ass'n, No. JD-403-80, slip op. at 10 (July 10, 1980); note 19 *supra.*

[31] No. JD-403-80, slip op. at 18.

[32] *Id.*, slip op. at 18.

[33] *Id.*, slip op. at 18. The Administrative Law Judge speculated that the district court's interpretation of the collective bargaining agreement bound the employees who were named defendants in the district court action. *Id.*, slip op. at 18. The ALJ stated that the defendant employees could not bring another suit for interpretation of the collective bargaining agreement. *Id.*, slip op. at 18. The Board stated, however, that the district court action bound neither the Board nor the Steelworkers because neither were parties in the district court action. *Id.*, slip op. at 18.

[34] *Id.*, slip op. at 18.

[35] *Id.*, slip op. at 26. The Administrative Law Judge held that PSA committed an unfair labor practice by interfering with employees' collective bargaining rights through enforcement of section 23.2 of the collective bargaining agreement. *Id.*, slip op. at 26. The manifestations of the violations occurred when PSA told Newport News Shipbuilding to continue the checkoff and when PSA received and retained the dues of employees who attempted to revoke PSA dues checkoffs on non-PSA forms. *Id.*, slip op. at 26.

News Shipbuilding[36] had committed unfair labor practices.[37] The ALJ concluded that section 23.2 of the collective bargaining agreement violated subsection 302(c)(4) of the NLRA since the agreement required employees to go beyond the requirements of the NLRA by permitting revocation of dues checkoffs only on PSA forms.[38] The ALJ relied on *Felter v. Southern Pacific Co.*[39] to protect employees from employer-union agreements that limit a union member's ability to revoke the dues checkoff authorization.[40] In *Felter*, the Supreme Court held that a checkoff provision similar to section 23.2 violated the Railway Labor Act because the provision restricted individual employee's freedom to revoke the dues checkoff.[41] The ALJ concluded that *Felter* controlled the *Peninsula Shipbuilders'* case since section 23.2 curtailed the right of individual employees to revoke their dues.[42] The Administrative Law

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[36] *Id.*, slip op. at 26. The Administrative Law Judge concluded that Newport News Shipbuilding committed unfair labor practices by interfering with employees' collective bargaining rights through enforcement of section 23.2 of the collective bargaining agreement. *Id.*, slip op. at 26. Newport News Shipbuilding's violations consisted of restricting employees from exercising their checkoff rights and continuing to checkoff union dues to PSA after receiving unambiguous revocations of dues checkoff authorizations from the concerned employees. *Id.*, slip op. at 26.

[37] *Id.*, slip op. at 26.

[38] *Id.*, slip op. at 19. Both the NLRA and the collective bargaining agreement between PSA and Newport News Shipbuilding permitted employees to revoke their dues deduction authorizations after one year or when the collective bargaining agreement terminated. *See* 29 U.S.C. § 186(c)(4) (1976); note 12 *supra*. Section 23.2, however, required revocation of dues deduction authorizations to be on forms provided by PSA. *See* note 12 *supra*.

[39] 359 U.S. 326 (1959). In *Felter v. Southern Pacific Co.*, a dues deduction agreement between a union and an employer stated that the union's form was the only valid form for revoking dues checkoffs. *See id.* at 327. A union member challenged the contractual regulation as a violation of the statutory right to revoke the assignment of dues deductions. *Id.* at 328. The union member notified the union that he was revoking the authorization to checkoff his dues and sent a revocation form to the employer. *Id.* The union and the employer declined to revoke the dues checkoff, although the employee had used a form identical to the union forms. *Id.* at 328-29. The Supreme Court held that the dues deduction agreement violated the Railway Labor Act, 45 U.S.C. § 152(11)(b) (1976). 359 U.S. at 330. The Court held that the authority to checkoff dues does not include the authority to bind the individual employees to the checkoff. *Id.*

[40] *Id.*, slip op. at 20.

[41] 359 U.S. at 330. The Railway Labor Act permits an employee to revoke his dues checkoff authorization after one year or when the collective bargaining agreement terminates. 45 U.S.C. § 152(11)(b) (1976). The Act also permits revocation of dues deduction authorization in the same manner as the National Labor Relations Act. *Id.*; *see* note 36 *supra*. In *Felter v. Southern Pacific Co.*, the Supreme Court found a violation of the Railway Labor Act's procedure for revocation of dues deduction authorization when the union made the employee revoke his checkoff authorization on a union form. 359 U.S. at 334. Similarly, the Administrative Law Judge in *Peninsula Shipbuilders'* found a violation of the NLRA's procedure for revocation of dues deduction authorizations when PSA required employees to revoke checkoff authorizations on PSA forms. No. JD-403-80, slip op. at 21, 22.

[42] No. JD-403-80, slip op. at 22. The Administrative Law Judge held that section 23.2 of the collective bargaining agreement constituted an unfair labor practice because section 23.2 required employees to revoke their dues deduction authroizations on PSA forms. *Id.*,

Judge held, therefore, Newport News Shipbuilding and PSA jointly and severally liable to reimburse employees who had revoked checkoff authorizations on non-PSA forms.[43] The ALJ ordered[44] PSA and Newport News Shipbuilding to discontinue the requirement that revocation of dues checkoffs be on PSA forms.[45]

After the Board found that PSA and Newport News Shipbuilding had committed unfair labor practices, the Fourth Circuit reversed the district court and held the Board had a right to intervene in the district court action.[46] The Fourth Circuit concluded that the Board's jurisdiction

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slip op. at 22. The ALJ held alternatively that section 23.2 of the collective bargaining agreement was unlawful as applied, since PSA imposed further restrictions on employees beyond the requirement that employees use PSA forms to revoke dues deduction authorizations. *Id.*, slip op. at 22. First, the ALJ observed the absence of convenient access to PSA forms. *Id.*, slip op. at 23. Secondly, the ALJ noted that employees had no formal notice of proper checkoff procedures. *Id.*, slip op. at 23. Finally, the ALJ emphasized that employees could exercise the right to revoke only through personal appearance at the PSA hall. *Id.*, slip op. at 23. The Administrative Law Judge surmised that requiring employees to terminate the dues checkoff at the union headquarters constituted an unconscionable impediment to the employees' exercise of the right to revoke. *Id.*, slip op. at 23. PSA's history of abuses towards employees who did not support PSA reinforced the ALJ's conclusions. *Id.*, slip op. at 24. *See* Newport News Shipbuilding & Drydock Co., 236 NLRB No. 202, 1499, 1508-509 (1978) (unfair labor practices found against PSA and Newport News Shipbuilding for various acts of coercion against employee supporters of Steelworkers). The ALJ concluded that Newport News Shipbuilding was equally as responsible as PSA for the unfair labor practice convictions since Newport News Shipbuilding delegated to PSA responsibility for distributing the revocation forms. No. JD-403-80, slip op. at 23.

[43] No. JD-403-80, slip op. at 26.

[44] *Id.*, slip op. at 26. The Administrative Law Judge's order that PSA and Newport News Shipbuilding discontinue the requirement that revocation of dues checkoffs be on PSA forms was moot since PSA no longer was the employees' collective bargaining agent. *Id.*, slip op. at 27.

[45] *Id.*, slip op. at 27. The Board issued an enforcement order affirming the Administrative Law Judge's determination that PSA and Newport News Shipbuilding committed unfair labor practices. *See* Newport News Shipbuilding & Drydock Co., 253 NLRB No. 96,721-22 (1980).

[46] *See* Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n & NLRB, 646 F.2d 117 (4th Cir. 1981). To intervene by right an applicant must make a timely application and have an interest in the action. FED. RULE CIV. P. 24(a). In addition, the applicant must have an interest that will be impaired by disposition of the action in the applicant's absence, and the applicant's interst must be inadequately represented. *Id.* The Fourth Circuit found that the district court's denial of Board intervention impaired the Board's interest in the district court action. 646 F.2d at 121. Even though the district court action did not bar the unfair labor practice hearing before the Board, the Fourth Circuit concluded that the denial of intervention created a "practical disadvantage" for the Board. 646 F.2d at 121, *quoting* Neusse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967). The Fourth Circuit found that the Board's status as amicus curiae in the district court action did not safeguard adequately the Board's interest. 646 F.2d at 121-22. The Fourth Circuit noted that the district court's refusal to allow the Board to demonstrate that section 23.2 was an unfair labor practice on the ground that the Board lacked party status illustrated the inadequacy of amicus curiae standing. *Id.* Further, the Fourth Circuit noted the Board could not appeal the district court decision because the Board was not a party to the action. *Id.* An applicant for intervention may have an impaired interest even though the court decision is not bin-

over the subject matter of unfair labor practices constituted a sufficient interest to allow the Board to intervene.[47] The court noted that the proceeding before the Board involved the same issues as in the district court suit, and that denial of intervention could result in inconsistent interpretations of section 23.2 of the collective bargaining agreement.[48] The Fourth Circuit noted that the primary concern of both parties in the district court action was to fix ultimate financial liability resulting from the Board proceeding.[49] The Fourth Circuit did not decide whether the district court had jurisdiction over the collective bargaining dispute, but did question whether the declaratory action before the district court constituted a live justiciable controversy since the collective bargaining agreement had expired.[50] After allowing intervention, the Fourth Circuit permitted the Board to appeal all findings of the district court.[51] The Board, using the status of intervenor on appeal, appealed the determinations of the district court to the Fourth Circuit.[52] PSA petitioned the Fourth Circuit to set aside the Board's enforcement order, and the Board

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ding on the applicant. *See* Atlantis Dev. Corp. v. United States, 379 F.2d 818, 825 (5th Cir. 1967) (court decision does not have to bind party to permit intervention). The primary weakness of amicus curiae status is lack of standing to appeal. *See* Neusse v. Camp, 385 F.2d 694, 704 n.10 (D.C. Cir. 1967) (important characteristic of amicus curiae is lack of right to appeal).

The requirement of inadequate representation is met if the applicant shows the possibility of inadequate representation, and the burden of making the showing is minimal. *See* Trbovich v. UMW, 404 U.S. 528, 538 n.10 (1972). The Fourth Circuit found that the Board's interest was inadequately represented. 646 F.2d at 122. The Fourth Circuit noted that both Newport News Shipbuilding and PSA were aligned against the Board. *Id.* Furthermore, the 158 individual defendants did not have any incentive to represent the Board's interests. *Id.*

[47] 646 F.2d at 121; *see* Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183, 185 (4th Cir. 1948) (Board has sufficient jurisdictional interest in unfair labor practices to permit intervention); International Bhd. of Boilermakers v. Combustion Eng'r, Inc., 337 F. Supp. 1349, 1351 (D. Conn. 1972) (Board's jurisdictional interest sufficient to permit intervention).

[48] 646 F.2d at 120-21.

[49] *Id.* The district court held that PSA would indemnify Newport News Shipbuilding for any liability from administration of section 23.2 of the collective bargaining agreement. *Id.* at 120.

[50] *Id.* at 121. An actual controversy must exist for a federal court to issue a declaratory judgment. 28 U.S.C. § 2201 (1976 & Supp. III 1979); Smith v. DCA Food Indus., Inc., 269 F. Supp. 863, 867-68 (D. Md. 1967) (assertion of federal court jurisdiction requires existence of actual controversy).

[51] 646 F.2d at 122-23. An intervenor can appeal a determination of the court that affects the intervenor's interest. *See* Smuck v. Hobson, 408 F.2d 175, 182 (D.C. Cir. 1969) (appeal limited to intervenor's interest in proceeding). The Board had sufficient jurisdictional interest to appeal the district court's assumption of jurisdiction, refusal to stay the proceedings, and the interpretation of the collective bargaining agreement. 646 F.2d at 122-23; *see* text accompanying note 1 *supra*.

[52] *See* Peninsula Shipbuilders' Ass'n v. NLRB, 663 F.2d 488, 489 (4th Cir. 1981).

cross-applied for enforcement of the order against PSA.[53] The Board further applied for enforcement of the Board's order against Newport News Shipbuilding.[54] The Fourth Circuit consolidated the three actions on appeal.[55]

The Fourth Circuit held that because the Board had exclusive jurisdiction over the unfair labor practice actions, the Board's conclusion that section 23.2 of the collective bargaining agreement constituted an unfair labor practice preempted the district court's determination that section 23.2 was lawful.[56] Thus, the Fourth Circuit concluded that the district court's findings were invalid to the extent they conflicted with the Board's determinations.[57] The Fourth Circuit noted that the indemnification issue presented a live controversy for the district court[58] and that the district court had concurrent jurisdiction with the Board over contract disputes.[59] Nevertheless, the Fourth Circuit found the district court's jurisdiction subordinate to the Board's exclusive jurisdiction over unfair labor practice actions.[60] The Fourth Circuit reasoned that the district court should have stayed its proceedings pending the outcome of the Board action.[61] The Fourth Circuit did not find, however, that the failure to stay the proceedings was an abuse of discretion.[62] Accordingly, the Fourth Circuit did not vacate the district court's holding, but merely held the district court decision invalid where inconsistent with the Board's decision.[63]

The Fourth Circuit agreed with the Board's determination that application of section 23.2 of the collective bargaining agreement was unlawful under the National Labor Relations Act.[64] The Fourth Circuit

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[53] *Id.* The Board can petition federal circuit courts for enforcement of the Board's order. 29 U.S.C. § 160(e) (1976). Any aggrieved party can appeal the Board's enforcement order. *Id.* § 160(f). Thus, both PSA and the Board appealed the Board decision to the Fourth Circuit. 663 F.2d at 489.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 492.

[57] *Id.* at 493-94.

[58] *Id.* at 494 n.9. The Fourth Circuit concluded that the issue created an actual controversy noting the district court determination that PSA would indemnify and defend Newport News Shipbuilding for any liability arising from administration of section 23.2 of the collective bargaining agreement. *Id.; see* note 50 *supra.*

[59] 663 F.2d at 494 n.19.

[60] *Id.* at 492.

[61] *Id.* at 494. n.9.

[62] *Id.*; *see* Landis v. North American Co., 299 U.S. 248, 254-55 (1936) (power to stay proceedings is within court's discretion).

[63] 663 F.2d at 493-94.

[64] *Id.* at 492-93. The Fourth Circuit did not address the issue whether the procedure for dues deduction in the collective bargaining agreement was an unfair labor practice on its face. *Id.* The Board has stated that a violation of section 302(c)(4) of the NLRA cannot itself constitute an unfair labor practice. *See* note 38 *supra. See, e.g., In re* Salant & Salant, Inc.,

noted that employees did not have easy access to PSA forms.[65] The court observed that before 1978 employees had no information regarding the manner of revoking dues checkoff authorizations except through the clause in section 23.2 which required the use of a PSA form.[66] Finally, the Fourth Circuit noted that employees had to appear personally at the PSA hall to sign the proper forms.[67] While the Fourth Circuit found no evidence of harassment at the PSA office, the court asserted that the additional requirement of appearance at the PSA office could restrict the employees' freedom to revoke union dues.[68] The Fourth Circuit concluded that the Board properly applied section 23.2 and affirmed the Board's order requiring PSA and Newport News Shipbuilding to reimburse employees who had attempted to revoke dues deductions on non-PSA forms.[69]

In *Peninsula Shipbuilders' Association v. NLRB*, the Fourth Circuit addressed a lawsuit that had inconsistent interpretations of a collective bargaining agreement as a consequence of the district court's failure to recognize the Board's role as primary arbiter of labor disputes.[70] The district court should not have asserted jurisdiction since the collective bargaining agreement had expired.[71] Furthermore, the district court did not have to interpret the indemnification and defense sections of the collective bargaining agreement since PSA already had agreed to indemnify and defend Newport News Shipbuilding for any liability that arose from administration of the collective bargaining agreement.[72] No actual

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88 NLRB 816, 817-18 (1950) (§ 302 of NLRA has enforcement provisions and violation thereof cannot be per se unfair labor practice). *But see* NLRB v. Atlanta Printing Specialties & Paper Prod. Union, 523 F.2d 783, 784-85 (5th Cir. 1975) (in face of valid revocation, employer's continued checkoff is unfair labor practice); NLRB v. Penn Cork & Closures, Inc., 376 F.2d 52, 55 (2nd Cir. 1967), *cert. denied*, 389 U.S. 843 (1967) (penalties contained within § 302 do not immunize section from unfair labor practice scrutiny).

[65] 663 F.2d at 492-93.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 493. PSA argued that the difficulty employees experienced in revoking their dues checkoffs resulted from PSA's concern about the authenticity of the revocation signatures. *Id.* The Fourth Circuit rejected PSA's argument and stated that PSA should have consulted informally with the employees if PSA was concerned with the autenticity of the signatures. *Id.*, *quoting* Felter v. Southern Pacific Co., 359 U.S. 326, 335 (1958).

[69] 663 F.2d at 493-94.

[70] *See* note 1 *supra.*

[71] 663 F.2d at 490-91. Newport News Shipbuilding brought the declaratory action on November 16, 1978 and the collective bargaining agreement expired on October 28, 1978. *Id.* No actual controversy was before the court since the contract had expired. *See* Mackay v. Loew's Inc., 84 F. Supp. 676, 677 (S.D. Cal. 1949) (employee cannot bring declaratory action if collective bargaining agreement has expired). The Fourth Circuit in *Peninsula Shipbuilders'* stated that a live controversy was before the district court over indemnification but the Fourth Circuit enforced the Board's decision which did not permit PSA to indemnify Newport News Shipbuilding. 663 F.2d at 492-93.

[72] *See* note 22 *supra.*

controversy was before the district court because the real reason Newport News Shipbuilding brought the declaratory action was to absolve itself from any liability before the Board.[73] Thus, the district court should have stayed or dismissed its proceedings pending the outcome of the Board dispute.[74] Since the district court failed to stay or dismiss its proceedings, the Fourth Circuit permitted the Board to intervene to render appealable all determinations of the district court.[75]

Once the Board appealed the district court action, the Fourth Circuit correctly deferred to the Board's determinations.[76] Although the Board did not dismiss explicitly the district court decision, the effect of the Fourth Circuit's preemption remedy was dismissal of the district court findings.[77] The district court held that section 23.2 was lawful,[78] but the Board held that section 23.2 constituted an unfair labor practice.[79] The district court held that PSA should indemnify Newport News Shipbuilding,[80] but the Board held PSA and Newport News Shipbuilding jointly and severally liable to the employees.[81] As a consequence of the Fourth Circuit's deference to the Board's determinations on both the section 23.2 and indemnity issues, the district court decision was practically dismissed.

The Fourth Circuit's decision in *Peninsula Shipbuilders'* limits federal court concurrent jurisdiction over collective bargaining contract disputes. By stating that the district court should have stayed its proceedings,[82] the Fourth Circuit determined that the Board had exclusive jurisdiction over section 23.2 of the collective bargaining agreement since it involved unfair labor practices.[83] Although the Fourth Circuit's decision fails to establish when a court should stay its proceedings pending the Board's determination,[84] courts will certainly have to stay or dismiss their proceedings once the Board takes subsequent jurisdiction over the same contract provisions. Thus, a federal court has concurrent jurisdiction over a contract dispute provided the Board does not adjudicate subsequent unfair labor charges over the same contract provisions.

In *Peninsula Shipbuilders'*, the Fourth Circuit correctly recognized that PSA and Newport News Shipbuilding committed unfair labor prac-

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[73] 649 F.2d at 120-21; *see* notes 22 & 50 *supra*.
[74] *See* text accompanying note 5 *supra*.
[75] *See* text accompanying note 51 *supra*.
[76] 663 F.2d at 492-93.
[77] *See id.*
[78] *Id.* at 492.
[79] *Id. See* notes 35 & 36 *supra*.
[80] *See* text accompanying note 26 *supra*.
[81] *See* text accompanying note 43 *supra*.
[82] 663 F.2d at 494 n.9.
[83] *Id.* at 492.
[84] *Id.* at 494 n.9.

tices by enforcing section 23.2 of the collective bargaining agreement.[85] The Board's findings of fact demonstrated that PSA and Newport News Shipbuilding interfered with employees' right to revoke dues checkoffs.[86] Although the Fourth Circuit did not decide whether section 23.2 was unlawful on its face,[87] the Fourth Circuit penalized PSA and Newport News Shipbuilding for their unlawful application of section 23.2 to Newport News Shipbuilders' employees.[88] Thus, by deferring to the Board's determinations, the Fourth Circuit protected employees from the unlawful practices of their union and employer.

JOHN PALMER FISHWICK, JR.

C. Section 2(3) of the NLRA and the "Right to Control" Test

Section 2(3) of The National Labor Relations Act (Act),[1] as amended by The Labor Management Relations Act of 1947 (LMRA),[2] excludes independent contractors from coverage under the Act.[3] Congress did not define the term "independent contractor" in the Act,[4] but intended the exclusion to codify the common-law distinction between independent contractors and employees.[5] Prior to the 1947 amendment to the

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[85] *See* text accompanying notes 64-68 *supra.*

[86] *See* note 42 *supra*; Congress has stated that the Board's findings of fact are conclusive if supported by substantial evidence. 29 U.S.C. § 160(e) (1976); *see* Community Hosp. of Roanoke Valley, Inc. v. NLRB, 538 F.2d 607, 609-10 (4th Cir. 1976) (Board's findings of fact conclusive if supported by substantial evidence).

[87] *See* note 64 *supra.*

[88] *See* text accompanying notes 43-45 *supra.*

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[1] 29 U.S.C. § 152(3) (1976).

[2] Pub. L. No. 101, § 101, 61 Stat. 136 (1947).

[3] 29 U.S.C. § 152(3) (1976). Section 2(3) of the National Labor Relations Act (Act) now defines the term "employee" as any employee, not merely the employees of a particular employer. *Id.* The Act excludes from the term "employee" any individual having the status of independent contractor, anyone employed as an agricultural laborer, domestic servant, or supervisor, anyone employed by a parent or spouse, anyone employed by an employer subject to the Railway Labor Act, 45 U.S.C. § 151 (1976), and anyone employed by someone not an employer within the meaning of the Act. 29 U.S.C. § 152(3) (1976).

[4] 29 U.S.C. § 152(3) (1976); *see* note 3 *supra* (Act's definition of employee). The Act does not clarify the meaning of the term "independent contractor."

[5] NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (obvious congressional purpose in amending act to have courts and NLRB use agency principles to distinguish between employees and independent contractors); Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 909 (D.C. Cir. 1978) (NLRB and courts must avoid tendency to expand meaning of term "employee" beyond limits set by common-law agency principles); *see* note 7 *infra* (legislative history of Act).

The common law recognized a distinction between independent contractors and employees that derived from the amount of control the master reserved over the

Act,[6] the National Labor Relations Board (Board, NLRB) acted with the United States Supreme Court's sanction in interpreting the term "employee" expansively.[7] The Supreme Court interpreted section 2(3) of the amended Act to require the NLRB and reviewing courts to apply common-law agency principles to distinguish employees from independent contractors on a case by case basis.[8] Courts have developed the

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individual's conduct in performing the required services. RESTATEMENT (SECOND) OF AGENCY § 220(1) (1957). The nature of the relationship between master and servant, though not precisely definable, determined the master's potential liability to third parties for the acts of his servant. *Id.*, Comment c at 486. Thus, while a master would be liable for injuries arising out of the negligent conduct of a servant in performing his duties, the master would not be liable for the negligence of an independent contractor. *Id.*, Comment e at 487-88. An individual rendering service but retaining control over the manner of performance would be an independent contractor not a servant. *Id.* at 488. Factors indicating a master-servant relationship included close supervision, unskilled labor, use of tools that the master supplied, payment by the hour or month, long-term employment with regular hours, full-time employment by one employer, work done constituting part of the employer's regular business, the belief of the parties concerning the nature of the relationship, and an agreement limiting delegation of the duties agreed upon. *Id.* § 220(2) & Comment h at 489.

[6] Pub. L. No. 101, § 101, 61 Stat. 136 (1947), now codified as 29 U.S.C. § 152 (1976). Prior to the 1947 amendment, the Act defined "employee" in the same way as the current Act, *see* note 3 *supra*, except that the term "employee" excluded from coverage under the Act only agricultural laborers, domestic servants, and employees of parents or spouse. National Labor Relations Act, § 2(3), 49 Stat. 449 (1935) (current version at 29 U.S.C. § 152(3) (1976)).

[7] *See, e.g.*, Stockholder's Publishing Co., 28 N.L.R.B. 1006, 1023 n.33 (1941) (in determining employment status under Act, primary consideration is whether policies and purposes of Act justify granting individual in question rights and protection Act guarantees); Seattle Post-Intelligence Dept. of Hearst Publications, Inc., 9 N.L.R.B. 1262, 1274-75 (1938) (public policy requires broad interpretation of employment status pursuant to Act). *See also* NLRB v. E. C. Atkins & Co., 331 U.S. 398, 403 (1947) (Board not confined to technical or common-law definition of employee, but may examine relevant economic and statutory considerations since Congress did not define term); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124, 127-29 (1944) (policy considerations, legislative intent, and economic realities of employment relations relevant to determination of employee or independent contractor status); NLRB v. Gluek Brewing Co., 144 F.2d 847, 855 (8th Cir. 1944) (common-law definitions of employment relationships must yield to more inclusive definitions to effectuate purpose of Act). *But see* H. R. REP. No. 245, 80th Cong., 1st Sess. 18, *reprinted in* [1947] I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 309 (criticizing *Hearst* Court for expanding meaning of term "employee" and ignoring customary legal distinction between independent contractor and employee).

[8] NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256, 258 (1968). The *United Insurance* Court examined the employment relationship between the company and the debit agents that collected premiums, sold new insurance, and kept old policies from lapsing for the company. *Id.* at 255. The Court weighed all the incidents of the relationship, listing numerous factors relevant to the determination that the debit agents were employees of the insurance company. *Id.* at 258. The Court noted that the agents were essential to the company's ordinary operations and did business in the company's name, that company personnel trained the agents and assisted them in performing their jobs, and that the agents sold only company insurance policies. *Id.* Other factors the Court mentioned were that the agents regularly reported the funds they collected to the company under a procedure the company developed, that the company unilaterally set the conditions and terms of employment, that the agents participated in the company's benefit plans, and that the company had issued a

right to control test from common-law agency principles to determine an individual's employment status under section 2(3) of the Act.[9] In applying the right to control test, courts and the Board examine the nature of the control the putative employer exerts over the disputed individual's performance by analyzing all elements of the employment relationship.[10] If the employer controls the manner and means of the putative employee's performance, the individual is an employee within the meaning of section 2(3).[11] If the employer simply assigns the task and accepts or rejects the end product, the individual is an independent contractor.[12]

Government regulation of employers may complicate assessment of the degree of control present in an employment relationship.[13] Federal regulation of the trucking industry affects application of the right to con-

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policy statement asserting that debit agents could not operate except by complying with company procedures. *Id.* at 258-59. The *United Insurance* Court emphasized that no single factor was decisive in the determination of the debit agents' status. *Id.* at 258. The court must assess the entire factual context of the employment relationship. *Id.*

[9] The Second, Third, Sixth, Eighth, Tenth, and District of Columbia Circuits consider the right to control test determinative of an individual's employment status. *See* note 81 *infra*. The First, Fifth, and Ninth Circuits consider other factors in addition to the right to control test. *See* note 82 *infra*. *See also* T. KHEEL, 2 LABOR LAW §§ 8.02[4][a] & 8.02[5][b][iv] (1981).

[10] *See, e.g.*, NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 382 (3d Cir. 1979); Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 873-74 (D.C. Cir. 1978); NLRB v. Warner, 587 F.2d 896, 899 (8th Cir. 1978); Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 449 (2d Cir. 1975); NLRB v. Cement Transp. Inc., 490 F.2d 1024, 1027 (6th Cir.), *cert. denied*, 419 U.S. 828 (1974); NLRB v. A. S. Abell Co., 327 F.2d 1, 4-5 (4th Cir. 1964); Continental Bus Sys., Inc. v. NLRB, 325 F.2d 267, 271 (10th Cir. 1963); Mitchell Bros. Trucklines, 249 N.L.R.B. 476, 479-80 (1980).

[11] NLRB v. Maine Caterers, Inc., 654 F.2d 131, 133-34 (1st Cir. 1981) (employer's right to control means of job performance requires enforcement of Board order stating that drivers are employees); Seven-Up Bottling Co. v. NLRB, 506 F.2d 596, 598-99 (1st Cir. 1974) (employer's right to control manner of performing services indicates employee status); Standard Oil Co., 230 N.L.R.B. 967, 968 (1977) (factors indicating that employer controlled manner and means of performance outweigh factors indicating independent contractor status); John Himmer Transfer, Inc., 221 N.L.R.B. 284, 285 (1975) (factors indicating extensive employer control over owner-operators demonstrate employee not independent contractor despite some factors showing degree of freedom in performing duties).

[12] *See* NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 385 (3d Cir. 1979) (company's lack of control over details of owner-operator's performance indicates independent contractor status); Frito-Lay, Inc. v. NLRB, 385 F.2d 180, 184 (7th Cir. 1967) (failure to distinguish between employer's control over result sought and control over manner and means of performance is basis of erroneous Board decision granting distributors status as employees); George Transfer & Rigging Co., 208 N.L.R.B. 494, 496 (1974) (employer-employee relationship not established when employer's control extends "*solely*" to results sought) (emphasis in original); Portage Transfer Co., 204 N.L.R.B. 787, 788 (1973) (when employer exercised control only over matters relating to results sought, no employer-employee relationship established).

[13] Local 814, Int'l Brotherhood of Teamsters v. NLRB, 512 F.2d 564, 568-69 (D.C. Cir. 1975) (Bazelon, J., dissenting), *cert. denied*, 434 U.S. 818 (1977); Tri-State Transp. Corp., 245 N.L.R.B. 1030, 1032 (1979).

trol test because the regulations establish minimum levels of employer control over leased vehicles and the drivers operating those vehicles.[14] Courts applying the right to control test in a regulated industry must determine whether to consider indicia of employer control arising out of government regulations.[15]

In *NLRB v. Tri-State Transportation Corp.*,[16] the Fourth Circuit reviewed the status of a non-owner driver of a leased vehicle in the heavily regulated trucking industry.[17] Tri-State Transportation Corp. (Tri-State), a West Virginia contract pipe carrier, operates under an Interstate Commerce Commission (ICC) certificate of public convenience and necessity.[18] To increase the company's hauling capacity, Tri-State's president executed and signed a lease agreement with Violet Coss, whose husband Joseph D. Coss was the owner and actual lessor of the trucking equipment.[19] Cunningham, an intermittent driver of Coss's leased vehicles, possessed a power of attorney from the hospitalized Coss and assisted Mrs. Coss in the negotiations leading to an agreement covering one truck and driver.[20]

The lease agreement set out each party's responsibilities.[21] Pursuant to applicable ICC regulations, lessor Coss's responsibilities included license fees, fines and penalites arising out of the rig's unlawful operations, maintenance costs, and liability insurance on the rig itself.[22] In conforming with ICC regulations, lessee Tri-State assumed responsibility for liability insurance for damage to the cargo or the public.[23] The lease absolved lessee Tri-State from responsibility for the driver of the

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[14] NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 383 (3d Cir. 1979). The objects of federal regulation of the trucking industry are to promote highway safety and ensure financial responsibility so that losses do not go uncompensated. White v. Excalibur Ins. Co., 599 F.2d 50, 53-54 (5th Cir.), *cert. denied*, 444 U.S. 965 (1979); NLRB v. Deaton, Inc., 502 F.2d 1221, 1224-25 (5th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975). Thus, the regulations protect both the general public and the industry's consumers.

[15] *See* NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 383 (3d Cir. 1979) (federal regulations help shape relationship between owner-operator and company); Ace Doran Hauling & Rigging Co. v. NLRB, 462 F.2d 190, 194 (6th Cir. 1972) (court must consider controls arising out of compliance with federal regulations in conjunction with additional employer controls in assessing nature of employment relationship); Mitchell Bros. Truck Lines, 249 N.L.R.B. 476, 477, 480 (1980) (state and federal regulations dictate much of employment relationship between employer and owner-operators).

[16] 649 F.2d 993 (4th Cir. 1981).

[17] *Id.* at 995.

[18] *Id.* The Interstate Commerce Commission (ICC) has statutory authority and discretion to issue certificates of public necessity and convenience authorizing a motor carrier to engage in interstate transportation. 49 U.S.C. § 10922 (1976 & 1978 Supp. II). No person lacking the appropriate certificate may engage in interstate transportation. *Id.* § 10921.

[19] 649 F.2d at 995.

[20] *Id.* at 995-96.

[21] *Id.* at 996; *see* notes 48 & 52 *infra* (impact of ICC regulations on lease).

[22] 649 F.2d at 996.

[23] *Id.*

leased vehicle and denied the driver status as a Tri-State employee.[24] Tri-State paid Coss seventy-five percent of the gross receipts that the leased vehicle generated, and Coss apparently paid Cunningham twenty-five percent of that amount.[25] Tri-State did not withhold tax, social security, or other payroll deductions from Cunningham's pay check, although Tri-State did make deductions for the drivers the company conceded had employee status.[26] At Coss's request, Tri-State issued the first four checks payable to Cunningham, although Tri-State made subsequent payments directly to Coss when he requested the company do so.[27] The working relationship that developed between Cunningham, Coss, and Tri-State indicated that both Coss and Tri-State directed Cunningham's performance as a driver.[28] Tri-State dispatched Cunningham directly when he called in for assignments, but used Coss as an intermediary when Cunningham did not check in.[29] When Cunningham and Tri-State's president disagreed over a particular assignment, Coss participated in the resolution of the dispute.[30]

When Cunningham refused to cross a picket line of striking Tri-State drivers,[31] Tri-State's president notified Coss that Tri-State was cancelling the lease on the rig that Cunningham drove.[32] Cunningham asserted that since he was a Tri-State employee within the meaning of the Act, Cunningham's discharge through the president's cancellation of the lease constituted an unfair labor practice.[33] At the hearing before the Administrative Law Judge (ALJ),[34] Tri-State conceded that if Cunning-

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[24] *Id.* at 995 n.2.

[25] *Id.* at 996 & 996 n.3.

[26] *Id.* at 996. Coss provided Cunningham with fringe benefits. Brief for Petitioner at 9, NLRB v. Tri-State Transp. Corp., 649 F.2d 993 (4th Cir. 1981) [hereinafter cited as Brief for Petitioner].

[27] 649 F.2d at 996.

[28] *Id.*

[29] *Id.*

[30] Brief for Respondent at 4, NLRB v. Tri-State Transp. Corp., 649 F.2d 993 (4th Cir. 1981).

[31] Tri-State Transp. Corp., 245 N.L.R.B. 1030, 1032 (1979).

[32] 649 F.2d at 997. Tri-State's president terminated the lease the same day Cunningham refused to cross the picket line. 245 N.L.R.B. at 1032.

[33] 245 N.L.R.B. at 1030. Section 8(a)(1) of the Act prohibits employer discrimination against employees participating in union activities for the mutual aid and protection of other employees. 29 U.S.C. § 158(a)(1) (1976); *see* note 3 *supra* (definition of employee under Act).

The complaint alleged that Tri-State unlawfully had dismissed five employees for participation in protected activities. 245 N.L.R.B. at 1030. Tri-State settled the cases of the other four employees prior to the opening hearing in Cunningham's case. Brief for Petitioner, *supra* note 26, at 2.

[34] 649 F.2d at 994. According to the Board procedure, the General Counsel for the NLRB issues a complaint against an employer upon receipt of a formal charge against an employer or labor union. 29 U.S.C. § 160(b) (1976). *See generally* A. COX, D. BOK, & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 105 (9th ed. 1981) [hereinafter cited as COX]. Any person, employer, or qualified labor organization in the office for the region in which the

ham had been a Tri-State employee the discharge of Cunningham would violate section 8(a)(1) of the Act[35] protecting concerted activities.[36] The Board, on review, concluded that the employment relationship between Tri-State and Cunningham determined the outcome of the unfair labor practices charge against Tri-State.[37] The Board adopted the ALJ's decision that Cunningham was an employee within section 2(3) of the Act, thereby affirming that Tri-State had violated section 8(a)(1) of the Act.[38] On appeal, the Fourth Circuit agreed with the Board that the nature of the employment relationship between Cunningham and Tri-State determined the outcome of the unfair labor practices charge.[39] The Fourth Circuit reversed the Board, however, holding that the evidence as a whole would not support a finding that Cunningham was a Tri-State employee.[40]

In reversing, the Fourth Circuit briefly discussed the standard governing appellate review of NLRB decisions.[41] The Fourth Circuit announced an intention to follow the standard of review the Supreme Court promulgated in *Universal Camera Corp. v. NLRB*.[42] The *Universal*

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alleged unfair labor practice occurred may file a charge within six months of the offense. 29 U.S.C. § 160(b) (1976); Cox, *supra*, at 105. A Board field examiner investigates the allegations to determine the validity of the charge. Cox, *supra*, at 105. If the NLRB does not drop charges, the Board usually will encourage settlement of the dispute in informal conferences in the local office. *Id.* Most unfair labor practice charges are settled at informal conferences. *Id.* at 106.

If the Board does not drop the charges, the next step is formal proceedings before an Administrative Law Judge (ALJ). *Id.* at 107. At the hearing, both parties may introduce evidence, submit written briefs in support of their positions, and make oral arguments, although the last is uncommon. *Id.* at 108. The ALJ prepares a decision containing proposed findings of fact and recommendations for the Board. 29 U.S.C. § 160(c) (1976). The Board usually adopts the ALJ's findings unless one or more of the parties files an exception to the proposed findings. Cox, *supra*, at 108. After reviewing any exceptions and supporting briefs, if filed, the Board issues an opinion and order. 29 U.S.C. § 160(c) (1976). Since Board orders are not self-enforcing, the Board must seek enforcement against a non-complying party by filing a petition for enforcement in the federal court of appeals in the circuit in which the unfair labor practice occurred. *Id.* § 160(e). Any person aggrieved by a final Board order granting or denying relief in whole or in part may obtain review of the order in the appeals court in the circuit in which the unfair labor practice occurred, the circuit in which the respondent does business, or in the District of Columbia Court of Appeals. *Id.* § 160(f).

[35] 245 N.L.R.B. at 1030.

[36] *Id.*; *see* note 33 *supra*.

[37] 245 N.L.R.B. at 1030.

[38] *Id.* at 1032.

[39] 649 F.2d at 994.

[40] *Id.* at 997.

[41] *Id.* at 995.

[42] *Id.* at 994; *see* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The *Universal* Court reversed the Second Circuit on the standard of review an appellate court should apply to an appeal of an NLRB decision regarding an unfair labor practice under § 8(a) of the Act. *Id.* at 490. The Supreme Court identified as error the Second Circuit's refusal to examine part of the record merely because isolated portions of the record supported the Board's decision. *Id.* at 492.

Court held that unless the evidence in the record as a whole, including evidence detracting from the Board's findings, substantiates the Board's decision, an appellate court may overrule that decision.[43] The *Universal* Court, however, emphasized that courts must uphold Board decisions when the evidence indicates that the Board chose "between two fairly conflicting views."[44] The Board's decision regarding Cunningham's employment status required the application of common-law principles to the Board's factual findings.[45] Tri-State did not raise issues requiring the Board to apply its special expertise. Nevertheless, the Fourth Circuit recognized the duty to defer to the Board if the Board chose between two fairly conflicting views.[46]

The Fourth Circuit scrutinized the employment relationship between Tri-State and Cunningham in applying the right to control test to evaluate Cunningham's status.[47] The court noted that federal regulations complicate the application of the right to control test in the trucking industry by requiring carriers to exert some indicia of control over non-owner drivers of leased equipment.[48] The Fourth Circuit discerned from case law a standard for evaluating the effect of federal regulations on assessment of an employer's right to control the details of a putative employee's performance.[49] The standard that the court applied required a determination of whether the carrier imposed a significant layer of regulations on the individual's job performance beyond what federal regulations mandate.[50]

The Fourth Circuit found a variety of factors relevant to assessing the nature of the control Tri-State exercised over Cunningham. The

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[43] 340 U.S. at 497. The *Universal* Court reasoned that § 10(e) of the Act, as amended by the Labor Management Relations Act (LMRA), *see* note 2 *supra*, in 1947, 29 U.S.C. § 160(e) (1976), requires appellate courts to apply the substantial evidence test to Board decisions. 340 U.S. at 477. The Board's findings of fact are conclusive only if substantial evidence in the record as a whole supports those findings. *Id.* at 487. The kind of scrutiny Congress intended appellate courts to apply to Board decisions precludes courts from judging the sufficiency of supporting evidence without also considering the contradictory or potentially contradictory evidence available to the reviewing courts. *Id.* at 487-88. Courts must consider all probative evidence that appears credible, even if the Board discounted some or all of the evidence. *Id.* at 495-97.

[44] 340 U.S. at 488.

[45] 649 F.2d at 995.

[46] *Id.*

[47] *Id.* at 995-97.

[48] *Id.* at 995; *see, e.g.*, Lease & Interchange of Vehicles, 49 C.F.R. § 1057 (1980); Hours of Service of Drivers, 49 C.F.R. § 395 (1980); Identification of Vehicles, 49 C.F.R. § 1058 (1980); and Qualifications of Drivers, 49 C.F.R. § 391 (1980). *See also* note 52 *infra* (discussion of indicia of control arising out of federal regulations).

[49] 649 F.2d at 995.

[50] *Id.* (citing Local 814, Int'l Brotherhood of Teamsters (Santini Bros. Inc.), 208 N.L.R.B. 184, 197 n.18 (1974), *remanded for clarification*, 512 F.2d 564 (D.C. Cir. 1975), *clarified*, 223 N.L.R.B. 752, *upheld*, 546 F.2d 989 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818 (1977)).

court examined the terms of the lease agreement and the practice of the parties in dealing with each other.[51] The court noted that federal regulations determined some of the terms of the lease agreement and influenced the course of dealing, although the Fourth Circuit did not identify examples of either.[52] In addition, the Fourth Circuit considered other factors important to a determination of whether Cunningham was an employee or independent contractor. The court noted that Cunningham did not complete his employment application form and that Tri-State personnel files identified Cunningham as a driver for owner-broker rather than simply a driver.[53] Tri-State paid Cunningham and Coss on a percentage basis for each job, withholding no tax, social security, or other payroll deductions.[54] Tri-State needed Coss's permission before a driver other than Cunningham could operate the leased rig.[55] The Fourth Circuit further considered the parties' perceptions of the employment relationship,[56] Cunningham's right to refuse a job,[57] and Tri-State's ability to terminate

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[51] 649 F.2d at 996-97.

[52] *Id.* at 995. The Fourth Circuit in *Tri-State* stated that many lease provisions obligating Tri-State's performance arose from federal and state regulations. *Id.*

Federal regulations require the lessee to provide liability insurance for public injury and damages to shipped goods. 49 C.F.R. § 1043.1 (1980). Regulations require the lessee to display his insignia, name, and number prominently on leased vehicles. *Id.* § 1058. The lessee must give each driver a written examination or obtain a certificate stating the driver has passed a written examination. *Id.* § 391.11(b)(11). The lessee must ensure that its drivers are conversant with regulations establishing the maximum driving and on-duty time, travel time, and those requiring that drivers maintain and file daily logs of their trips. *Id.* § 395.1-.3 & .7-.9. The motor carrier may not permit a person to drive a motor vehicle unless the person meets the specifications set forth in the regulations. *Id.* § 391.11.

The Fourth Circuit also noted that lessor Coss assumed responsibility for furnishing the necessary licenses, for paying fines and penalties arising out of illegal operation of the rig, for maintenance costs, and for insurance of the equipment itself. 649 F.2d at 996.

[53] 649 F.2d at 996. The Fourth Circuit in *Tri-State* stressed that the application form conformed to federal regulations requiring the lessee to obtain certain information from each driver. *Id.* at n.4; *see* 49 C.F.R. §§ 391.21, .61 & .63 (1980) (requirements of application for employment and limited exceptions to requirements).

[54] 649 F.2d at 996. Tri-State did make deductions for drivers having the status of employees. *Id.* Coss was responsible for Cunningham's fringe benefits. Brief for Petitioner, *supra* note 26, at 9.

[55] 649 F.2d at 996.

[56] *Id.* The parties involved in the dispute in *Tri-State* did not agree on the nature of the employment relationship. *Id.* Tri-State's general manager considered Cunningham one of Coss's employees. *Id.* Tri-State's president thought Cunningham and Coss were partners, though Coss's wife testified that no partnership existed. *Id.* Cunningham considered himself a Tri-State employee. *Id.*

[57] *Id.* The *Tri-State* majority implied that Tri-State's president deferred to Coss on whether Cunningham had to make the trip. *Id.* The majority further stressed that Cunningham's concern with profit and loss on the trip indicated an entrepreneurial interest on his part. *Id.* The *Tri-State* dissent elaborated that Coss, also concerned over the risk of loss on the trip, nevertheless considered any attempt to refuse Tri-State's request on that point futile, indicating that Cunningham and Coss lacked authority to make entrepreneurial decisions affecting profit and loss. *Id.* at 1001 (Murnaghan, J., dissenting).

the employment relationship.[58] The court found the record did not support the ALJ's findings, affirmed by the NLRB, that Cunningham was a Tri-State employee.[59] The majority of the factors on which the ALJ relied to establish control were "expressions or consequences" of federal regulations, and, therefore, irrelevant to the determination of employment status.[60]

The *Tri-State* dissent criticized the majority opinion on two grounds. The dissent asserted that the majority conducted a *de novo* review of Cunningham's status under the Act instead of applying the standard of review the majority had established.[61] The dissent criticized the majority for not enforcing the Board's choice between fairly conflicting views, as the applicable standard of review required.[62] The dissent characterized the Board's decision as reasonable in light of the evidence that the whole record presented.[63]

Secondly, the *Tri-State* dissent argued that since the effects of federal regulations are significant, the court should consider the regulations as factors in evaluating an individual's employment status under the right to control test.[64] Under the dissent's analysis, the right to control rather than the reason for control, is important regardless of the form the control takes.[65] The dissent characterized the "involuntary" incidents of control that the regulations mandated as representing only

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[58] *Id.* at 997. Tri-State terminated the lease agreement, effectively firing Cunningham. *Id.* Coss actually fired Cunningham, telling him that Tri-State "had fired his truck." *Id.*

[59] *Id.*

[60] *Id.* The Fourth Circuit in *Tri-State* provided no explanation for the holding except to note that the ALJ erroneously had relied on indicia of employer control derived from federal regulations. *Id.* The Board decision, affirming the ALJ's judgment that Cunningham was a Tri-State employee, listed several factors in the employment relationship as critical. 245 N.L.R.B. at 1032. Of the critical factors the Board cited to support the conclusion that Cunningham was an employee, federal regulations affected only Tri-State's prohibition on backhauling, the drivers' mandatory daily logs, and some of the rules Tri-State imposed on all drivers. *See* 649 F.2d at 1000; 245 N.L.R.B. at 1032. The factors the Board cited included Tri-State's control over assignments because Cunningham could not refuse a job and Tri-State's subsequent control over Cunningham's income, especially since he could not augment his income with other hauling jobs. 245 N.L.R.B. at 1032. Other factors were Tri-State's discharge threats and use of lease cancellation as a disciplinary measure, and Tri-State's control over Cunningham's employment conditions and work hours. *Id.*

[61] 649 F.2d at 998 (Murnaghan, J., dissenting); *see* text accompanying notes 42-46 *supra.*

[62] 649 F.2d at 1004 (Murnaghan, J., dissenting), *see* notes 42-44 *supra* (applicable standard).

[63] 649 F.2d at 998 (Murnaghan, J., dissenting).

[64] *Id.*

[65] *Id.* at 998-99 (Murnaghan, J., dissenting). The *Tri-State* dissent disagreed with the majority's decision to ignore federal regulatory controls and examine only controls Tri-State imposed on its own initiative. *Id.* at 998. Nevertheless, the dissent evaluated Tri-State's additional controls in isolation and found them sufficiently indicative of control to establish an employer-employee relationship. *Id.* at 1000; *see* notes 68-70 *infra.*

the threshold level of Tri-State's control over Cunningham.[66] The dissent found that Tri-State imposed sufficient additional controls to make Cunningham an employee.[67] For example, Tri-State closely supervised Cunningham's work, imposing a number of rules on all drivers, only some of which derived from federal regulations.[68] In addition, Tri-State's president considered herself Cunningham's boss and treated him as an employee,[69] and Tri-State controlled Cunningham's income by prohibiting moonlighting and backhauling.[70] The dissent applied a standard different from the majority's for assessing the effect of federal regulations on the right to control test[71] and characterized the relationship between Cunningham and Tri-State as an employer-employee relationship.[72]

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[66] 649 F.2d at 1000 (Murnaghan, J., dissenting).

[67] *Id.*

[68] *Id.* Tri-State's president told Cunningham that she would not tolerate unauthorized female passengers, drinking, loafing, or moonlighting and that Tri-State would not pay Coss until Cunningham turned in his trip log. *Id.* Federal regulations do not prohibit loafing or moonlighting, but § 392.60 of the ICC regulations prohibits unauthorized passengers. 49 C.F.R. § 392.60 (1980). Section 392.5 prohibits drinking and driving, and § 391.15(c)(2) disqualifies a driver for that offense. *Id.* §§ 392.60, 391.15(c)(2)(i). A driver's failure to complete trip logs accurately and keep them current, or the carrier's failure to file logs promptly and retain them as required subjects both driver and carrier to prosecution. *Id.* § 395.8(a). The dissent noted that the regulations do not require drivers to turn the logs in on time as a precondition of payment. 649 F.2d at 1000 (Murnaghan, J., dissenting).

[69] 649 F.2d at 1000-01 (Murnaghan, J., dissenting). Tri-State's president told Cunninghan she was his boss, and Coss also referred to her as Cunningham's boss on at least one occasion. *Id.* at 1001. The president had authority to hire and fire Cunningham and threatened to fire Cunningham when she suspected him of allowing an unauthorized female passenger to accompany him in violation of Tri-State rules and federal regulations. *Id.*; *see* note 68 *supra*. In addition, Tri-State's dispatch and scheduling procedures ensured that Tri-State retained control through setting time schedules, checking trip logs, assigning jobs, and setting routes. 649 F.2d at 1001 (Murnaghan, J., dissenting). The *Tri-State* dissent disputed the majority's contention that occasional use of Coss as a relay indicated Coss supervised Cunningham. *Id.* at 1001.

[70] 649 F.2d at 1003 (Murnaghan, J., dissenting). ICC regulations provide that the lessee maintain exclusive possession, control, and use of the equipment. 49 C.F.R. § 1057.12(d)(1) (1980). Parties to the lease may agree to limit those provisions to times when the lessee is using the equipment. *Id.* § 1057.12(d)(4). Tri-State controlled Cunningham's income because Tri-State denied him any opportunity to exercise entrepreneurial judgment by rejecting Tri-State assignments or engaging in moonlighting and backhauling. 649 F.2d at 1002-03 (Murnaghan, J., dissenting).

[71] 649 F.2d at 999 (Murnaghan, J., dissenting). The *Tri-State* dissent considered federal regulations as significant factors in resolving the dispute over Tri-State's right to control Cunningham's activities in the performance of his duties. *Id.*; *see* text accompanying notes 64-65 & 48-50 *supra* (majority standard).

[72] 649 F.2d at 998 (Murnaghan, J., dissenting). The *Tri-State* dissent contended that substantial evidence supported the Board's interpretation of the employment relationship, obligating the court to uphold the Board's decision that Cunningham was a Tri-State employee. *Id.* at 1004; *see* text accompanying notes 61-63 *supra*.

The *Tri-State* dissent further considered the possibility that Tri-State and Coss might be joint employers of Cunningham. *Id.* at 1003-04 (Murnaghan, J., dissenting).

The Fourth Circuit's reliance on the common-law right to control test to distinguish independent contractors from employees is consistent with prior Fourth Circuit decisions. In *NLRB v. A. S. Abell Co.*,[73] the Fourth Circuit examined whether newspaper carriers were employees or independent contractors under the Act.[74] Like the *Tri-State* court, the *Abell* court considered the nature and amount of control the employer retained by examining the totality of circumstances in the employment relationship.[75] The *Abell* court cited a variety of factors contributing to the decision that the carriers were independent contractors.[76] The *Abell* court emphasized the factors demonstrating that the carriers exercised judgment to determine the working environment and to control income.[77] The Fourth Circuit also applied the right to control test in *Taylor v. Local No. 7 International Union of Journeyman Horseshoers*,[78] to determine whether farriers engaged in a group boycott and price fixing action were employees and, therefore, exempt from antitrust legislation.[79] The *Taylor* court stressed the importance under the right to control test of determining whether the contractor exercised judgment in completing the assigned tasks.[80]

Several other circuits have applied the right to control test to determine whether an individual is an independent contractor or an employee.[81]

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[73] 327 F.2d 1 (4th Cir. 1964).

[74] *Id.* at 4-10.

[75] *Id.* at 4-5.

[76] *Id.* at 6-9. The *Abell* court noted that the newspapers provided neither benefits nor workmen's compensation and withheld no taxes. *Id.* at 8-9. In addition, the *Abell* court found that the contracts between the parties specified that no employment relationship existed and that the paper's supervision of delivery procedures was minimal. *Id.* at 6-7. The publishers did exert some control over the carriers' performance of delivery duties by prohibiting the carriers from delivering advertisements with the papers, setting the geographical boundaries of each carrier's territory, and setting the cost of the papers to the carriers and the price to the customers. *Id.* at 3, 9.

[77] *Id.* at 7-8. The carriers made entrepreneurial judgments about the use of assistants, the number of papers to order, how to prevent damage to papers after receipt, the method of customer payment, and how many and what hours to work. *Id.* The carriers bore the consequences in profit and loss of these business judgments. *Id.* at 7.

[78] 353 F.2d 593 (4th Cir. 1965), *cert. denied*, 384 U.S. 969 (1966).

[79] *Id.* at 596. The *Taylor* court cited the Restatement of Agency in applying the right to control test to determine if farriers were employees under the antitrust laws. 353 F.2d at 599. The court declared that the farriers were independent contractors because they performed a skilled task with their own tools, controlled their own income by setting their own hours and fees, brought their materials, established their own credit policies, received payment by the job, worked for a number of employers, and perceived themselves as independent contractors as did their employers. *Id.* at 599-600.

[80] *Id.* at 596.

[81] *See, e.g.*, NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 382 (3d Cir. 1979) (ability to control details of performance determines individual's status); Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 874 (D.C. Cir. 1978) (real issue is putative employer's right to control manner and means of job performance); NLRB v. Warner, 587 F.2d 896, 899 (8th Cir. 1978) (right to control test focuses on nature and amount of control

The First, Fifth, and Ninth Circuits, however, have adopted a narrow definition of the right to control test and have applied the test in conjunction with other factors.[82] A narrow interpretation of the right to control test limits the scope of the test to an examination of the putative employer's right to supervise the details of the worker's job performance.[83] Additional factors considered include whether the putative employer provides benefits,[84] how the company and the worker perceive the worker's status,[85] the types of services rendered,[86] the entrepreneurial nature of the disputed worker's tasks[87] and who bears the risk of loss and opportunity for gain.[88] Other circuits, in applying the right to control test, have interpreted the test to encompass all factors relevant to a determination of employment status.[89] The apparent difference among the circuits results from the elements that the courts label as part of the common-law test and not from a variance in the elements that the courts

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putative employer reserves); Lorenz Schneider, Inc. v. NLRB, 517 F.2d 445, 449, 451 (2d Cir. 1975) (right to control test, though difficult to apply, distinguishes employees and independent contractors); NLRB v. Cement Transp., Inc., 490 F.2d 1024, 1027 (6th Cir. 1974) (right to control, and not actual exercise of control, determines individual's status). *Accord*, Continental Bus Sys., Inc. v. NLRB, 325 F.2d 267, 271 (10th Cir. 1963) (applied right to control test to evaluate status of maintenance workers).

[82] *See, e.g.*, Merchants Home Delivery Serv., Inc. v. NLRB, 580 F.2d 966, 972-73 (9th Cir. 1978) (application of right to control test must be tempered by other relevant considerations); NLRB v. Deaton, Inc., 502 F.2d 1221, 1223 (5th Cir. 1974) (right to control test not sole analytical tool used to determine individual's status); Seven-Up Bottling Co. v. NLRB, 506 F.2d 596, 598 (1st Cir. 1974) (although right to control test generally determinative of employee status, other factors also relevant).

[83] *See* note 82 *supra*.

[84] Merchant's Home Delivery Serv. v. NLRB, 580 F.2d 966, 973 (9th Cir. 1978).

[85] *See* NLRB v. Deaton, Inc., 502 F.2d 1221, 1224 (5th Cir. 1974).

[86] *Id.*

[87] *See* Seven-Up Bottling Co., Inc. v. NLRB, 506 F.2d 596, 599-600 (1st Cir. 1974).

[88] *See, e.g.*, NLRB v. Maine Caterers, Inc., 654 F.2d 131, 133 (1st Cir. 1981); NLRB v. Amber Delivery Serv., Inc., 651 F.2d 57, 61 (1st Cir. 1981); Merchant's Home Delivery Serv., Inc. v. NLRB, 580 F.2d 966, 973 (9th Cir. 1978).

[89] *See generally* NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 382 (3d Cir. 1979) (common-law right to control test encompasses examination of kind of services, possibility of entrepreneurial activity resulting in profit or loss, mode of compensation, contractual provisions and practice of parties, and disciplinary methods adopted); NLRB v. Warner, 587 F.2d 896, 899-900 (8th Cir. 1978) (factors considered in determining employment status include right to hire and fire; method and determination of amount of payment; possibility of profit or loss because of independent enterprise; permancency of relationship; and party furnishing tools, controlling premises, and designating where work occurs).

The NLRB also considers the right to control test to encompass more than the distinction between controlling the manner and means of performance and accepting or rejecting the end product. Standard Oil Co., 230 N.L.R.B. 967, 968 (1977); *see* note 5 *supra* (employer's right to control manner and means of performance indicates employee status). The NLRB considers such factors as whether the functions performed are an integral part of the company's business, the permanence and exclusivity of the employment relationship, and the skill level of the putative employee. 230 N.L.R.B. at 968. The Board also examines the degree of an individual's proprietary interest in his business and whether he makes entrepreneurial decisions affecting profit and loss that determine his income. *Id.*

consider relevant to a determination of employment status. The Fourth Circuit has adopted the dominant approach in applying the right to control test to distinguish employees from independent contractors and in considering the scope of the test broad enough to encompass all aspects of the employment relationship.[90]

In applying the right to control test to determine independent contractor or employee status, judicial and Board decisions have turned on the totality of circumstances characterizing the relationship.[91] Courts weigh all the elements of the employment relationship, balancing those indicating employee status against those indicating independent contractor status, and characterize the relationship as one or the other depending on the overall weight of the evidence.[92] Courts have examined the nature of the employment relationship in great detail and have grouped the factors under review into factors tending to indicate independent contractor status and factors more representative of employee status.[93] Courts have concluded that an individual who makes entrepreneurial decisions affecting his income by accepting or rejecting assignments, choosing whether to engage in backhauling or moonlighting, assuming operation and maintenance costs on his own equipment, accepting payment by the job, receiving no employee benefits, and hiring or firing assistants on his own initiative is more like an independent contractor than an employee.[94] Various courts have considered such factors as lease statements indicating the intention to avoid an employment relationship,[95] lack of supervision over the details of the performance,[96] and differences in the employer's treatment of conceded employees and employees whose status is in dispute[97] as relevant in deciding that an in-

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[90] NLRB v. A. S. Abell Co., 327 F.2d 1, 7-9 (4th Cir. 1964) (court considered contractual provisions, entrepreneurial decisions, risk of profit or loss, method of payment, and parties' perception of employment relationship).

[91] *See, e.g.*, NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968); NLRB v. Maine Caterers, Inc., 654 F.2d 131, 132 (1st Cir. 1981); NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 382 (3d Cir. 1979); Robbins Motor Transp., Inc., 225 N.L.R.B. 761, 764 (1975); Portage Transfer Co., 204 N.L.R.B. 787, 788 (1973).

[92] *See, e.g.*, NLRB v. United Ins. Co. of AM., 390 U.S. 254, 258 (1968); NLRB v. Maine Caterers, Inc., 654 F.2d 131, 132-34 (1st Cir. 1981); NLRB v. A. S. Abell Co., 327 F.2d 1, 10 (4th Cir. 1967).

[93] *See* text accompanying notes 94-97 *infra* (factors indicating independent contractor status).

[94] *See, e.g.*, NLRB v. Amber Delivery Serv., Inc., 651 F.2d 57, 61 (1st Cir. 1981); NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 382-84 (3d Cir. 1979); Merchants Home Delivery Serv., Inc. v. NLRB, 580 F.2d 966, 974-75 (9th Cir. 1978); Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 447-48 (2d Cir. 1975); Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322, 1326-27 (D.C. Cir. 1971) (per curiam); Carnation Co. v. NLRB, 429 F.2d 1130, 1133-34 (9th Cir. 1970).

[95] *See* Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 868 (D.C. Cir. 1978); Steel City Transp., Inc. v. NLRB, 389 F.2d 735, 738 (3d Cir. 1968).

[96] *See* Lorenz Schneider Co. v. NLRB, 517 F.2d 445, 451 (2d Cir. 1975); SIDA, Inc. v. NLRB, 512 F.2d 354, 357-59 (9th Cir. 1975).

[97] *See* NLRB v. Warner, 587 F.2d 896, 900-01 (8th Cir. 1978); National Van Lines v. NLRB, 273 F.2d 402, 405 (7th Cir. 1960).

dividual is an independent contractor rather than an employee. In contrast, certain other factors characterize an employer-employee relationship. An individual who may not refuse an assignment without penalty or engage in backhauling or moonlighting at his own discretion more resembles an employee than an independent contractor.[98] Similarly, a worker whose putative employer sets his hours and pays him a wage or salary including benefits and payroll deductions is more like an employee than an independent contractor.[99] The use of lease termination as a disciplinary measure and close supervision of the details of job performance also suggest employee status.[100]

Cunningham's status as employee or independent contractor was controversial. Certain facets of the relationship between Cunningham and Tri-State support the majority's contention that Cunningham was not a Tri-State employee. Tri-State paid Cunningham by the job, provided no benefits, and made no withholding deductions from his pay.[101] Cunningham and Coss were responsible for operating and maintenance costs.[102] The lease indicated that as driver of a leased vehicle, Cunningham did not obtain employee status, and the parties' perceptions of the relationship conflicted.[103] Tri-State personnel records characterized Cunningham's status as driver for broker, while classifying other employees as drivers.[104] Cunningham's reluctance to accept an unprofitable job demonstrated Cunningham's knowledge of and concern with the costs associated with doing business, a significant indicator of entrepreneurship.[105] The Fourth Circuit considered each of these factors important, especially the personnel records classifying Cunningham as driver for broker rather than driver and the controversy arising out of Cunningham's refusal to make a trip certain to represent a loss.[106]

Other aspects of the relationship between Cunningham and Tri-State support the Board's decision that Cunningham was a Tri-State employee. The record did not clarify whether Cunningham had the right to refuse a job, but Tri-State's president successfully prevailed upon

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[98] *See* NLRB v. Amber Delivery Serv., Inc., 651 F.2d 51, 52 (1st Cir. 1981); Aetna Freight Lines, Inc. v. NLRB, 520 F.2d 928, 930-31 (6th Cir. 1975), *cert. denied*, 424 U.S. 910 (1976).

[99] *See* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 257 (1968) (employer provides bonuses and other fringe benefits indicating employee status); News-Journal Co. v. NLRB, 447 F.2d 65, 66-67 (3d Cir. 1971) (no withholding tax indicates independent contractor status); NLRB v. Keystone Floors, Inc., 306 F.2d 560, 562 (3d Cir. 1962) (requirement that salesman work eight-hour days and full work week indicates employee status).

[100] *See* Aetna Freight Lines, Inc. v. NLRB, 520 F.2d 928, 930 (6th Cir. 1975); Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322, 1327 (D.C. Cir. 1971) (per curiam).

[101] *See* text accompanying note 54 *supra*.

[102] *See* note 52 *supra*.

[103] *See* note 56 & text accompanying note 24 *supra*.

[104] *See* note 53 *supra*.

[105] *See* note 57 *supra*.

[106] 649 F.2d at 996-97.

Cunningham to accept a job that would lose money, indicating that Tri-State dealt with him as an employee.[107] Although both Tri-State and Coss participated in dispatch procedures, Tri-State scheduled jobs, selected routes, and otherwised controlled the details of Cunningham's duties.[108] Tri-State effectively limited Cunningham's income by prohibiting backhauling and moonlighting.[109] Furthermore, Tri-State used lease cancellation to discipline Cunningham and terminate his employment.[110] Thus, several factors support the Board's and the *Tri-State* dissent's conclusion that Cunningham was a Tri-State employee.

Since the determination of an individual's employment status requires an assessment of all factors affecting the employment relationship,[111] the NLRB and several circuit courts of appeals have considered the effect of federal regulations on the application of the right to control test.[112] The NLRB and courts have agreed that federal regulations complicate assessment of the putative employer's right to control in a particular situation.[113] The NLRB has developed a standard for evaluating the effect of federal regulations on the putative employer's right to control the manner and means of the worker's performance.[114] The Board's application of the right to control test is identical to that of the *Tri-State* dissent, which stated that the source of controls is irrelevant to an assessment of the degree of control an employer exerts over the driver.[115] The NLRB has asserted that while the scope of federal regulation in the trucking industry may not be sufficient to establish employer control, the regulations are comprehensive enough to preclude the need for a carrier's own personnel policies or operational standards.[116] The Third, Fifth, Sixth, and Ninth Circuits have adopted the Board's standard, finding federally mandated controls as relevant as other factors to assessing

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[107] *Id.* at 1001 (Murnaghan, J., dissenting). *See also* Steel City Transp. Inc. v. NLRB, 389 F.2d 735, 738 (3d Cir. 1968).

[108] 649 F.2d at 1001-02. *See* note 68 *supra.*

[109] *See* text accompanying note 68 *supra.*

[110] 649 F.2d at 1002.

[111] *See* text accompanying notes 81-90 *supra.*

[112] *See* text accompanying notes 113-15 *infra.*

[113] *See, e.g.*, NLRB v. Deaton, Inc., 502 F.2d 1221, 1224 (5th Cir. 1974); Kreitz Motor Express, Inc., 210 N.L.R.B. 27, 29 (1974).

[114] Mitchell Bros. Truck Lines, 249 N.L.R.B. 476, 480-81 (1980) (citing Robbins Motor Transp. Inc., 225 N.L.R.B. 761, 764 (1975) and John Himmer Transfer, Inc., 221 N.L.R.B. 284, 285 (1975) for proposition that proper standard is consideration of degree of control putative employer exerts regardless of whether federal regulations or other business reasons mandate employer action). The NLRB expressly disavowed prior decisions indicating that courts could ignore controls exercised pursuant to federal regulations in applying the right to control test. 249 N.L.R.B. at 480.

[115] Mitchell Bros. Truck Lines, 249 N.L.R.B. 476, 480-81 (1980); *see* text accompanying notes 63-64 *supra.*

[116] Mitchell Bros. Truck Lines, 249 N.L.R.B. 476, 480 (1980).

the employment relationship.[117] Clearly, the Fourth Circuit is in the minority in adopting the position that mandatory regulations are irrelevant to an evaluation of the employer's right to control.[118]

The *Tri-State* court's failure to express a rationale for adopting the minority view detracts from the validity of that position.[119] Requiring common carriers to exert sufficient control over drivers of leased vehicles to qualify as employers is not the purpose of the federal regulations.[120] Nevertheless, the regulations do pervade the employment relationship. Ignoring the elements of control emanating from comprehensive federal regulations unnecessarily complicates application of the right to control test.[121] The pervasiveness of federal regulations has confused reviewing courts attempting to identify the sources of particular indicia of control.[122] In addition, since the common-law test encompasses all aspects of the employment relationship, no reason exists to exclude those aspects arising out of federal regulations.[123] Therefore, the more reasonable and more easily applied standard for measuring the right to control is the standard the NLRB and other circuits have adopted. The Fourth Circuit adopted the wrong standard for assessing the degree to which courts should consider controls emanating from federal regulations when applying the right to control test.[124] The unanimity of the

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[117] NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 385 (3d Cir. 1979); Merchants Home Delivery Serv., Inc. v. NLRB, 580 F.2d 966, 974 (9th Cir. 1978); Aetna Freight Lines, Inc. v. NLRB, 520 F.2d 928, 930 (6th Cir. 1975); SIDA, Inc. v. NLRB, 512 F.2d 354, 359 (9th Cir. 1975); NLRB v. Cement Transp., Inc., 490 F.2d 1024, 1027 (6th Cir. 1974); Ace Doran Hauling & Rigging Co. v. NLRB, 462 F.2d 190, 194 (6th Cir. 1972); Steel City Transp., Inc. v. NLRB, 389 F.2d 735, 737-38 (3d Cir. 1968); *cf.* NLRB v. Deaton, Inc., 502 F.2d 1221, 1225 (5th Cir. 1974) (court reserved question whether ICC regulations alone are sufficient control to establish employment relationship).

[118] 649 F.2d at 995. The Fourth Circuit relied on a Board decision holding that owner-operators are independent contractors unless a carrrier imposes a layer of regulation beyond that which government regulation mandates. *Id.*, citing Local 814, Int'l Brotherhood of Teamsters (Santini Bros., Inc.), 208 N.L.R.B. 184, 197 n.18 (1974). The NLRB no longer adheres to this view. *See* Mitchell Bros. Truck Lines, 249 N.L.R.B. 476, 480 (1980) (federal regulations are relevant in assessing control carrier imposed on owner-operators, and may be sufficient to establish employee status). *But see* Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 875 (D.C. Cir. 1978) (Board should not consider municipal regulations beyond company's control as meaningful indicia of control).

[119] 649 F.2d at 995, 997.

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

[121] *See* 649 F.2d at 998-99 (Murnaghan, J., dissenting).

[122] *Compare* 649 F.2d at 1006 n.6 (Murnaghan, J., dissenting) (assertion that federal regulation does not require dismissal of drivers for infraction of regulation prohibiting drinking and driving) *with* 49 C.F.R. § 391.15(c)(2)(i) (1980) (motor carrier must dismiss driver disqualified for driving under influence of alcohol).

[123] *Cf.* White v. Excalibur Ins. Co., 599 F.2d 50, 52-53 (5th Cir. 1979) (application of right to control test to determine individual's employment status in tort action resulted in consideration of motor carriers as statutory employers whose control over drivers of leased vehicles derived from federal regulations).

[124] *See* text accompanying notes 113-19 *supra.*

Board and other circuits that have addressed the question[125] suggests that courts facing the issue for the first time should ignore the Fourth Circuit's interpretation and consider federally mandated controls relevant but not decisive in assessing the degree of control an employer exercises over a putative employee.

Even under the right to control test that the *Tri-State* court promulgated,[126] the majority erred in reversing the Board's decision that Cunningham was a Tri-State employee. An appellate court may not substitute its own judgment regarding an employment relationship for that of the Board if the Board's interpretation was reasonable.[127] Reviewing courts have deferred to a Board decision characterized as reasonable, even when disagreeing with the Board's interpretation of the employment relationship.[128] When overruling a Board decision determining employment status, courts have identified explicitly the Board's error.[129] The *Tri-State* record considered as a whole reveals that the Board's decision represented a reasonable choice between conflicting views of the facts.[130] The Fourth Circuit's characterization of the Board's decision as

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[125] *See* text accompanying notes 114-16 *supra.*

[126] *See, e.g.*, NLRB v. Maine Caterers, Inc., 654 F.2d 131, 133 (1st Cir. 1981) (reviewing court should uphold Board order even if different choice justifiable); NLRB v. Amber Delivery Serv., Inc., 651 F.2d 57, 62-63 (1st Cir. 1981) (duty to enforce Board order that was reasonable, despite evidence supporting opposite result); NLRB v. Deaton, Inc., 502 F.2d 1221, 1224-28 (5th Cir. 1974) (enforcing Board order because sufficient evidence supported determination of employee status). *But see* Ace Doran Hauling & Rigging Co. v. NLRB, 462 F.2d 190, 193-94 (6th Cir. 1972) (enforcement of Board order granted to single owner drivers and denied to drivers of vehicles carrier leased from multiple owners would represent unjustified expansion of term "employee"); Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322, 1329 (D.C. Cir. 1971) (per curiam) (Board decision representing choice between two fairly conflicting views must stand).

[127] *See* text accompanying notes 48-50 *supra.*

[128] NLRB v. United Ins. Co of Am., 390 U.S. 254, 260 (1968) (refusal to enforce Board's decision merely because reviewing court would have decided differently if court heard issue *de novo* constitutes error); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1950) (reviewing court may not displace Board's choice between two fairly conflicting views). *See also* Hosiery Corp. of Am. v. NLRB, 422 F.2d 784, 786 (4th Cir. 1970) (applying substantial evidence standard, court overruled Board's decision that employee's solicitation during work hours constituted protected activity). *See* text accompanying notes 42-44 *supra.*

[129] *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 492 (1950) (reviewing court must examine entire record and determine if record supports Board's decision); NLRB v. A. Duie Pyle, Inc., 606 F.2d 379, 387 (3d Cir. 1979) (overruling Board due to failure to consider relevant agency principles); Merchants Home Delivery Serv., Inc. v. NLRB, 580 F.2d 966, 973-76 (9th Cir. 1978) (court in overruling Board clearly identified relevant facts supporting court conclusion and noted Board's misapplication of law); Carnation Co. v. NLRB, 429 F.2d 1130, 1134 (9th Cir. 1970) (court overruled Board because Board failed to apply agency principles in determining employment status and neither overruled, distinguished, nor followed similar cases); NLRB v. A. S. Abell Co., 327 F.2d 1, 5-6 (4th Cir. 1964) (although court may not substitute its judgment for Board's judgment, court must overrule Board when evidence insufficient to support Board decision).

[130] *See* text accompanying notes 101-10 *supra.*

unsupported by the record neither pinpoints the Board's error nor clarifies the court's rationale. The Fourth Circuit, therefore, exceeded its discretion in overruling the Board. The Fourth Circuit's error, however, probably will not affect future cases because the court did recognize the applicable standard of review.[131]

Once the Fourth Circuit reversed the Board, the court should have remanded the case for clarification of Cunningham's relationship with the lessor Coss. The majority noted that Cunningham and Coss might be profit sharers or partners, supporting the majority's contention that Cunningham was an independent contractor.[132] The *Tri-State* dissent pointed out that Coss and Tri-State might be joint employers of Cunningham, supporting the dissent's conclusion that Cunningham was an employee.[133] Other courts considering the status of a non-owner driver of a leased vehicle have found the individiaul to be an employee either of the carrier or of the vehicle's lessor.[134] Thus, the court should have questioned whether Cunningham was an employee of Coss. Non-owner drivers are generally within the coverage of the Act,[135] which protects drivers participating in concerted activities from employer retaliation. Congress intended the independent contractor exception to the Act to prevent the Board and appellate courts from engaging in unwarranted expansion of employee status.[136] The Fourth Circuit, however, denied the Act's protection to an individual by categorizing him as an independent contractor based on a misapplication of the right to control test and an error in assessing the scope of its review of Board decisions.

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[131] *See* text accompanying notes 42-44 *supra.*

[132] 649 F.2d at 997. The majority noted that Cunningham might be an employee of Coss. *Id.* Such a conclusion required further consideration of Cunningham's status once the *Tri-State* court concluded that he was not a Tri-State employee.

[133] *Id.* at 1003-04.

[134] *See, e.g.*, Aetna Freight Lines, Inc. v. NLRB, 520 F.2d 928, 930 (6th Cir. 1975) (non-owner drivers are employees of carrier); NLRB v. Deaton, Inc., 502 F.2d 1221, 1222 (5th Cir. 1974) (non-owner drivers of leased vehicles conceded to be employees); Ace Doran Hauling & Rigging Co. v. NLRB, 462 F.2d 190, 194 (6th Cir. 1972) (non-owner drivers are employees of lessor because lessor operates from distinct location, provides variety of services for multiple companies, interchanges drivers with other employees, and has sole control over hiring, firing, working conditions, wages, and fringe benefits); Steel City Transp. Inc. v. NLRB, 389 F.2d 735, 739 (3d Cir. 1968) (non-owner drivers and owner-operators are employees of carrier).

[135] *See* note 134 *supra.*

[136] *See* note 7 *supra.*

D. Section 8(a)(3) Dual Motive Cases

Under section 8(a)(3) of the National Labor Relations Act[1] ("NLRA" or "the Act") an employer commits an unfair labor practice when he discharges an employee in order to encourage or discourage membership

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[1] 29 U.S.C. §§ 151-69 (1976 & Supp. III 1979). Congress passed the National Labor Relations Act ("NLRA" or "the Act") or Wagner Act, in 1935. National Labor Relations Act, Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-69 (1976 & Supp. III 1979)). Congress enacted the NLRA to secure employees' right to organize and to encourage collective bargaining. *See* 29 U.S.C. § 151 (1976). *See also* NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-03 (1952); NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 265-66 (1938). In 1947, Congress passed the Labor Management Relations Act ("LMRA"), or Taft-Hartley Act, believing the NLRA to be too favorable to unions. *See* 29 U.S.C. §§ 141-97 (1976 & Supp. III 1979). *See also* Allis-Chalmers Mfg. Co. v. NLRB, 358 F.2d 656, 661 (7th Cir. 1966), *rev'd on other grounds*, 388 U.S. 175 (1967); F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 12 (1977) [hereinafter cited as BARTOSIC]; S. REP. No. 105, 80th Cong., 1st Sess., 20, *reprinted in* II LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1018 (1948). Title I of the LMRA, §§ 101-04, amended the NLRA to protect nonunion employees from union coercion. *See* 29 U.S.C. §§ 157, 158(b) (1976 & Supp. III 1979). Title I of the LMRA includes 29 U.S.C. §§ 151-69 (1976 & Supp. III 1979) and is still known as the National Labor Relations Act. *See* 29 U.S.C. § 167 (1976).

The NLRA applies to all employees except supervisors, agricultural laborers, domestic servants employed at a person's home, anyone employed by his parents or spouse, independent contractors or anyone employed under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1976 & Supp. III 1979). 29 U.S.C. § 152(3) (Supp. III 1979). Section 7 is the core of the NLRA and guarantees to employees the right to join a labor organization, to bargain collectively, and to engage in other "concerted activities," or to refrain from any of these activities. 29 U.S.C. § 157 (1976 & Supp. II 1978). *See* BARTOSIC, *supra*, at 12. Section 8 of the NLRA sets forth and defines various unfair labor practices. *See* 29 U.S.C. § 158 (1976). Section 8(a) defines employer unfair labor practices and § 8(b) defines union unfair labor practices. *See id.* at § 158(a), (b).

Section 3 of the NLRA authorizes creation of the National Labor Relations Board ("the Board" or "NLRB"), which consists of five members appointed for five-year terms by the President with Senate approval. 29 U.S.C. § 153(a) (1976). The NLRB is an administrative agency with exclusive original jurisdiction to enforce the NLRA and LMRA. *See* Amalgamated Clothing Workers of Am. v. Richman Bros., 348 U.S. 511, 516-17 (1955). Section 3 of the Act also creates the office of General Counsel. 29 U.S.C. § 153(d) (1976). The General Counsel, like the Board itself, acts on behalf of the public and not a particular victim of alleged unfair practices. Local 282 Int'l Bhd. of Teamsters v. NLRB, 339 F.2d 795, 799-800 (2d Cir. 1964). Section 6 of the Act empowers the Board to establish rules under the Act. 29 U.S.C. § 156 (1976). Under § 9, the Board may hold hearings and conduct elections regarding representation questions. *Id.* at § 159. Section 10 authorizes the Board to prevent and remedy unfair labor practices. *Id.* at § 160.

An unfair labor practice case begins when a private party files a charge with the NLRB within six months of the occurrence of the alleged misconduct. 29 U.S.C. § 160(b) (1976); *see* Radio Officers' Union v. NLRB, 347 U.S. 17, 34 n.30 (1954). *See generally* BARTOSIC, *supra*, at 15-17. The General Counsel has the power to investigate charges, and issue and prosecute complaints before the Board. 29 U.S.C. § 153(d) (1976). If the General Counsel issues a complaint, and the parties cannot reach a settlement, the parties hold a hearing before an Administrative Law Judge ("ALJ"). *See id.* at § 160(b); 29 C.F.R. § 101.10 (1981). The ALJ acts as a trier of fact, makes conclusions of law and issues a recommended order. 29 C.F.R. § 102.45(a) (1981). If the parties file exceptions to the ALJ's decision, the case goes

in any labor organization.[2] An employer, however, may dismiss an employee involved in union activity on grounds not illegal under the

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before the Board for review. 29 U.S.C. § 160(c) (1976); 29 C.F.R. § 102.46 (1981). The parties submit supporting briefs, and the Board, usually sitting as a three-member panel, may allow oral argument and submission of evidence before deciding the case on the entire record. 29 U.S.C. § 160(c) (1976); 29 C.F.R. § 102.48(b) (1981). The Board is not bound by the ALJ's findings, and may make any contrary findings if supported by substantial evidence. NLRB v. Duquesne Elec. & Mfg. Co., 518 F.2d 701, 704 (3d Cir. 1975); *cf.* NLRB v. New York-Keansburg Long Branch Bus Co., 578 F.2d 472, 478 n.15 (3d Cir. 1978) (final determinations of credibility rest with ALJ as long as he considers all relevant factors and sufficiently explains resolutions) (citing NLRB v. W.C. McQuaide, Inc., 552 F.2d 519, 526 n.14 (3d Cir. 1977). Upon finding an unfair labor practice, the Board may issue an order requiring the practice to cease and requiring such affirmative action as reinstatement of employees with or without back pay. 29 U.S.C. § 160(c) (1976); *see* BARTOSIC, *supra*, at 66-67.

Board orders are not self-enforcing. *See* 29 U.S.C. § 160(e) (1976). If an employer refuses to comply with an order, the Board must file a petition for enforcement with the Federal Circuit Court of Appeals in the circuit where the unfair practice occurred or where the employer resides or transacts business. *Id.* Any aggrieved party, moreover, can appeal a Board decision to a Federal Circuit Court. *See id.* at § 160(f). Before a circuit court, the findings of fact by the Board are conclusive if supported by "substantial" evidence. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951); 29 U.S.C. § 160(e) (1976). "Substantial" evidence means that the record must do more than create a suspicion that the fact to be established exists. *See Id.* The Supreme Court may review the decision of a circuit court by writ of certiorari. *See* 29 U.S.C. § 160(e) (1976).

[2] *See* 29 U.S.C. § 158(a)(3) (1976). Under § 8(a)(3) of the NLRA, an employer commits an unfair labor practice by discriminating in regard to hiring, tenure, or any other condition of employment to encourage or discourage employee membership in any labor organization. *Id.; see* American Shipbldg Co. v. NLRB, 380 U.S. 300, 311 (1965). Section 8(a)(3) contains two provisos. *See* 29 U.S.C. § 158(a)(3) (1976). First, § 8(a)(3) allows an employer to conclude an agreement with a representative labor organization requiring all employees join the labor organization within 30 days of the beginning of employment. *See id.*; NLRB v. Hershey Foods Corp., 513 F.2d 1083, 1084-87 (9th Cir. 1975). Second, an employer may not discharge an employee for lack of membership in the representative labor organization if such organization discriminatorily denied or terminated the employee's membership. *See* 29 U.S.C. § 158(a)(3) (1976); Radio Officers' Union v. NLRB, 347 U.S. 17, 40-42 (1954).

To prove a violation of § 8(a)(3) of the NLRA, the General Counsel, *see* note 1 *supra*, must show that the discharge was discriminatory and actually resulted in encouraging or discouraging union membership. *See* NLRB v. Brown, 380 U.S. 278, 286 (1965). In addition, the employer's motive or intent to discriminate is vital to proving a § 8(a)(3) violation. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967); NLRB v. Brown, 380 U.S. 278, 286-87 (1965); Radio Officers' Union v. NLRB, 347 U.S. 17, 43 (1954). In § 8(a)(3) cases, the Supreme Court differentiates between employer actions which are inherently destructive of employee rights and actions which impact only slightly on employee interests. *See, e.g.*, American Shipbldg Co. v. NLRB, 380 U.S. 300, 311-12 (1965) (employer's action in closing one shipyard and laying off workers at another when union contract negotiations stagnated is not inherently destructive of union rights); NLRB v. Brown, 380 U.S. 278, 287-88 (1965) (employer use of temporary nonunion personnel during lockout is not inherently destructive of union rights); NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-28, 231 (1963) (employer practice of giving superseniority only to workers who were not on strike is inherently destructive of union rights); Radio Officers' Union v. NLRB, 347 U.S. 17, 45 (1954) (employer denial of job to worker allegedly not in good standing with union is inherently destructive of employee rights because employer had no agreement with union requiring membership of

Act.[3] When an employer discharges an employee under circumstances suggesting both legal and illegal motives under the Act, courts face two crucial issues. First, the court must determine the extent to which the illegal motive may have affected the employer's decision to fire the employee and still not be a violation of section 8(a)(3) of the Act.[4] Second, the court must decide which party has the burden of proving the extent to which the illegal motive influenced the employer's discharge decision.[5] In *NLRB v. Kiawah Island Co.*,[6] the Fourth Circuit restated the language used in previous Fourth Circuit opinions to decide dual motive cases under section 8(a)(3) of the Act.[7]

Defendant Kiawah Island Co. ("Kiawah") owns and operates a resort, including a hotel and a restaurant.[8] Kiawah had continual problems in maintaining proper standards of cleanliness in its food storage, preparation and service facilities.[9] After unsatisfactory results in numerous state inspections, Kiawah demoted the foreman of the kitchen clean-up crew, James Hymes.[10] Shortly thereafter, Hymes and another member of

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all employees). If the employer's action is inherently destructive of employee rights, the Supreme Court will assume that the employer intended the natural consequences of his act and will infer an intent to discriminate. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967); NLRB v. Brown, 380 U.S. 278, 287 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963). If the employer's action has only a slight effect on employee interests, a specific showing of discriminatory intent by the General Counsel is necessary to prove a violation of § 8(a)(3). *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967); NLRB v. Brown, 380 U.S. 278, 287-88 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-28 (1963). The remedies for § 8(a)(3) violations include Board orders requiring defendants to cease engaging in unfair practices and orders requiring reinstatement of any affected employees plus employees' back pay. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187-98 (1941); 29 U.S.C. § 160(c) (1976); note 1 *supra*.

[3] *See, e.g.*, NLRB v. Bangor Plastics, Inc., 392 F.2d 772, 776-77 (6th Cir. 1967) (employer lawfully discharged union member for directing vulgar remarks to foreman); Lozano Enterprises v. NLRB, 357 F.2d 500, 502-03 (9th Cir. 1966) (misconduct of union activist is proper ground for layoff); NLRB v. Soft Water Laundry, Inc., 346 F.2d 930, 932-35 (5th Cir. 1965) (union member's insubordination in presence of other employees is clear justification for discharge).

[4] *See* Allen v. NLRB, 561 F.2d 976, 982 (D.C. Cir. 1977); NLRB v. Lowell Sun Publ. Co., 320 F.2d 835, 842 (1st Cir. 1963). *See also* text accompanying notes 37-38 *infra*.

[5] *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34-35 (1967); NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d 899, 903-07 (1st Cir. 1981). *See also* text accompanying notes 34-36 *infra*.

[6] 650 F.2d 485 (4th Cir. 1981).

[7] *Id.* at 490-91.

[8] *Id.* at 488.

[9] *Id.* State inspectors examined the Kiawah Island Hotel kitchen immediately before the hotel opened in 1976 and issued an unsatisfactory inspection rating. *Id.* Subsequent state inspections produced several additional unsatisfactory ratings. *Id.* After the first inspection, Kiawah's general manager established a kitchen clean-up crew supervised by employee Hymes. *Id.*

[10] *Id.* The Kiawah hotel chef recommended that the management discharge kitchen clean-up crew supervisor Hymes and employee Murray. *Id.* at 489. The food and beverage director, however, decided to give the employees another chance to improve, and merely

the clean-up crew, Robert Murray, contacted union representatives regarding the organization of a labor union at Kiawah.[11] Two months later, after another unsatisfactory inspection, the company suspended Hymes and Murray for three days.[12] A week after the suspension, Kiawah discharged Hymes and Murray for unsatisfactory performance after an unacceptable internal inspection.[13] The National Labor Relations Board ("NLRB" or "the Board") found that Kiawah discharged Hymes and Murray because of the employees' union activities in violation of section 8(a)(3) of the NLRA.[14] The Board then petitioned the Fourth Circuit for an enforcement order.[15]

In *Kiawah*, the Fourth Circuit recognized that Kiawah knew of the union's attempt to organize when the company fired Hymes and Murray.[16] The court added, however, that Kiawah had valid reasons for releasing the employees prior to, and independent of, their union activities.[17] The *Kiawah* court began its analysis by stating the general rule that a discharge violates the NLRA only if motivated by an unlawful discriminatory intent.[18] The court further stated that, in the Fourth Circuit, the

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demoted Hymes. *Id.* at 490. Meanwhile, Kiawah discharged the general manager and left the clean-up crew under the control of the night auditor. *Id.* at 488. Kiawah subsequently ordered the chef to assume total responsibility for kitchen cleanliness. *Id.* at 489.

[11] *Id.* at 488. Hymes and Murray contacted and worked with the Hotel, Motel, Restaurant Employees and Bartenders Union, Local 270, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO. *Id.* at 488 n.3. The company knew of the employees' union contacts. *Id.* at 488.

[12] *Id.* at 490.

[13] *Id.* Kiawah discharged Hymes and Murray, demoted the manager of the dining room, issued disciplinary warnings to three other non-supervisory employees, and reprimanded the food and beverage director. *Id.* After additional unsatisfactory state ratings, Kiawah discharged the chef, the food and beverage director, and the subsequently hired chef and food beverage director. *Id.*

[14] *Id.* at 487. The Hotel, Motel, Restaurant Employees and Bartender's Union filed the original charges against Kiawah. *See* Recommended Order by P. Kirkwood, Administrative Law Judge, January 16, 1980.

In addition to finding a § 8(a)(3) violation, the NLRB found that Kiawah violated § 8(a)(1) of the NLRA through statements and actions designed to deter the employees from organizing a union. 650 F.2d at 487; *see* note 32 *infra*. The senior vice-president of the company told the employees that the company would fight the union as hard as the law would permit and that the employees would be hurt by such a fight. 650 F.2d at 488. Company supervisors denied several employees' raise requests admittedly because of the union fight and told employees that the union would get the employees in trouble. *Id.* at 488-89. The Board found that these actions threatened employees with retaliatory action for exercise of § 7 rights in violation of § 8(a)(1). *Id.*; *see* note 32 *infra*.

[15] 650 F.2d at 487; *see* note 1 *supra*.

[16] 650 F.2d at 489. Proof of employer's knowledge of an employee's union activity is an essential element in establishing that the discharge of that employee was discriminatory. *See* Dubin-Haskell Lining Corp. v. NLRB, 375 F.2d 568, 573 (4th Cir. 1967).

[17] 650 F.2d at 487; *see* text accompanying notes 9-13 *supra*.

[18] 650 F.2d at 490; *see* Radio Officers' Union v. NLRB, 347 U.S. 17, 43 (1954); note 2 *supra*. An employer has discriminatory intent if he differentiates between union and non-union members for the purpose of discouraging union membership. *See* Montgomery Ward & Co. v. NLRB, 107 F.2d 555, 563-64 (7th Cir. 1939).

rule in *Neptune Water Meter Co. v. NLRB*[19] controls situations in which the evidence supports inferences of both discriminatory and non-discriminatory reasons for the discharge of an employee.[20] In *Neptune*, the Fourth Circuit held that an employer violates section 8(a)(3) if a discriminatory motive is a factor in the employer's decision to discharge an employee.[21] The *Neptune* court also stated that the Board may find an unfair labor practice only if the record enables the court to find that the employer would not have discharged the employee except for the employee's union activity.[22] The *Kiawah* court[23] continued by stating that in cases of legal and illegal discharge motives, the burden of persuasion throughout the case falls on the General Counsel to show that a discriminatory motive was a factor in the discharge.[24] The court stated that a circuit court must affirm an NLRB decision when substantial evidence supports the decision.[25] The court explained that in determining whether substantial evidence supports the Board's holding that an illegal motive was a factor in the discharge, the appellate court must consider all the evidence.[26] The Fourth Circuit warned the Board that, because the

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[19] 551 F.2d 568 (4th Cir. 1977).

[20] 650 F.2d at 490. In *Neptune Water Meter Co. v. NLRB*, the employer discharged two union supporters allegedly for tardiness and excessive absenteeism, 551 F.2d 568, 569 (4th Cir. 1977). The Fourth Circuit upheld an NLRB finding of discrimination because the employer did not discharge the two employees until after they became union activists. *See Id.* at 569, 570.

[21] 551 F.2d at 569. The Fourth Circuit in *Neptune* stated that the Board's findings of tardiness and absenteeism did not impair the Board's findings of discriminatory motivation because the discriminatory motive need only be a "factor" in the discharge. *Id.* The *Neptune* opinion does not define the word "factor." *See* text accompanying notes 40-44 *infra.*

[22] Neptune Water Meter Co. v. NLRB, 551 F.2d at 570. The *Neptune* court stated that the Board must weigh all relevant factors, particularly the gravity of the offense allegedly committed by the employee, and may only find an unfair labor practice if the record supports the view that the employer would not have fired the employee "except for" the employee's union activity. *Id.*

[23] The *Kiawah* Fourth Circuit panel included Judges Winter, Sprouse and Ervin, with Judge Sprouse writing the majority opinion. 650 F.2d at 487.

[24] *Id.* at 490. The Fourth Circuit in *Kiawah* acknowledged that a shifting burden of proof concept is useful when a case includes evidence of both discriminatory and valid motives for the discharge. *Id.* An employer has the burden of rebutting initial evidence of union membership and employer animus. *Id.* The *Kiawah* court stressed, however, that the ultimate burden is always upon the General Counsel to prove that the discriminatory motive was a "factor" in the discharge. *Id.* The court stated that the burden is on the General Counsel to show an affirmative and persuasive reason why the employer rejected the legal motive for discharge and chose an illegal one. *Id.* at 491.

[25] *Id.*; *see* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951); 29 U.S.C. § 160(f) (1976); note 1 *supra.*

[26] 650 F.2d at 491. The *Kiawah* court emphasized that a court must consider the employer's evidence of proper motivation and not merely the employee's evidence of discriminatory motive. *Id.* The Fourth Circuit declared that an employee's union membership or an employer's union animus by themselves do not taint a discharge for cause. *Id.* The evidence must show why a legal motive was not the sole reason for the discharge. *Id.*

General Counsel has the affirmative burden of proving his case, evidence consisting of conjecture or suspicion will not sustain the burden.[27] The court concluded by restating the Fourth Circuit's rule that if an employer has a valid reason to discharge an employee, but would not have done so except for the employee's union activity, the discharge violates section 8(a)(3) of the Act.[28]

Addressing the instant facts, the Fourth Circuit in *Kiawah* stated that Kiawah presented unrebutted evidence that the company discharged the two employees for reasons unrelated to union activity.[29] The court, relying on *Neptune*, stated that an employee cannot shield unsatisfactory behavior from discipline by joining a union.[30] The *Kiawah* court ruled that the direct evidence of the company's valid business reasons for discharging Hymes and Murray far outweighed the circumstantial evidence of improper motivation, and that the latter evidence was not substantial.[31] The *Kiawah* court, consequently, denied enforcement of the Board's finding of a section 8(a)(3) violation.[32]

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[27] *Id.*

[28] *Id.*

[29] *Id.* The Fourth Circuit in *Kiawah* found that Kiawah experienced continual kitchen cleaning problems before and after the company discharged Hymes and Murray, that Kiawah continuously attempted to rectify the problem and that Kiawah expressed disapproval with the work of Hymes and Murray preceding any union contact. *Id.*

[30] *Id.*; *see* Neptune Water Meter Co. v. NLRB, 551 F.2d at 570.

[31] 650 F.2d at 491. Judge Winter felt that the circumstantial evidence was sufficient to support the Board's order. *Id.* at 492 (Winter, J., concurring and dissenting). Judge Winter argued that the circumstances showed a disparity of treatment between Hymes and Murray and several other non-managerial kitchen employees who only received disciplinary warnings when Kiawah discharged Hymes and Murray, *Id.* at 492-93.

[32] 650 F.2d at 491. Although the Fourth Circuit in *Kiawah* denied enforcement of the Board's order regarding the § 8(a)(3) violation, the court enforced the Board's order relating to the § 8(a)(1) violation. *Id.* at 489; *see* note 14 *supra*. Section 8(a)(1) of the NLRA prohibits employer interference with the rights guaranteed in § 7, 29 U.S.C. § 158(a)(1) (1976), including the rights to form a union, to bargain collectively, and to engage in other "concerted activities." *Id.* at § 157 (1976 & Supp. III 1979); *see* note 1 *supra*. To prove a § 8(a)(1) violation, the General Counsel must show employer interference with employees acting in a group effort, or "concerted activity." *See* Western Cartridge Co. v. NLRB, 139 F.2d 855, 858 (7th Cir. 1943); BARTOSIC, *supra* note 1, at 60. In contrast to § 8(a)(1), an employer violates § 8(a)(3) only if union activity is involved. *See* 29 U.S.C. § 158(a)(3) (1976); note 2 *supra*. In addition, the employer's motivation, crucial to a court's finding a § 8(a)(3) violation, *see* note 2 *supra*, is immaterial in establishing a § 8(a)(1) violation. *See* NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964); Stein Seal Co. v. NLRB, 605 F.2d 703, 706 (3d Cir. 1979); NLRB v. McCatron, 216 F.2d 212, 215 (9th Cir. 1954), *cert. denied*, 348 U.S. 943 (1955). The inferences that employees draw from employer action, and the effects such inferences have on employee behavior determine whether an employer has violated § 8(a)(1). *See* NLRB v. McCatron, 216 F.2d at 215; BARTOSIC, *supra* note 1, at 60. The customary remedy for a § 8(a)(1) violation is a Board order requiring the employer to cease and desist from the interfering activity. *See* United Steelworkers of Am. v. NLRB, 376 F.2d 770, 772-73 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 932 (1967); BARTOSIC, *supra* note 1, at 66.

In enforcing the Board's finding of a § 8(a)(1) violation, the Fourth Circuit in *Kiawah* cited the rule established in NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969), stating

In *Kiawah*, the Fourth Circuit adopted the language of earlier Fourth Circuit opinions for section 8(a)(3) cases involving both legal and illegal discharge motives.[33] The Fourth Circuit requires the General Counsel to carry the ultimate burden of persuasion throughout the trial.[34] The Fourth Circuit, however, places upon the employer a burden of producing some evidence of a legitimate reason for the discharge once the General Counsel has established a prima facie case of discrimination.[35]

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that a court should evaluate an employer's actions in light of the fact that employees are more sensitive to their employer's implications than are outsiders. 650 F.2d at 489. The *Kiawah* court also cited the rule from Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951), stating that when substantial evidence supports the Board's findings, a circuit court will not substitute its own judgment for that of the Board. 650 F.2d at 489; note 1 *supra*. The Fourth Circuit held that substantial evidence supported the Board's findings of a § 8(a)(1) violation on the facts in *Kiawah*. 650 F.2d at 489; *see* note 14 *supra*.

The Fourth Circuit's finding of a § 8(a)(1) violation is consistent with other decisions under the section. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969); Mueller Brass Co. v. NLRB, 544 F.2d 815, 820-21 (5th Cir. 1977). A campaign for union organization qualifies as "concerted activity" within §§ 7 and 8(a)(1). *See, e.g.*, Brown & Root, Inc. v. NLRB, 634 F.2d 816, 818 (5th Cir. 1981) (§ 8(a)(1) protects employees' activities if those activities reasonably may affect terms and conditions of employment); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1348-49 (3d Cir. 1969) (any expression inclined to produce or even suggesting group or representative action is concerted activity), *cert. denied*, 397 U.S. 935 (1970). A court reasonably could hold employer threats of harm to employees or denial of raises because of union activity to be coercive of employee rights in a protected area. *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1968) (employer may make prediction to employees concerning effects he thinks union will have on company, but employer must base predictions on objective fact and include no threats); NLRB v. International Medication Syss. Ltd., 640 F.2d 1110, 1112 (9th Cir. 1981) (threats by employer of reprisals and plant closing if union is successful are unlawful); Midwest Regional Joint Bd., Amal. Clothing Workers of Am. v. NLRB, 564 F.2d 434, 444 (D.C. Cir. 1977) (employer threats that company will be tougher on employees if union succeeds are unlawful). In Mueller Brass Co. v. NLRB, 544 F.2d 815, 821 (5th Cir. 1977), the court stated that in determining whether employer conversations with employees are coercive, a court should look at several factors. These factors include the history of the company's attitude toward employees, the type of information sought, the rank of the officer seeking information, the place and manner of the conversation, the truthfulness of the employee's responses, whether the company had a valid purpose in getting the information, whether the officer communicated that purpose to the employee and whether the company assured the employee of no reprisals. *Id.*

[33] 650 F.2d at 490-91.

[34] *See* American Thread Co. v. NLRB, 631 F.2d 316, 320-21 (4th Cir. 1980); American Mfg. Assocs, Inc. v. NLRB, 594 F.2d 30, 36 (4th Cir. 1979); NLRB v. Patrick Plaza Dodge, Inc., 522 F.2d 804, 807 (4th Cir. 1975).

[35] *See, e.g.*, American Thread Co. v. NLRB, 631 F.2d 316, 321 (4th Cir. 1980) (inference of discriminatory motive in discharge of union supporter disappears when employer offers reasonable business explanation); NLRB v. Appletree Chevrolet Inc., 608 F.2d 988, 993 (4th Cir. 1979) (when employer has supportable cause for discharge, burden shifts to General Counsel); Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337 (4th Cir. 1976) (when employer demonstrates good ground for discharge apart from union animus, Board cannot declare ground pretextual without basis); Maphis Chapman Corp. v. NLRB, 368 F.2d 298, 304 (4th Cir. 1966) (once General Counsel presents prima facie case, employer must assume burden of showing justifiable reason for discharge). The employer does not bear the burden of production until the General Counsel presents a prima facie case. *See* Maphis Chapman

After the employer has come forward with evidence of a legitimate discharge motive, the General Counsel must show by substantial evidence an affirmative reason why the employer depended upon an illegal motivation and not a legal one.[36]

The *Kiawah* court also addressed the extent to which the illegal motive may affect the employer's discharge decision without violating section 8(a)(3). In *Kiawah* and *Neptune*, the Fourth Circuit emphasized that an employer violates section 8(a)(3) if a discriminatory motive is a "factor" in the discharge.[37] The Fourth Circuit combined this requirement, however, with the stipulation that the General Counsel prove that the employer would not have discharged the employee "except for" his union activity.[38]

By using both "factor" and "except for" language, Fourth Circuit opinions are confusing because the two phrases imply different standards for finding a section 8(a)(3) violation.[39] In stating that an illegal

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Corp. v. NLRB, 368 F.2d 298, 304 (4th Cir. 1966). Basically, the General Counsel establishes a prima facie case by showing employer's knowledge of employee's union activities, and the employer's union animus. *See* American Thread Co. v. NLRB, 631 F.2d 316, 321 (4th Cir. 1980); Maphis Chapman Corp. v. NLRB, 368 F.2d at 304.

[36] *See* American Thread Co. v. NLRB, 631 F.2d 316, 321 (4th Cir. 1980); NLRB v. Appletree Chevrolet, Inc., 608 F.2d 988, 993 (4th Cir. 1979); Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337 (4th Cir. 1976); NLRB v. Patrick Plaza Dodge, Inc., 522 F.2d 804, 807 (4th Cir. 1975); note 24 *supra.*

[37] *See* 650 F.2d at 490; Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 569 (4th Cir. 1977). In NLRB v. Dove Coal Co., 369 F.2d 849, 852 (4th Cir. 1966), the Fourth Circuit held for the first time that if a discriminatory motive was at least a "factor" in the employer's decision, the discharge was discriminatory. Since *Dove Coal*, most Fourth Circuit cases dealing with the extent to which the illegal motive may affect the employer's discharge decision have adopted the "factor" language. *See* American Thread Co. v. NLRB, 631 F.2d 316, 320 (4th Cir. 1980); Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 569 (4th Cir. 1977); Winn-Dixie Stores, Inc. v. NLRB, 448 F.2d 8, 13 n.16 (4th Cir. 1971); NLRB v. Hanes Hosiery Division, Hanes Corp., 413 F.2d 457, 458 (4th Cir. 1969); Winchester Spinning Corp. v. NLRB, 402 F.2d 299, 304 (4th Cir. 1968). *But see* Filler Prods., Inc. v. NLRB, 376 F.2d 369, 377-78 (4th Cir. 1967) (Fourth Circuit states that court must weigh circumstances to determine what motivation dominated employer) (citing NLRB v. Jones Sausage Co., 257 F.2d 878, 882 (4th Cir. 1958)).

[38] The Fourth Circuit has not used the "except for" requirement as consistently as the "factor" requirement. *See* note 37 *supra.* In *Kiawah*, *American Thread* and *Neptune*, the court used the "except for" and "factor" requirements concurrently. *See* 650 F.2d at 490-91; American Thread Co. v. NLRB, 631 F.2d 316, 320 (4th Cir. 1980); Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 569-70 (4th Cir. 1977). In NLRB v. Appletree Chevrolet, Inc., 608 F.2d 988, 995 (4th Cir. 1979), the Fourth Circuit mentioned only the "but for" requirement and omitted the "factor" requirement. Since *Appletree* concerned primarily the distribution of the burden of proof in § 8(a)(3) cases, the court used the "but for" language to demonstrate the General Counsel's burden and the omission of the "factor" language is not significant. *See id.* at 993-95; text accompanying notes 34-36 *supra.* The only other case in which the Fourth Circuit used the "but for" language is NLRB v. Jones Sausage Co., 257 F.2d 878, 881 (4th Cir. 1958). In *Jones Sausage*, the court combined the "but for" language with a requirement that the court weigh the circumstances of each case to determine what motivations "truly dominated" the employer's decision. *Id.* at 881-82.

[39] *See* text accompanying notes 40-50 *infra.*

motive need only be a "factor" in the employer's discharge decision, the Fourth Circuit suggests that a discharge is illegal if the discriminatory motive played any part in the employer's decision.[40] In *Winn-Dixie Stores, Inc. v. NLRB*,[41] the Fourth Circuit stated that the Board found that the employer discharged an employee "at least in part" because of the employee's union activity.[42] In an explanatory footnote, the court explained that a discharge is unlawful if a discriminatory motive is "at least a factor" causing the discharge.[43] The Fourth Circuit in *Winn-Dixie*, therefore, held that under the "factor" test, a section 8(a)(3) violation exists if the employee's union activity played a part in the employer's discharge decision.[44] The NLRB and several circuit courts besides the Fourth Circuit have used an "in part" test under which an employer violates section 8(a)(3) if the employee's participation in the protected activities plays any part in the discharge.[45]

In comparison, the "except for" language represents a "dominant motive" test, rather than an "in part" test.[46] In *NLRB v. Jones Sausage Co.*,[47] the Fourth Circuit stated that business motives could not shield an employer who would not have discharged an employee "but for" the employee's union activity.[48] The *Jones Sausage* court then held that an employer violates section 8(a)(3) if discriminatory motives "truly dominated" the employer's decision to discharge the employee.[49] The First Circuit has applied a "dominant motive" test using "but for" language under which the General Counsel must prove that an illegal motive dominated or controlled the employer's decision.[50]

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[40] *See* text accompanying notes 41-45 *infra*.

[41] 448 F.2d 8 (4th Cir. 1971).

[42] *Id.* at 13. The *Winn-Dixie* court denied enforcement of the Board's order finding a § 8(a)(3) violation in the discharge of an employee because the Fourth Circuit found no evidence that the employer knew of the employee's union activities. *Id.* at 13-14.

[43] *Id.* at 13 n.16 (citing Winchester Spinning Corp. v. NLRB, 402 F.2d 299, 304 (4th Cir. 1968)).

[44] 448 F.2d at 13.

[45] The NLRB followed the "in part" test for years. *See* Wright Line, A Div. of Wright Line, Inc., 251 NLRB Dec. ¶ 17,356 at 32463-64 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981) (citing examples). In *Wright Line* the Board formally abandoned the "in part" test. *See id.*; text accompanying note 80 *infra*. The 8th, 10th and District of Columbia Circuits presently use the "in part" test. *See* Berbiglia, Inc. v. NLRB, 602 F.2d 839, 843 (8th Cir. 1979) (discharge unlawful unless predicated solely on valid grounds); M.S.P. Indus., Inc. v. NLRB, 568 F.2d 166, 173-75 (10th Cir. 1977) (employer violates § 8(a)(3) if union animus was material part of motive for discharge); Allen v. NLRB, 561 F.2d 976, 982 (D.C. Cir. 1977) (discharge unlawful if motivated even in part by union animus). *See also* notes 50 & 82 *infra*.

[46] *See* NLRB v. Jones Sausage Co., 257 F.2d 878, 881-82 (4th Cir. 1958). *See also* Filler Prods., Inc. v. NLRB, 376 F.2d 369, 377-78 (4th Cir. 1967); NLRB v. Overnite Transp. Co., 308 F.2d 284, 288 (4th Cir. 1962).

[47] 257 F.2d 878 (4th Cir. 1958).

[48] *Id.* at 881.

[49] *Id.* at 882. Applying the "dominant motive" test, the Fourth Circuit in *Jones Sausage* found substantial evidence to support the Board's finding that the employer laid off two employees because of their union activities. *Id.* at 880-82.

[50] *See* NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1315 (1st Cir. 1971) (on petition for rehearing) (per curiam). The First Circuit was the first court to reject the Board's "in part"

Despite the conflicting "factor" and "but for" language, the Fourth Circuit applies a "dominant motive" rather than an "in part" test. Although the *Winn-Dixie* court equated "factor" with "in part,"[51] other Fourth Circuit cases intend "factor" to mean a "but for" or "motivating" factor necessary for the "dominant motive" test.[52] The early Fourth Circuit cases applied a "dominant motive" test.[53] In *NLRB v. Jones Sausage Co.*,[54] the Fourth Circuit first enunciated a dominant motive test by looking for the motive that truly dominated the employer's discharge decision.[55] The Fourth Circuit cited and applied the *Jones Sausage* "dominant motive" test in *NLRB v. Overnite Transportation Co.*[56] and *Filler Products, Inc. v. NLRB*.[57] More recent Fourth Circuit opinions use the "factor" language which normally denotes an "in part" test.[58] The Fourth Circuit, however, uses "factor" language to indicate a "dominant motive" test. The recent Fourth Circuit opinions, rather than overruling the early "dominant motive" cases, cited the early cases as support for the "factor" requirement.[59] The Fourth Circuit, therefore, equates the present "factor" language with the "dominant motive" test enunciated in earlier Fourth Circuit cases.

Another indication that the Fourth Circuit is applying a "dominant motive" test is the court's requirement that the General Counsel prove that the employer would not have discharged the employee "but for" the employee's union activity.[60] The "but for" language usually accompanies the "dominant motive" test.[61] In addition, the Fourth Circuit places a burden on the General Counsel to show an affirmative reason why the

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test and to substitute a "dominate motive" test. *See* NLRB v. Whitin Machine Works, 204 F.2d 883, 885 (1st Cir. 1953). Several other circuits since have adopted the "dominant motive" test. *See* NLRB v. International Medication Syss. Ltd., 640 F.2d 1110, 1113 (9th Cir. 1981); Berry Schools v. NLRB, 627 F.2d 692, 704-05 (5th Cir. 1980); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 93 (2d Cir. 1978). *See also* Wright Line, A Div. of Wright Line, Inc., 251 NLRB Dec. ¶ 17,356 at 32464-65 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981); Note, Wright Line: *The NLRB Adopts the* Mt. Healthy *Test for Dual Motive Discharge Cases Under the LMRA*, 32 MERCER L. REV. 933, 935-37 (1981).

[51] *See* Winn-Dixie Stores, Inc. v. NLRB, 448 F.2d 8, 13 n.16 (4th Cir. 1971); text accompanying notes 41-44 *supra*.

[52] *See* text accompanying notes 53-64 *infra*.

[53] *See* text accompanying notes 54-57 *infra*.

[54] 257 F.2d 878 (4th Cir. 1958).

[55] *Id.* at 882; *see* text accompanying notes 47-49 *supra*; note 38 *supra*.

[56] 308 F.2d 284, 288 (4th Cir. 1962).

[57] 376 F.2d 369, 377-78 (4th Cir. 1967).

[58] *See* Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 569 (4th Cir. 1977); Winn-Dixie Stores, Inc. v. NLRB, 448 F.2d 8, 13 n.16 (4th Cir. 1971).

[59] *See* Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 569 (4th Cir. 1977) (citing Filler Prods., Inc. v. NLRB, 376 F.2d 369, 377 (4th Cir. 1967); Winchester Spinning Corp. v. NLRB, 402 F.2d 299, 304 (4th Cir. 1968)); Winchester Spinning Corp. v. NLRB, 402 F.2d 299, 304 (4th Cir. 1968) (citing NLRB v. Dove Coal Co., 369 F.2d 849, 852 (4th Cir. 1966)); NLRB v. Dove Coal Co., 369 F.2d 849, 852 (4th Cir. 1966) (citing NLRB v. Overnite Transp. Co., 308 F.2d 284, 284-85 (4th Cir. 1962)).

[60] *See* text accompanying notes 46-50 *supra*.

[61] *Id.*

employer rejected a good cause and relied on an illegal motive for the discharge.[62] The Fourth Circuit places the "affirmative reason" burden on the General Counsel, following First Circuit "dominant motive" opinions.[63] The "dominant motive" test, consequently, provided the basis for both the Fourth Circuit's burden of proof requirement and motive requirement.[64]

The "in part" test differs significantly in practical terms from the "dominant motive" test. If an employer discharges an employee for three reasons, one of which is the employee's union activity, the employer is guilty of a section 8(a))3) violation under the "in part" test regardless of the weight the employer accords the different discharge reasons.[65] Under the "dominant motive" test, however, the employer is not guilty of a violation unless the General Counsel can prove that the employer would not have discharged the employee had the employer only considered the two legitimate reasons.[66] Both the "dominant motive" and the "in part" tests are legitimate tests. Lack of a clear analytical framework, however, weakens the Fourth Circuit's "dominant motive" test.[67] The analytical framework confuses practitioners over how the Fourth Circuit will apply the dual motivation test.[68]

In contrast to the Fourth Circuit, the First Circuit, in *NLRB v. Wright Line, A Division of Wright Line, Inc.*,[69] articulated a section 8(a)(3) test within a well-defined analytical framework.[70] In *Wright Line*, the First Circuit held that once the General Counsel establishes a prima facie case of discrimination,[71] the employer has a burden of producing a legitimate reason for the discharge.[72] If the employer satisfies this

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[62] *See* note 36 *supra*.

[63] *See* NLRB v. Patrick Plaza Dodge, Inc., 522 F.2d 804, 807 (4th Cir. 1975) (citing NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968)).

[64] *See* text accompanying notes 52-63 *supra*.

[65] *See* Wright Line, A Div. of Wright Line, Inc., 251 NLRB Dec. ¶ 17,356 at 32463-64, 32465-66 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

[66] *See* NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1315 (1st Cir. 1971) (on petition for rehearing) (per curiam). *See also* NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968); NLRB v. Lowell Sun Publ. Co., 320 F.2d 835, 842 (1st Cir. 1963) (Aldrich, J., concurring).

[67] *See* text accompanying notes 39-50 *supra*.

[68] *Compare* Wright Line, A Div. of Wright Line, Inc., 251 NLRB Dec. ¶ 17,356 at 32472 n.9 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981) (Fourth Circuit applies "dominant motive" test) *and* Note, Wright Line, *The NLRB Adopts the* Mt. Healthy *Test for Dual Motive Discharge Cases Under the LMRA*, 32 MERCER L. REV. 933, 936 (1981) (Fourth Circuit applies "dominant motive" test in "pretext" format) *with* DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of* Mt. Healthy Board of Education v. Doyle *Upon the NLRA*, 66 GEO. L. J. 1109, 1111 n.16 (1978) (the Fourth Circuit has accepted Board's "in part" test).

[69] 662 F.2d 899 (1st Cir. 1981).

[70] *Id.* at 904-07.

[71] *See* text accompanying note 80 *infra*.

[72] NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d 899, 904-07 (1st Cir. 1981).

burden of production, the General Counsel must prove that the employer would not have discharged the employee but for his union activity.[73]

The First Circuit's *Wright Line* test is a modification of a test formulated by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*.[74] *Mt. Healthy* involved a refusal to rehire which allegedly violated the employee's first amendment rights.[75] The Supreme Court stated that the employee first must show that his participation in the protected activity was a "substantial factor" in the decision not to rehire.[76] The Court held that the burden of proof then shifts to the employer to show that it would not have rehired the employee regardless of the employee's participation in the protected activity.[77]

In *Wright Line*, the employer discharged a union activist allegedly for filing inaccurate time reports.[78] The employee filed a complaint with the NLRB.[79] In its decision, the NLRB abandoned the "in part" test and adopted the *Mt. Healthy* test for the section 8(a)(3) context.[80] As applied to section 8(a)(3), the *Mt. Healthy* test provides that the General Counsel initially must establish a prima facie case by showing that the employee's participation in protected activity was a substantial factor in the refusal to rehire.[81] If the General Counsel establishes a prima facie case, the burden shifts to the employer to prove by a preponderance of the evidence that he would have reached the same decision regardless of the employee's participation in protected activity.[82]

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[73] *Id.*

[74] 429 U.S. 274, 285-87 (1977); *see* NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d at 904-07.

[75] *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 283-84. In *Mt. Healthy*, the City School Board decided not to rehire a teacher for the stated reasons that he made an obscene gesture towards a student and conveyed the contents of a confidential memorandum regarding the faculty dress code to a radio station. *Id.* at 283-84. The Supreme Court held that the first amendment's free speech provision protected conveyance of the dress code memo. *See id.* at 284. However, the school board legally could have refused to rehire Doyle because of the obscene gesture incident. *Id.* at 285. Thus, the school board had two possible reasons for refusing to rehire Doyle, one permissible and one impermissible under the first amendment. *See id.* at 284-85.

[76] *Id.* at 287.

[77] *Id.*

[78] NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d at 900.

[79] *Id.*

[80] *See* Wright Line, A Div. of Wright Line, Inc., 251 NLRB Dec. ¶ 17,356 at 32467-69 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

[81] *Id.* at 32468-69.

[82] *Id.* The Board adopted the *Mt. Healthy* test in an attempt to clarify the burden allocation process in dual motive cases and to alleviate confusion caused by rejection of the "in part" test by many of the circuit courts. *See* NLRB v. International Medication Syss. Ltd., 640 F.2d 1110, 1113 (9th Cir. 1981); Berry Schools v. NLRB, 627 F.2d 692, 704-05 (5th Cir. 1980); NLRB v. Eastern Smelt. & Ref. Corp., 598 F.2d 666, 670-71 (1st Cir. 1979); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98-99 (2d Cir. 1978). Several circuit courts adopted the Board's *Wright Line* test before the First Circuit reviewed the Board's decision. *See* NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 446 (6th Cir. 1981); NLRB v. Nevis Indus., Inc., 647 F.2d 905, 909 (9th Cir. 1981); Peavey Co. v. NLRB, 648 F.2d 460, 461

When the First Circuit reviewed the Board's order in *Wright Line*, the court adopted the Board's test in every aspect except that the court put the final burden of proof on the General Counsel and not on the employer.[83] The First Circuit organized the test to delineate clearly the

(7th Cir. 1981); Statler Indus., Inc. v. NLRB, 644 F.2d 902, 905 (1st Cir. 1981). In *Eastern Smelting*, the First Circuit abandoned its "dominant motive" test in favor of the *Mt. Healthy* test. *See* 598 F.2d 666, 671 (1st Cir. 1979). Then, in *Statler Indus., Inc. v. NLRB*, the First Circuit approved the Board's *Wright Line* decision as a conscientious effort to reduce confusion in dual motive cases in the § 8(a)(3) area. *See* Statler Indus., Inc. v. NLRB, 644 F.2d 902, 905 (1st Cir. 1981). In its *Wright Line* decision modifying the *Mt. Healthy* test, the First Circuit expressly overruled contrary portions of *Eastern Smelting* and *Statler*. *See* NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d at 905 n.10. When *Wright Line* partially overruled *Statler*, a brief period of harmony between the Board and the First Circuit ended. The First Circuit and other circuits have criticized the Board not only for the "in part" test, but also for how the Board applies the test to the facts. *See, e.g.*, NLRB v. Eastern Smelt. & Ref. Corp., 598 F.2d 666, 669-70 (1st Cir. 1979) (Board errs in labelling good reason "pretextual" without adequate consideration and in applying "in part" test); American Mfg. Assocs. v. NLRB, 594 F.2d 30, 37 (4th Cir. 1979) (when employer had good motive for discharge, Board cannot declare motive pretext without affirmative and persuasive reason); NLRB v. Billen Shoe Co., 397 F.2d 801, 802-03 (1st Cir. 1968) (Board must look at all evidence and not just that of one side); Local 138, Int'l Union of Operating Eng'rs v. NLRB, 321 F.2d 130, 138 n.1 (2d Cir. 1963) (Friendly, J., concurring) (disturbed by common practice of Board examiners of supporting findings by declaring one witness credible and another not credible without explanation).

[83] *See* NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d at 905-07 (1st Cir. 1981). The First Circuit affirmed its view expressed in *Eastern Smelting* and *Statler* that the *Mt. Healthy* "but for" standard is the best test for causation in mixed motive cases. *Id.* at 903. *See* Statler Indus., Inc. v. NLRB, 644 F.2d 902, 905 (1st Cir. 1981); NLRB v. Eastern Smelt. & Ref. Corp., 598 F.2d 666, 671 (1st Cir. 1979). The court stated that if the employer would have discharged the employee regardless of the employee's participation in the protected activity, then the impermissible motive had no effect and is no more an unfair labor practice than an unexecuted evil intent is a crime. NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d at 903.

In support of placing the final burden of proof upon the employer, the Board in *Wright Line* relied upon NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 32-35 (1967). *See* Wright Line, A Div. of Wright Line, Inc., 251 NLRB Dec. ¶ 17,356 at 32468 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). *Great Dane* arose because an employer refused to pay striking employees accrued vacation benefits. 388 U.S. at 27. The Supreme Court held that once the General Counsel proves that the employer engaged in discriminatory conduct which slightly could have affected employee rights, the burden is upon the employer to prove that legitimate reasons motivated the dismissal. *Id.* at 34; *see* note 2 *supra*. The Board felt justified in placing the burden of proof upon the employer because such a structure balanced the competing interests of employers and employees. Wright Line, A Div. of Wright Line, Inc., 251 NLRB Dec. ¶ 17,356 at 32468 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). The advantage to this structure, according to the Supreme Court, is that the burden of proof of motivation is on the party to whom the proof is most accessible. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

The First Circuit, in placing the ultimate burden of proof upon the General Counsel, stated that *Great Dane* was inapposite in *Wright Line* because *Great Dane* involved a challenge to an employer's overall policy and not a single discharge. NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d at 904 n.8. In addition, the employer in *Great Dane* admitted discrimination, while in *Wright Line* discrimination was at issue. *Id.* The First Circuit also stated that when a party merely must rebut a prima facie case, that party should never have the burden of proof. *Id.* at 904; *see* FED. R. EVID. 301; 9 WIGMORE ON EVIDENCE §

duties of each party.[84] The General Counsel first must prove that the employee's participation in the protected activity was a substantial factor in the employer's decision.[85] Second, the employer must produce some evidence showing the existence of a legitimate business reason for the discharge.[86] Third, the General Counsel must prove that the employer would not have discharged the employee but for the employee's protected activity.[87] At each step, the test sets forth and allocates the burden of proof. The test clearly states that for the employer to violate section 8(a)(3) the illegal motive must be both a substantial factor and the "but for" cause of the discharge.[88]

The Fourth Circuit test and the *Wright Line* test are substantively very similar. Both place a burden of production on the employer after the General Counsel establishes a prima facie case.[89] Both tests also place the ultimate burden upon the General Counsel to show that the discharge would not have occurred "but for" the protected activity.[90] The *Wright Line* test, however, presents a well-defined analytical framework. The step-by-step progression of the *Wright Line* test clearly establishes the final "but for" requirement. The Fourth Circuit test, on the other hand, causes confusion as to the weight of the final burden because of the conflict between the "factor" language and the "but for" language.[91] The Fourth Circuit, when next presented with a section 8(a)(3) dual motive case, should consider adaptation of a framework similar to that announced by the First Circuit in *Wright Line*.

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2487, at 281-2 (3d ed. 1940). Finally, the First Circuit pointed out a distinction between *Mt. Healthy* and most § 8(a)(3) cases which justified reversing the *Mt. Healthy* allocation of the burden of proof. The court stated that in *Mt. Healthy* the employer admitted violating the employee's constitutional rights, thus making the "but for" analysis an affirmative defense which justified placing the burden of proof on the defendant. NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d at 906. On the other hand, in § 8(a)(3) cases, the employer does not admit to a discriminatory practice, so the legitimate motive evidence is not an affirmative defense, but merely rebuts a prima facie case. *Id.* Thus, the burden of proving that the employer would not have discharged the employee in the absence of union activity is properly upon the General Counsel. *Id.* at 906-07. The Supreme Court has imposed the same proof structure in the analogous Title VII area as the First Circuit imposed in *Wright Line*. *See generally* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[84] *See* NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d at 902-07.

[85] *See id.* at 901-02. *Cf.* American Thread Co. v. NLRB, 631 F.2d 316, 321 (4th Cir. 1980) (General Counsel establishes prima facie case by showing employer's knowledge of employee's union activities and employer's union animus).

[86] *See* NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d at 907.

[87] *See id.* at 903.

[88] *See id.* at 902-07.

[89] *Compare id.* at 901-02 *with* Maphis Chapman Corp. v. NLRB, 368 F.2d 298, 304 (4th Cir. 1966).

[90] *Compare* NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F.2d at 903-04 *with* NLRB v. Kiawah Island Co., 650 F.2d at 490.

[91] *See* text accompanying notes 39-50 *supra*.