

1985

Labor Law: Interboro Doctrine Constitutes Reasonable Interpretation of Section 7 of NLRA. *NLRB v. City Disposal Systems*, 104 S. Ct. 1505 (1984).

Vicky M. Phillips

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Vicky M. Phillips, *Labor Law: Interboro Doctrine Constitutes Reasonable Interpretation of Section 7 of NLRA. NLRB v. City Disposal Systems*, 104 S. Ct. 1505 (1984), 68 Marq. L. Rev. 366 (1985).

Available at: <https://scholarship.law.marquette.edu/mulr/vol68/iss2/7>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

LABOR LAW — *Interboro* Doctrine Constitutes Reasonable Interpretation of Section 7 of NLRA. *NLRB v. City Disposal Systems*, 104 S. Ct. 1505 (1984).

The *Interboro* doctrine¹ provides that an individual's honest and reasonable assertion² of a right grounded in a collective bargaining agreement is concerted activity within the meaning of section 7 of the National Labor Relations Act,³ even in the absence of interest by fellow employees.⁴ Section 7 protects employees against employer sanctions when they engage in concerted activities for mutual aid or protection.⁵ In *NLRB v. City Disposal Systems*⁶ the United States Supreme Court held that the National Labor Relations Board's *Interboro* doctrine constituted a reasonable interpretation of section 7.⁷

By its holding, the Supreme Court resolved the dispute which had existed between the Board and the circuits supporting the doctrine⁸ and those circuits that had rejected it.⁹ Jus-

1. The doctrine was enunciated in *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967).

2. See *infra* note 32 and accompanying text.

3. 29 U.S.C. § 157 (1982) (section 7 of the Act) provides:

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

4. *Interboro Contractors*, 157 N.L.R.B. at 1298. The dissenting justices in *City Disposal Systems* apparently misunderstood this aspect of the *Interboro* doctrine. Justice O'Connor wrote that the doctrine made little sense when applied to this case because there was no attempt to get other employees involved. *NLRB v. City Disposal Sys.*, 104 S. Ct. 1505, 1519 (1984) (O'Connor, J., dissenting). The District of Columbia Circuit has made the same mistake. See *Kohls v. NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

5. See *supra* note 3.

6. 104 S. Ct. 1505 (1984).

7. *Id.* at 1510. See *infra* text accompanying note 62 for the standard of review of Board interpretations of the Act.

8. See, e.g., *NLRB v. Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971) (*per curiam*); *NLRB v. Selwyn Shoe Mfg. Corp.*, 428 F.2d 217 (8th Cir. 1970); *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967).

9. See, e.g., *Royal Dev. Co. v. NLRB*, 703 F.2d 363 (9th Cir. 1983); *Roadway Express, Inc. v. NLRB*, 700 F.2d 687 (11th Cir. 1983), *vacated and remanded*, 104 S. Ct. 1699 (1984); *ARO, Inc. v. NLRB*, 596 F.2d 713 (6th Cir. 1979); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973). See also *Kohls v. NLRB*, 629 F.2d 173, 176-77 (D.C. Cir. 1980) (questioning the validity of the doctrine), *cert. denied*, 450

tice O'Connor, dissenting,¹⁰ adhered to the view of the circuits rejecting the doctrine.¹¹ She stated that the *Interboro* doctrine was an unwarranted exercise of legislative power by the Board.¹²

This Note will discuss the history of the *Interboro* doctrine as set forth in the Board's decision and its treatment in the courts of appeals. It will also examine the opinions in *City Disposal Systems* discussing how the majority opinion creates a disparity between the treatment of union and nonunion employees, while the dissent's criticism of the decision as an unwarranted expansion of section 7 is without merit.

I. STATEMENT OF FACTS

James Brown was employed as a truck driver by City Disposal Systems to haul garbage from Detroit to a landfill outside the city. Brown was assigned to drive truck number 245. One day while hauling garbage, Brown experienced problems with his truck. He took the truck back to the shop, but was told the truck could not be repaired that day. Brown reported to his supervisor who asked him to drive truck number 244. A few days earlier brake problems on truck number 244 had nearly caused a collision.¹³ Brown refused to drive the truck, stating that it was unsafe. Although he did not specifically refer the supervisor to the collective bargaining agreement,¹⁴ he later claimed he was attempting to enforce its provisions.¹⁵ Brown subsequently clocked out and went

U.S. 931 (1981); *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079, 1082-84 (8th Cir. 1977) (finding statutory basis for *Interboro* doctrine questionable).

10. Chief Justice Burger and Justices Powell and Rehnquist joined in the dissent.

11. See *City Disposal Sys.*, 104 S. Ct. at 1516-17 (O'Connor, J., dissenting).

12. *Id.* at 1517. See *infra* text accompanying notes 70-76.

13. *NLRB v. City Disposal Sys.*, 104 S. Ct. 1505, 1509 (1984). Brown observed truck number 244's difficulty and was, in fact, nearly involved in the collision. *Id.*

14. See *infra* text accompanying note 29.

15. *City Disposal Sys.*, 104 S. Ct. at 1509. Article XXI of the collective bargaining agreement provided:

The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

Id. at 1507-08.

home. Later that day he received word that he had been discharged because of his refusal to drive the truck.¹⁶

Brown filed a grievance with his union. The union failed to process it. Brown then filed an unfair labor practice charge with the Board, challenging his discharge.¹⁷ The Administrative Law Judge (ALJ) found that City Disposal committed an unfair labor practice by discharging him.¹⁸ The Board adopted the findings and conclusions of the ALJ and ordered Brown reinstated with backpay.¹⁹ The Court of Appeals for the Sixth Circuit denied enforcement;²⁰ however, the United States Supreme Court reversed and remanded for further proceedings consistent with its decision.

II. THE *Interboro* Doctrine

Section 7 of the NLRA gives employees "the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"²¹ Action by an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]" constitutes an unfair labor practice²² and empowers the Board to take action against the employer.²³

As early as 1962, the Board found that an individual employee who was fired for requesting show-up-time pay,²⁴ which he believed he was entitled to under a collective bargaining agreement, was engaged in concerted activities.²⁵ This rule became known as the *Interboro* doctrine.²⁶ In *Interboro*

16. *Id.* at 1509.

17. Brown claimed the company violated section 8(a)(1) of the Act by discharging him. *Id.* See *infra* text accompanying note 22 for the text of § 8(a)(1).

18. *City Disposal Sys.*, 104 S. Ct. at 1509.

19. *Id.* See 29 U.S.C. § 160(c) (1982).

20. *City Disposal Sys.*, 104 S. Ct. at 1509. See 29 U.S.C. § 160(e) (1982).

21. 29 U.S.C. § 157 (1982).

22. *Id.* § 158(a)(1).

23. See *id.* § 160(a).

24. Show-up-time pay is compensation for reporting to work when, through no fault of the employee, work is unavailable. See *Bunney Bros. Constr. Co.*, 139 N.L.R.B. 1516, 1516 n.1 (1962).

25. *Id.* at 1519.

26. For a general discussion of the development of the *Interboro* doctrine, see Dolin, *The Interboro Doctrine and the Courts: A History of Judicial Pronouncements on the Protected Status of Individual Assertions of Collective Rights*, 31 AM. U.L. REV. 551, 552-62 (1982).

Contractors, Inc.,²⁷ the Board held that an individual's attempt to assert a right under a collective bargaining agreement was concerted activity, even in the absence of interest by fellow employees.²⁸ The Board subsequently broadened this protection by holding that the employee need not refer specifically to the collective bargaining agreement nor even be aware of the existence of such an agreement.²⁹

The *Interboro* doctrine caused a great deal of controversy,³⁰ prior to *City Disposal Systems*, only a few circuits had embraced it.³¹ Those that did placed some limitations on the doctrine, such as requiring the assertion of the right to be a reasonable one³² or requiring the employee to refer expressly to the collective bargaining agreement.³³

Several circuits, however, believed the Board had exceeded its jurisdiction in *Interboro*.³⁴ They claimed that the statute unambiguously called for some activity which looked toward group action.³⁵ These circuits criticized the Board for ex-

27. 157 N.L.R.B. 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967).

28. *See id.* at 1298.

29. *See, e.g.*, Michigan Screw Prods., 242 N.L.R.B. 811, 814 (1979); Roadway Express, Inc., 217 N.L.R.B. 278, 279 (1975), *enforced*, 532 F.2d 751 (1976). The Board justified the *Interboro* doctrine on two grounds. First, the Board recognized that an individual's attempt to implement the terms of a collective bargaining agreement was but an extension of the concerted activity that gave rise to the agreement. Second, in seeking to enforce the agreement, the rights and interests of all the employees were affected. *See Interboro Contractors*, 157 N.L.R.B. at 1298. *But see* NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 979 (9th Cir. 1973) (holding *Interboro* doctrine inapplicable because express reference was not made to the collective bargaining agreement).

30. *See generally* Note, *The Sixth Circuit Spurns Interboro and the Doctrine of Constructive Concerted Activity* — ARO, Inc. v. NLRB, *Leaves Non-union Employees at the Mercy of Their Bosses*, 11 U. Tol. L. Rev. 1045, 1059-63 (1980).

31. *See supra* note 8.

32. *See, e.g.*, NLRB v. Ben Pekin Corp., 452 F.2d 205, 206-07 (7th Cir. 1971) (*per curiam*); NLRB v. John Langenbacher Co., 398 F.2d 459, 463 (2d Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969). The Board itself requires only a good faith belief that the right is grounded in the agreement. *See, e.g.*, Transport Serv. Co., 263 N.L.R.B. 910, 912 (1982); Varied Enters., Inc., 240 N.L.R.B. 126, 132 (1979).

33. *See supra* note 29 and accompanying text.

34. *See, e.g.*, Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 310 (4th Cir. 1980) (the scope of the concerted activities in section 7 is essentially a jurisdictional concern).

35. *See, e.g.*, Royal Dev. Co. v. NLRB, 703 F.2d 363, 374 (9th Cir. 1983) (*Interboro* doctrine goes beyond the express language of section 7); ARO, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979) (this expansive definition of the concerted activity clause of section 7 "goes too far"); NLRB v. Northern Metal Co., 440 F.2d 881, 884 (3d Cir. 1971) (citing Webster's dictionary for the definition of "concerted"). *But see*

panding the definition of the word "concerted" to include activities that merely affected others in the bargaining unit.³⁶ The idea that the assertion of a right was an extension of the concerted activity that gave rise to the collective bargaining agreement was denounced as a legal fiction.³⁷

As a result, the courts rejecting the *Interboro* doctrine required that the action be made on behalf of other employees³⁸ or at least have some relationship to group action.³⁹ Under this standard⁴⁰ an employee who engaged the aid of another employee⁴¹ or a union representative,⁴² sought to present a formal grievance,⁴³ sought to represent other employees,⁴⁴ or

Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1160 (5th Cir. 1980) (the term "concerted activities" should be construed as a term of art rather than a factual description); Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 329-46 (1981) (the history of the language and policy behind section 7 suggests an expansive reading of section 7).

36. See, e.g., *Royal Dev. Co. v. NLRB*, 703 F.2d 363, 374 (9th Cir. 1983); *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971).

37. See *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971). See also Gorman & Finkin, *supra* note 35, at 309 (the doctrine rests on "an accumulation of fictions and fabricated presumptions"); Note, *Protection of Individual Action as "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 387-93 (1983) (criticizing the doctrine as a distortion and a fiction) [hereinafter cited as Note, *Concerted Activity*]. But see Note, *Labor Law — The Interboro Doctrine of "Constructive" Concerted Activity — A Logical Interpretation of Section 7 of the NLRA or a Legal Fiction?*, 7 J. CORP. L. 75, 90 (1981) (stating the *Interboro* doctrine is not a fiction) [hereinafter cited as Note, *Constructive Concerted Activity*].

38. See, e.g., *ARO, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979). Accord *NLRB v. Guernsey-Muskingum Elec. Coop.*, 285 F.2d 8, 12 (6th Cir. 1960).

39. See, e.g., *Roadway Express, Inc. v. NLRB*, 700 F.2d 687, 694 (11th Cir. 1983), *vacated and remanded*, 104 S. Ct. 1699 (1984); *ARO, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979); *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971); *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

40. The standard is known as the *Mushroom Transportation* test. See Dolin, *supra* note 26, at 553-58; Comment, *National Labor Relations Act Section 7: Protecting Employee Activity Through Implied Concert of Action*, 76 NW. U.L. REV. 813, 821-25 (1981).

41. See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962); *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967).

42. See, e.g., *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975); *NLRB v. Adams Delivery Serv., Inc.*, 623 F.2d 96, 100 (9th Cir. 1980).

43. See, e.g., *NLRB v. Ford Motor Co.*, 683 F.2d 156, 158 (6th Cir. 1982); *Crown Cent. Petroleum Corp. v. NLRB*, 430 F.2d 724, 729 (5th Cir. 1970).

44. See, e.g., *NLRB v. Guernsey-Muskingum Elec. Coop.*, 285 F.2d 8, 12 (6th Cir. 1960) (it is not necessary to formally select a spokesperson). But cf. *Southwest Latex Corp. v. NLRB*, 426 F.2d 50, 56-57 (5th Cir. 1970) (self-appointed spokesperson that

at least attempted to initiate some group action⁴⁵ was protected. An individual who made a personal gripe, however, was not protected even if it was covered by the collective bargaining agreement.⁴⁶

Although the Board does not recognize purely personal complaints by an individual as concerted activity,⁴⁷ the Board did, for a time, attempt to expand the *Interboro* doctrine to include some situations in which no collective bargaining agreement was in effect.⁴⁸ In *Alleluia Cushion Co.*,⁴⁹ a nonunion employee who complained to the Occupational Safety and Health Administration about various safety hazards was dismissed.⁵⁰ The Board held that an individual who sought to enforce statutory provisions designed for the benefit of all employees was engaged in concerted activities, in the absence of any evidence that fellow employees disavowed such activities.⁵¹ The Board took this position still further in *Air Surrey Corp.*,⁵² by holding that an individual's actions were concerted when they related to conditions of employment that were matters of vital concern to all employees.⁵³

The Board's decisions in *Alleluia* and *Air Surrey* never gained acceptance by the courts of appeals.⁵⁴ Even those circuits that supported the *Interboro* doctrine were not willing to

neither employees nor employer knew was acting on behalf of others was not engaged in concerted activities).

45. See Comment, *supra* note 40, at 822-25, for examples of what activities courts have found to be concerted.

46. See *supra* note 9 for those courts rejecting the *Interboro* doctrine.

47. See, e.g., *Meyers Indus.*, 268 N.L.R.B., 115 L.R.R.M. (BNA) 1025, 1030 (1984); *Comet Fast Freight Inc.*, 262 N.L.R.B. 430, 431-32 (1982); *Tabernacle Community Hosp. & Health Center*, 233 N.L.R.B. 1425, 1429 (1977). See also *Gorman & Finkin*, *supra* note 35, at 289-93.

48. For a general discussion of the expansion of the *Interboro* doctrine, see Bohlander, *Employee Protected Concerted Activity: The Nonunion Setting*, 33 LAB. L.J. 344, 345-50 (1982); Murphy, *Protected Concerted Activity and Refusals to Work*, 34 LAB. L.J. 654, 656-58 (1983); Note, *Constructive Concerted Activity*, *supra* note 37, at 91-93; Comment, *supra* note 40, at 830-36.

49. 221 N.L.R.B. 999 (1975).

50. See *id.* at 999.

51. See *id.* at 1000.

52. 229 N.L.R.B. 1064 (1977), *enforcement denied*, 601 F.2d 256 (6th Cir. 1979).

53. See *id.* at 1064.

54. See Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 TEX. L. REV. 991, 1010-12 (1980) (none of the circuits protects unorganized individual activity).

expand the doctrine to embrace the *Alleluia* holding.⁵⁵ The Board has recently retreated from this position and has expressly overruled the *Alleluia* decision in *Meyers Industries*.⁵⁶ In *Meyers*, the Board criticized the *Alleluia* decision. Instead of looking at the form of the activity to see if it was concerted as required by the Act, the Board had instead looked to whether the purpose of the activity warranted the Board's protection.⁵⁷ It distinguished the *Interboro* decision from *Alleluia* by stating that in the former case the focal point was the attempted implementation of a collective bargaining agreement; in the *Alleluia* situation, there was no such agreement and, therefore, no attempt to enforce one.⁵⁸

Consequently, what has emerged are two lines of Board philosophy. When a collective bargaining agreement is in effect, an individual's attempt to enforce a provision of the agreement will be found to be concerted, even in the absence of interest by fellow employees.⁵⁹ When there is no collective bargaining agreement in effect, the Board will rely on an "objective standard" and find activity to be concerted only if it is engaged in with another employee or on behalf of another employee.⁶⁰

III. THE OPINIONS

A. Majority

In *NLRB v. City Disposal Systems*⁶¹ Justice Brennan noted that it was the function of the Board, in the first instance, to establish the scope of section 7 and that a reasonable construction by the Board is entitled to great deference when its exper-

55. See, e.g., *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 310 (4th Cir. 1980); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 30 (7th Cir. 1980).

56. 268 N.L.R.B. ___, 115 L.R.R.M. (BNA) 1025 (1984).

57. See *id.* at ___, 115 L.R.R.M. at 1027.

58. See *id.* at ___, 115 L.R.R.M. at 1028. *Accord* *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 310 (4th Cir. 1980); *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1242 (9th Cir. 1980). *But see* Comment, *supra* note 40, at 832 (statutes that protect labor are partially a result of concerted action by employees and labor organizations lobbying for enactment of these laws).

59. See *Interboro Contractors*, 157 N.L.R.B. at 1298.

60. See *Meyers Indus.*, 268 N.L.R.B. ___, ___, 115 L.R.R.M. 1025, 1028-29 (1984).

61. 104 S. Ct. 1505 (1984).

tise is implicated.⁶² In this context, the Court found the Board's interpretation of section 7 reasonable.⁶³

The majority reasoned that an employee's invocation of a right grounded in the collective bargaining agreement was part of the same concerted activity that gave rise to the agreement. The agreement was made by representatives of the group for the benefit of the group; if it was not honored, the power of the group could be brought to bear on the employer.⁶⁴ Thus, the mere fact that an individual employee's assertion of a right under the collective bargaining agreement was divorced in time from the agreement was not sufficient to take the employee out of section 7 protection.⁶⁵

In examining the history of section 7,⁶⁶ the majority noted that the *Interboro* doctrine is not inconsistent with congressional intent and is in fact consistent with the purpose of the Act.⁶⁷ The Court stated that Congress' intent was to equalize the bargaining power of the employees to that of the employer, by allowing them to band together to face their employer.⁶⁸ There is no indication that Congress intended to limit that protection to situations in which employees combined in certain ways or that Congress intended the protection not to be extended to individuals who participated in an integral part of a single collective process.⁶⁹

62. See *id.* at 1510. But cf. *NLRB v. Bildisco and Bildisco*, 104 S. Ct. 1188, 1198 n.9 (1984) (the Board's views are entitled to little deference when interpreting statutes other than the Taft-Hartley Act).

63. See *City Disposal Sys.*, 104 S. Ct. at 1510.

64. See *id.* at 1511. See also Dolin, *supra* note 26, at 556 (attempting to implement the agreement constitutes group action as a matter of law); Note, *Constructive Concerted Activity*, *supra* note 37, at 90 (*Interboro* doctrine satisfied the requirement that activity be related to group action).

65. See *City Disposal Sys.*, 104 S. Ct. at 1511-12. The majority noted that section 7 protects individuals who join or assist labor organizations, although these actions are also divorced in time and location from the actions of others. See *id.*

66. For a discussion of the history of section 7, see Gorman & Finkin, *supra* note 35, at 331-46.

67. See *City Disposal Sys.*, 104 S. Ct. at 1512.

68. See *id.* at 1513. Prior to enactment of the labor laws, many states regarded group protests by employees as unlawful conspiracies subject to criminal or civil sanctions, while individual protests on the same matters were lawful. See *Meyers Indus.*, 268 N.L.R.B. ___, 115 L.R.R.M. (BNA) 1025, 1032-33 (1984) (Zimmerman, dissenting). See also Gorman & Finkin, *supra* note 35, at 331.

69. See *City Disposal Sys.*, 104 S. Ct. at 1513. It has been suggested that Congress merely wanted to allow employees to band together if they wished and not to take away

B. Dissent

Justice O'Connor argued, as did the circuits rejecting the *Interboro* doctrine, that the Board had exceeded its jurisdiction and had engaged in an act of undelegated legislation.⁷⁰ Merely because the right an employee seeks to enforce is grounded in the collective bargaining agreement does not make the individual's action concerted.⁷¹ If this were the case, every contract claim could be the basis for an unfair labor practice complaint, and O'Connor felt that this interpretation was not a correct reading of the law.⁷² The labor laws were designed to encourage employees to act together. Protecting two employees acting together, while not extending this protection to an individual acting alone, was not inconsistent with this purpose.⁷³

the protection afforded to a single employee. See *Illinois Ruan Transp. Corp. v. NLRB*, 404 F.2d 274, 285-89 (8th Cir. 1968) (Lay, J., dissenting). See also Gorman & Finkin, *supra* note 35, at 376-77. The majority also observed that although the primary means of enforcing a collective bargaining agreement was the grievance procedure established by the agreement, there was not likely to be a clear-cut distinction between a properly filed grievance, a complaint to an employer, or even a refusal to perform a particular job. It is, therefore, not unreasonable to extend section 7 protection to informal grievances.

In addition, the majority made the following points. First, the argument that the *Interboro* doctrine undermined the arbitration process is without merit. Second, although the action may be found to be concerted, that does not preclude the possibility that the activities may be found to be unprotected. Third, an employee should not be denied the protection of section 7 simply because of a failure to refer to the collective bargaining agreement. Finally, the majority noted that the employee's belief that the right was grounded in the collective bargaining agreement need only be honest and reasonable because questions of merit do not go into the determination of whether the action was concerted or not. The Court pointed out that the arbitration process was similarly undermined by allowing two employees, acting together, to make an informal grievance and there is no reason to single out the *Interboro* doctrine as causing greater harm. See *City Disposal Sys.*, 104 S. Ct. at 1513-15. See also *supra* text accompanying notes 28 & 34; Note, *Constructive Concerted Activity*, *supra* note 37, at 76.

70. See *City Disposal Sys.*, 104 S. Ct. at 1517 (O'Connor, J., dissenting). See *supra* text accompanying notes 34-37.

71. 104 S. Ct. at 1517.

72. See *id.* Cf. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 426-28 (1967) (Congress determined the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements but that some jurisdiction should be vested in the courts.); *Kohls v. NLRB*, 629 F.2d 173, 179 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

73. See *City Disposal Sys.*, 104 S. Ct. at 1518. But see Note, *supra* note 54, at 1001-02 (protecting individual activity does not undermine unionization).

The dissent criticized the majority's position that the individual action was tied to the concerted activity creating the agreement. Such reasoning confused substantive contractual entitlements with the process by which these entitlements are vindicated. O'Connor stated that when employees act together their action is concerted, and the statute entitles them to seek enforcement through the Board. An individual expressing a personal concern, however, must seek enforcement through the union⁷⁴ or the courts.⁷⁵ In other words, to find concerted activity, an employee must act with, or expressly on behalf of, one or more other employees.⁷⁶

IV. CRITIQUE

The majority's opinion in *NLRB v. City Disposal Systems*,⁷⁷ holding that the Board's *Interboro* doctrine is a reasonable interpretation of section 7,⁷⁸ recognized the Board's expertise in labor relations and its function of interpreting and administering the Act.⁷⁹ In recognizing the validity of the *Interboro* doctrine, the Court equated an individual's assertion of a right under the collective bargaining agreement with a formal grievance, an act which is recognized by the courts as concerted activity.⁸⁰ In the ordinary situation, employees will probably still go to their union representatives for help or to file formal grievances.⁸¹ This decision, however, will protect employees in situations in which a "work now-grieve later" process would not be sufficient to protect the interests of the employees,⁸² as illustrated in the present case, in which an injury could have resulted had the employee driven the truck. The *Interboro* doctrine also extends protection to cases in

74. See *City Disposal Sys.*, 104 S. Ct. at 1518. Accord *NLRB v. Adams Delivery Serv., Inc.*, 623 F.2d 96, 100 (9th Cir. 1980) (when employee enlists the aid of union the requirement of concert is found).

75. See *City Disposal Sys.*, 104 S. Ct. at 1518. See generally Note, *supra* note 54, at 994-95 (federal statutes protect employees from discharge on the basis of color, race, religion, sex, national origin, and age).

76. See *City Disposal Sys.*, 104 S. Ct. at 1519.

77. 104 S. Ct. 1505 (1984).

78. See *id.* at 1510.

79. See *id.* at 1513-14.

80. See *supra* text accompanying note 43.

81. See Comment, *supra* note 40, at 829.

82. See *id.*

which the union declines to process the grievance or in which other employees not similarly situated may not want to become involved.⁸³

The majority noted that there is nothing to indicate that Congress wished to withdraw the section 7 protection when a single employee "participates in an integral aspect of a collective process."⁸⁴ However, by focusing on the fact that concerted activity in a literal sense exists,⁸⁵ the Court creates an inequality between the protection afforded to union and non-union employees. The Court vindicates the rights of a union employee to complain or refuse to work because of safety or health violations,⁸⁶ but leaves nonunion employees without section 7 protection for the same activity.

This disparity is especially significant in light of the Board's retreat⁸⁷ from *Alleluia Cushion Co.*⁸⁸ and *Air Surrey Corp.*⁸⁹ Under the Board's current policy, nonunion employees are without section 7 protection when they individually voice complaints to their employers, refuse to perform unsafe work,⁹⁰ or try to enforce statutory provisions relating to their employment,⁹¹ although these activities directly affect co-workers as well.⁹² This is startlingly clear when James Brown's situation in *City Disposal Systems* is compared with that in *Meyers Industries*.⁹³ In both cases, the individual employees refused to drive trucks they believed to be unsafe. In Brown's case, a collective bargaining agreement covering this refusal was in effect, so Brown's activity was deemed con-

83. See Dolin, *supra* note 26, at 584.

84. *City Disposal Sys.*, 104 S. Ct. at 1513.

85. See *id.* at 1512.

86. It is well settled that safety and health are mandatory subjects of bargaining. See generally M. ROTHSTEIN, *OCCUPATIONAL SAFETY AND HEALTH LAW* (2d ed. 1983).

87. See *supra* text accompanying notes 56-58.

88. 221 N.L.R.B. 999 (1975).

89. 229 N.L.R.B. 1064 (1977), *enforcement denied*, 601 F.2d 256 (6th Cir. 1979).

90. See, e.g., *Meyers Indus.*, 268 N.L.R.B. ___, 115 L.R.R.M. (BNA) 1025, 1029-30 (1984); *Comet Fast Freight, Inc.*, 262 N.L.R.B. 430, 431 (1982).

91. See, e.g., *Wabco Constr. & Mining Equip. Group*, 270 N.L.R.B. ___, 116 L.R.R.M. (BNA) 1171 (1984).

92. See, e.g., *Meyers Indus.*, 268 N.L.R.B. ___, ___, 115 L.R.R.M. (BNA) 1025, 1034 (1984) (Zimmerman dissenting).

93. 268 N.L.R.B. ___, 115 L.R.R.M. (BNA) 1025 (1984).

certed.⁹⁴ In contrast, the truck driver in *Meyers* had no protection under section 7 because his actions were not made with or on behalf of another employee and no collective bargaining agreement was in effect.⁹⁵

In both cases, other employees would benefit from the activities of these employees. The discharge of these individuals tends to discourage other employees from taking similar action, or attempting to enlist the aid of others in voicing similar grievances. This is especially tragic when unsafe conditions exist and the sole brave individual who speaks up in protest is discharged.⁹⁶

The labor laws were designed, in part, to protect employees from the tyranny of the employer.⁹⁷ Protecting two employees acting together while refusing to extend this protection to a single employee not covered by a collective bargaining agreement and whose activities are likely to benefit other employees has no justification,⁹⁸ and neither does a dictionary definition of the term "concerted activities."⁹⁹ Indeed, perhaps the word "concerted" should never have been included in section 7 in view of the language of the section 9(a) proviso which provides "[t]hat any individual employee . . . shall have the right at any time to present grievances to their [sic] employer"¹⁰⁰ This language clearly implies that an individual employee does have the right to complain to the employer.¹⁰¹ It would seem quite anomalous to suppose that Congress would encourage individuals to present grievances

94. See *City Disposal Sys.*, 104 S. Ct. at 1516.

95. See *Meyers Indus.*, 268 N.L.R.B. at ___, 115 L.R.R.M. (BNA) at 1029.

96. See Comment, *supra* note 40 at 836.

97. See *City Disposal Sys.*, 104 S. Ct. at 1513.

98. See Gorman & Finkin, *supra* note 35, at 348 (a collective bargaining agreement should not be required before finding an individual's activities concerted). See also Comment, *supra* note 40, at 820-21 (there is nothing to suggest that congressional purpose of encouraging organization is furthered by protection of two employees). But cf. Note, *Concerted Activity*, *supra* note 37, at 389 (the underlying policy of the NLRA is to preserve the institution of collective bargaining).

99. See *supra* note 35.

100. 29 U.S.C. § 159(a) (1982).

101. But see Note, *supra* note 54, at 1004-05 (the federal courts have taken the position that the only effect of the proviso is to make it plain that employers can receive grievances without violating their duty to bargain with the exclusive representative).

and then allow employers to discharge them for exercising this right.¹⁰²

In a nonunion setting, where the employees have no collective bargaining agreement to protect their interests, allowing individuals to enforce statutory provisions relating to their employment would appear particularly important. By requiring the existence of a collective bargaining agreement before an individual can voice a complaint, nonunion employees are put at a severe disadvantage.¹⁰³ This inequality would seem contrary to the Act which provides that employees have the right to refrain from forming or joining labor organizations.¹⁰⁴

The dissent's position rests primarily on the fact that the holding of the majority will allow the Board to make unfair labor practice claims out of all disputes.¹⁰⁵ This argument loses much of its strength, however, because if an employee seeks the aid of a single employee or seeks to represent one other employee, the dissent would find the employee protected by section 7.¹⁰⁶ The dissent correctly stated that the labor laws were designed to encourage unionization,¹⁰⁷ but failed to point out how expanding this position to include individual activity would undermine unionization. The dissent adhered to a rigid, technical definition of the term "concerted" that was not, in all likelihood, intended by Congress.

V. CONCLUSION

The United States Supreme Court found the Board's *In-terboro* doctrine to be a reasonable interpretation of section 7 of the NLRA. The decision protects the rights of individual

102. See Dolin, *supra* note 26, at 563-64. For a discussion of the section 9(a) proviso, see Gorman & Finkin, *supra* note 35, at 356-57; and Note, *supra* note 54, at 1003-05.

103. This is particularly true since about three-quarters of the workers in the United States are not members of unions. See Gorman & Finkin, *supra* note 35, at 287 (citing the U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 429 table 714 (101st ed. 1980)).

104. See 29 U.S.C. § 157. See *supra* note 3 for the text of section 7.

105. See Note, *supra* note 54, at 1013-14.

106. See *City Disposal Sys.*, 104 S. Ct. at 1517-18 (O'Connor, J., dissenting).

107. See *id.* at 1518. For a discussion on how extending protection to an individual would affect unionization and collective bargaining, see Comment, *supra* note 40, at 820-21; Note, *supra* note 54, at 1000-01.

union employees who assert a right under the collective bargaining agreement that will likely affect their co-workers. The decision, however, fails to extend this protection to nonunion employees who engage in the same activities, although these activities would affect the entire group as well. In this respect, the protection afforded in this decision is not complete.*

VICKY M. PHILLIPS

* In the wake of *NLRB v. City Disposal Systems*, the District of Columbia Circuit Court of Appeals reversed and remanded *Meyers Industries, Inc.* See *Prill v. NLRB*, DAILY LAB. REP. (BNA) D-1 (February 28, 1985).

The District of Columbia Circuit held that the Board's decision in *Meyers* rested on an erroneous view of the law, both when it decided its new definition of concerted activities was mandated by the NLRA and when it stated it was returning to the standard which the Board and courts relied on before *Alleluia Cushion Co.* See *Prill*, DAILY LAB. REP. (BNA) at D-1 to-2. The court stated that *City Disposal* "makes [it] unmistakably clear that contrary to the Board's view in *Meyers*, neither the language nor the history of section 7 requires that the term 'concerted activities' be interpreted to protect only the most narrowly defined forms of common action by employees, and that the Board has substantial responsibility to determine the scope of protection in order to promote the purposes of the NLRA." DAILY LAB. REP. at D-8. In addition, the court found that the test in *Meyers* did not represent a return to the standard relied on by the courts and the Board before *Alleluia*, but created a more restrictive standard. See DAILY LAB. REP. at D-9. The court therefore remanded the case to permit the Board to reconsider *Meyers* in light of *City Disposal*.

