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NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

Meyers Industries, Inc.
And
Kenneth P. Prill

Case 7-CA-17207
September 30, 1986

SUPPLEMENTAL DECISION AND ORDER [1]

**1 BY CHAIRMAN DOTSON AND MEMBERS BABSON AND STEPHENS

On 6 January 1984 the National Labor Relations Board issued its Decision and Order in this proceeding (*Meyers I*) [2] in which it overruled *Alleluia Cushion Co.* [3] and its progeny; defined the concept of concerted activity for purposes of Section 7 of the National Labor Relations Act; and reversed the judge's finding that the Respondent had violated Section 8(a)(1) of the Act by discharging employee Kenneth P. Prill. In finding a violation of Section 8(a)(1), the judge had relied on *Alleluia* to conclude that Prill's individual activity in refusing to drive an unsafe vehicle and in reporting the vehicle to state authorities constituted concerted activity for purposes of Section 7. The Board, however, held that the definition of concerted activity that was expressed in *Alleluia* does not comport with Section 7. Having rejected the *Alleluia* standard, the Board formulated a definition of concerted activity to comport with Section 7. Then, applying that standard to the facts surrounding Prill's discharge, the Board upheld the discharge and dismissed the complaint.

Thereafter, Prill, the Charging Party, filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the District of Columbia Circuit. [4] On 26 February 1985 the court remanded *Meyers I* on the grounds that the Board, first, erroneously assumed that the Act mandated its *Meyers I* interpretation of "concerted activities" and, second, relied on a misinterpretation of prior Board and court precedent, indicating to the court a lack of rationale for the new definition. [5] As to the first ground, the court did not express an opinion as to the correct test of concerted activity or whether the *Meyers I* test is a reasonable interpretation of the Act. [6] The court instead determined that the U.S. Supreme Court's recent decision in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), made clear that the Board was not required to give a "narrowly literal interpretation" to the term "concerted activities," but had substantial authority to define the scope of Section 7. The court concluded that a remand was appropriate "to afford the Board a full opportunity to consider such issues in light of the analysis of section 7 in *City Disposal*" [7] and to particularize more fully its rationale for the adoption of the *Meyers I* definition.

On 29 July 1985 the Board notified the parties that it had accepted the remand from the court of appeals and invited the parties to submit statements of position with regard to the remand issues. Thereafter, all parties filed statements of position. [8] The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO filed an amicus brief. [9]

**2 Having accepted the remand, the Board must observe the court's opinion as the law of the case and, necessarily, its judgment that the *Meyers I* definition is not mandated by the Act. [10]

The Board has reconsidered this case in light of the court's opinion, the parties' statements of position, and the Auto Workers' amicus brief and has decided to adhere to the *Meyers I* definition of concerted activity as a reasonable construction of Section 7 of the Act. Consistent with *City Disposal*, supra, we have exercised our discretion and have chosen the *Meyers I* definition over other possibly permissible standards for the reasons set forth below. [11]

**883 A. *Meyers I is Faithful to the Central Purposes of the Act*

At the outset, we reaffirm our recognition that the Board has a wide latitude in interpreting Section 7 of the Act, as the Supreme Court has stated on numerous occasions. [12] That latitude is not without limit, however; and even within the conceivable limits of a general phrase such as "concerted activities," it is surely appropriate to choose that construction that is mostly responsive to the central purposes for which the Act was created. We believe that our choice in *Meyers I*, as elucidated in this opinion on remand from the court, does fully reflect those purpose.

The precise phrase in Section 7 that we are construing, as the Supreme Court has recently noted in *City Disposal*, can be traced back to the Norris-LaGuardia Act of 1932. [13] In that statute Congress sought to protect the trade union movement from the hostility of the courts in their use of "the doctrine that concerted activities were conspiracies, and for that reason illegal." *Auto Workers Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245, 257 (1949). Several years later, in the Wagner Act, in an effort to reduce the industrial unrest produced by the lack of appropriate channels for the collective efforts of employees to improve workplace conditions, Congress gave employees affirmative protections from employer reprisal for collective activity. The emphasis on collective, as distinct from purely individual, activity is made clear in the Act's "Findings and declaration of policy" (29 U.S.C. § 151): they note the

> ... inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.

and they propose to overcome this inequality by encouraging

> ... the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. [14]

**3 To be sure, as Professors Gorman and Finkin have pointed out, the intent of the Wagner Act to extend protections to group action for the improvement of wages and working conditions is not necessarily incompatible with an intent to protect purely individual action for the same purpose; [15] but the fact remains, as the Supreme Court has repeatedly recognized, that it is protection for joint employee action that lies at the heart of the Act. [16] **884 (Congress' addition, in the Taft-Hartley Act, of a right to "refrain" from participating in concerted activities, did not shift the focus of the Act from collective action to individual action, but merely made it possible for individual employees to choose not to participate in the former.) It is therefore entirely appropriate for us to take that focus on joint employee action as the touchstone for our analysis of what kinds of activities we must find within the scope of Section 7 in order to effectuate the purposes of the Act. The definition of concerted activity that the Board provided in *Meyers I* proceeds logically from such an analysis insofar as it requires some linkage to group action in order for conduct to be deemed "concerted" within the meaning of Section 7.

B. *Meyers I is Consistent with City Disposal*

In *Meyers I*, the Board indicated that a serious problem with the analysis in *Alleluia* and its progeny was that its focus on the purpose or subject matter of a particular action—whether it was a subject with which a group was likely to be concerned—reflected the "mutual aid or protection" clause of Section 7 but had little apparent linkage to the notion of action taken in "concert." [17] The Board noted that its pre-*Alleluia* cases had, with court approval, distinguished between the two clauses and regarded them as separate tests to be met in establishing Section 7 coverage; the Board determined it should return to this approach. [18] This approach is consistent with the groundwork laid by the Supreme Court in *City Disposal*. [19]

In *City Disposal* the Supreme Court addressed the question of whether an individual employee's invocation of a right contained in a collective-bargaining agreement constituted concerted activity within the meaning of Section 7. The Court answered this question in the affirmative and found reasonable the Board's longstanding *Interboro* doctrine [20] recognizing as concerted an individual employee's reasonable and honest invocation of a collective-bargaining right.

The Court noted that the Board had relied on "two justifications" for its *Interboro* doctrine:

> First, the assertion of a right contained in a collective-bargaining agreement is an extension of the concerted action that produced the agreement, *Bunney Bros. Construction*, [139 NLRB 1516,] 1519 [(1962)]; and second, the assertion of such a right affects the rights of all employees covered by the collective-bargaining agreement. *Interboro Contractors, supra*, at 1298. [21]

****4** In the Court's only subsequently reference to the second justification, it described the effect that a single employee's invocation of a contract right exerts on the rights of other employees as the
type of generalized effect [that is] sufficient to bring the actions of an individual employee within the "mutual aid or protection" standard, regardless of whether the employee has his own interests most immediately in mind. [22]

The Court then proceeded to an analysis of the "concerted activity" issue that, as we explain below, relies only on the first justification—that the individual's action is an extension of the concerted action that produced the agreement.

It is noteworthy that the second justification—affecting the rights of others—which the Court linked to the "mutual aid or protection" clause closely resembles the reasoning that underlay the Board's decision in *Alleluia* to deem as "concerted" activity an individual employee's action to enforce "statutory provisions relating to occupational safety designed for the benefit of all employees" in the absence of employee disavowal of such action. [23] While it would be going too far to say that the Court in *City Disposal* held that questions of who is benefited by an action to go to the "mutual aid or protection" clause only and not to the "concerted" activity element of Section 7, it is surely reasonable to conclude from the Court's analysis that it deems some linkage to collective employee action to be at the heart of the "concertedness" inquiry.

Thus, in considering what constitutes "concerted activities" under Section 7, the Court stated that the inquiry was one in which it must determine "the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees." [24] The Court approved the *Interboro* doctrine because it found an individual employee's invocation of a

collective-bargaining right to be "unquestionably an integral part of the process that gave rise to the agreement." [25] The ***885** Court reviewed the stages of the process, including the organization of the union, the negotiation of the collective-bargaining agreement, and the assertion of rights under the agreement as "a single, collective activity." [26] The Court concluded: "A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense." [27] Further support was found from the fact that joining and assisting a labor organization can be engaged in by an individual employee, whose action, nevertheless, bears an integral relationship to the actions of other employees. It was recognized that the actions of the individual employee engaged in concerted activity might be remote in time and place from group action [28] but, at some point, there would be an outer limit to concerted activity in order to be faithful to the collective-action component of Section 7. [29]

****5** Even though the precise issue concerning the scope of "concerted activities" now before us was not before the Supreme Court in *City Disposal*, [30] several guiding principles concerning what might constitute a permissible definition of "concerted activities" emerge. First, a definition of concerted activity could include some, but not all, individual activity. Both the majority and dissenting opinions in *City Disposal* approve a definition of concerted activity encompassing individual employee activity in which the employee acts as a representative of at least one other employee, [31] whereas only the majority opinion endorses the inclusion of the individual activity reflected by the *Interboro* doctrine. Second, inasmuch as an essential component of Section 7 is its collective nature, a definition of concerted activity should reflect this component as well. Third, like the Board in *Meyers I*, the Court in *City Disposal* separated the concept of "concerted activities" and "mutual aid or protection," thereby giving its imprimatur to the reasonableness of such a separation of the two concepts underlying Section 7. [32]

Keeping these objectives in mind, we have scrutinized the *Meyers I* definition of "concerted activities." In our view, the *Meyers I* definition strikes a reasonable balance. It is not so broad as to create redundancy in Section 7, but expansive enough to include individual activity that is connected to collective activity, which lies at the core of Section 7.

C. *"Individual Activity" Under the Meyers I Standard*

In *Meyers I*, the Board adopted the following definition of the term "concerted activities": "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." [33] The *Meyers I* definition expressly distinguishes between an employee's activities engaged in "with or on the authority of other employees" (concerted) and an employee's activities engaged in "solely by and on behalf of the employee himself" (not concerted). There is nothing in the *Meyers I* definition that states that conduct engaged in by a single employee at one point in time can never constitute concerted activity within the meaning of Section 7. On the contrary, the *Meyers I* definition, in part, attempts to define when the act of a single employee is or is not "concerted."

The court of appeals raised several questions as to whether individual activity is indeed covered by the *Meyers I* definition. We interpret the court's opinion as inviting us to respond to the concerns raised by those questions.

1. The court queried whether *Meyers I* is consistent with *NLRB v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442 (6th Cir. 1981), a case that the *Prill* court stated was "a case quite similar on its facts to *Meyers*." 755 F.2d at 953 fn. 72. We respectfully point out that *Lloyd A. Fry* and the instant case are factually distinguishable in a critical respect. In *Lloyd A. Fry*, where concerted activity was established, the record was replete with instances in which the discharged employee (Varney) acted on a collective basis with other employees preceding his discharge. Thus, as found by the Sixth Circuit, Varney engaged in "numerous discussions" with his fellow drivers regarding the safety of the employer's trucks and Varney and a fellow employee (Wade) collectively met with management representatives specifically to discuss solutions to truck maintenance problems that had engendered numerous

complaints by other employees. In the instant ***886** case, there is no record evidence whatsoever that employee Prill at any relevant time or in any manner joined forces with any other employee, or by his activities intended to enlist the support of other employees in a common endeavor. Since *Lloyd A. Fry* is not on all fours with the instant case, a different result is not inconsistent with the results reached here.

****6** 2. The court of appeals also noted that, in previous Board cases,[34] concerted activity was found where an individual, not a designated spokesman, brought a group complaint to the attention of management. The court questioned whether *Meyers I* is consistent with those cases. We discern no basis upon which the *Meyers I* standard deviates from those cases in the manner suggested by the court's question. Indeed, *Meyers I* recognizes that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. When the record evidence demonstrates group activities, whether "specifically authorized" in a formal agency sense, or otherwise, we shall find the conduct to be concerted. In Board cases subsequent to *Meyers I*, we have followed that principle.[35] The Board decisions in *Mannington Mills*,[36] and *Allied Erecting Co.*,[37] cited by the court of appeals, are not contrary to that principle.

In *Mannington Mills*, supra, the Board majority found that employee Frie was not acting in concert with any other employee when he threatened a work stoppage in protest of certain extra work assignments. Former Member Zimmerman, dissenting on other grounds, did not take issue with the majority finding that Frie acted alone in making this threat.[38] According to the Board's findings, there was no evidence to show (1) that any employee had authorized or instructed Frie to make the threat;[39] (2) that any employee had discussed with him the possibility of a work stoppage; or (3) that any employee was aware of and supported Frie's threat. The Board majority suggested that had any one of these facts that was missing from the record been present, Frie's threat may have been found to be concerted.

In *Allied Erecting Co.*, supra, an employee contacted a representative of an employer (other than his immediate employer) to inquire whether employees on the project were covered by a contract. No evidence was presented that other employees in any way supported the employee's visit and the employee himself equivocated as to whether he even told any other employee about the prospective visit. The employee was fired because he had spoken to the other employer about his employer not paying union scale wages as required by the project contract. Concerted activity was not found.

In both *Mannington* and *Allied*, the circumstances failed to establish that the individual employee acted other than solely by and on behalf of himself. Neither case stands for the proposition that a group spokesman must be "specifically authorized" by the group to act in some formal declarative manner. Rather, there was not even a general awareness on the part of the group as to the intended action of the individual employee.

****7** In *Walter Brucker & Co.*, supra, which issued subsequent to Meyers I, the Board found that an individual employee acted on the authority of other employees within the meaning of *Meyers I* when that employee discussed with other employees a common wage complaint. The conduct was deemed concerted under the circumstances because a second employee refrained from making his own wage complaint, relying instead on the first employee to resolve the matter. Although there was no "specific authorization" in the formal agency sense, the record established that the employees acted as a group even though only the first employee further pursued the wage complaint, while the second employee was only generally aware that the first employee would take whatever action ***887** he deemed necessary to obtain the information concerning their wage dispute.

3. As to the court's question regarding *Mushroom Transportation Co. v. NLRB*,[40] the court stated that "[it] is not clear, however, that the Meyers standard would protect an individual's efforts to induce group action."[41] To clarify, we intend that *Meyers I* be read as fully embracing the view of concertedness exemplified by the *Mushroom Transportation* line of cases. We reiterate, our definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate

or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.

In *Meyers I* we noted with approval *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951), a decision antedating *Meyers I* by 33 years, in which the Board recognized that:

> Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.

More recently, in *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986), the Board noted with approval the Third Circuit's comments in *Mushroom Transportation*, supra, that:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Ontario Knife Co. v. NLRB,[42] relied on by the Board in support of the *Meyers I* test, indicates that individual activity "looking toward group action"[43] is deemed concerted. Although *Meyers I* did not expressly endorse *Mushroom Transportation*, it did so implicitly by its reliance on *Ontario Knife Co.*, supra. To recall, the Board cautioned in *Meyers I* that the definition formulated was by no means exhaustive and that a myriad of factual situations would arise calling for careful scrutiny of record evidence on a case-by-case basis. The record facts of the case simply did not warrant an examination of the viability of *Mushroom Transportation*, supra.

D. *Contract Rights Versus Statutory Rights*

****8** Finally, because the *Alleluia Cushion* doctrine at its origin and in its most appealing form concerns a single employee's invocation of a statute enacted for the protection of employees generally, we must consider whether any linkages to concerted activity may be discerned in such an individual employee act or whether overall public policy considerations should move us to protect even purely individual activity that is aimed at securing employer compliance with other statutes that benefit employees.

As explained in our discussion of *City Disposal*, supra, the Supreme Court regarded proof that an employee action inures to the benefit of all simply as proof that the action comes within the "mutual aid or protection" clause of Section 7. It found "concerted" activity because the employee's invocation of the contract was an extension of the collective employee activity that produced the contract. We freely acknowledged that efforts to invoke the protection of statutes benefiting employees are efforts engaged in for the purpose of "mutual aid or protection." As the Supreme Court noted in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 566 (1978), "labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context"; and the Court thus observed that employees' resort to "administrative and judicial forums" and their "appeals to legislators to protect their interests as employees are within the scope of [the 'mutual aid or protection'] clause."

But this does not resolve the separate "concerted activity" issue.[44] As the Board noted in *Meyers I*, the courts of appeals have rejected the *Alleluia* doctrine of constructive concerted activity stemming from an employee's invocation of a statute. We reiterate the comments of the Fourth Circuit in *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 309 (4th Cir. 1980):

> The only courts which have considered it [the theory of presumed "concerted activity"] have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws ***888** and there is no proof of a purpose enlisting group action in support of the complaint, there is "constructive concerted action" meeting the threshold requirement under Section 7.

Can an employee's invocation of a statute be regarded as the extension of "concerted activity" in any realistic sense? Certainly the activity of the legislators themselves cannot be said to be concerted activity within the contemplation of the Wagner Act. And while there may be concerted activity in the lobbying process preceding the passage of such legislation, the linkage is attenuated; any such activity is far removed from the particular workplace, and the critical link between lobbying and enforcement of the law is the legislative process itself, which is not a part of any ongoing employee-generated process such as the negotiation and administration of collective-bargaining agreements. If it was appropriate for the Supreme Court in *Eastex* to consider that "at some point" the relationship between some kinds of concerted activity and "employees' interests as employees" may be "so attenuated" that it cannot "fairly be deemed to come within the 'mutual aid or protection' clause," then it is surely appropriate to conclude that at some point the relationship between some kinds of individual conduct and collective employee action may be "so attenuated" as not to mandate inclusion of that conduct in the "concerted activity" clause. Indeed, the Court in *City Disposal* made that very point, noting that

****9** ... at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity.

465 U.S. at 833 fn. 10. Furthermore, a doctrine that rested on the presence of concerted employee activity prior to passage of a particular law would require a choice between two unattractive positions: either we would have to indulge in a presumption that *all* statutes that benefit employees are the product of concerted employee activity or we would have to make factual inquiries into who had worked for passage of the law in question.

In short, in construing. Section 7 we are not holding that employee contract rights are more appropriate subjects for joint employee action than are rights granted by Federal and state legislation concerning such matters as employee safety. We merely find that invocation of employee contract rights is a continuation of an ongoing process of employee concerted activity, whereas employee invocation of statutory rights is not. We believe that we best effectuate the policies of the Act when we focus our resources on the protection of actions taken pursuant to that process.

With respect to the public policy question, we must simply note that, although it is our duty to construe the labor laws so as to accommodate the purposes of other Federal laws (see, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-894 (1984); *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942)), this is quite a different matter from taking it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify all the injustices of the workplace. In Meyers I, the Board noted that although we may be outraged by a respondent who may have imperiled public safety, we are not empowered to correct all immorality or illegality arising under all Federal and state laws (268 NLRB at 499). We note Judge Bork's comments in his dissenting opinion in this case that employee Prill may have a cause of action under state law,[45] and that the policy interests underlying his colleagues' suggestion should be addressed to the legislature or to the state courts. We further note that section 405 of the Surface Transportation Assistance Act of 1982, although enacted after Prill's discharge and

not available to him, expressly prohibits the discharge, discipline, or imposition of other adverse treatment because an employee has filed a complaint or instituted any proceeding relating to motor carrier safety or because the employee has refused to drive a vehicle in certain circumstances. That statute provides for complaint procedures before the United States Department of Labor.

E. *The "Chilling Effect" Question*

**10 We do not view Prill's discharge as having a "chilling effect" on the exercise of Section 7 rights by other employees. In *City Disposal*, the Court noted that the discharge of an employee who is not himself involved in concerted activity may violate Section 8(a)(1) if the employee's actions "are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities." 465 U.S. at 833 fn. 10. Here, employee Prill acted alone and without an intent to enlist the support of other employees. The record fails to establish that his purely individual activities were "related to other employees' concerted activities" in any demonstrable manner. Even assuming arguendo that an otherwise lawful *889 discharge may have some remote *incidental* effect on other employees, such an incidental effect does not render the discharge unlawful. See *Panaderia Sucesion Alonso*, 87 NLRB 877, 881-882 (1949). Compare *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 404 (1982), enfd. sub nom. *Automobile Salesmen Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

Conclusion

Accordingly, we adhere to the definition of concerted activity set forth in *Meyers I* as a reasonable construction of the Act. As we find that employee Prill acted alone and did not engage in concerted activities within the meaning of Section 7, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Footnotes

1 Member Johansen did not participate in this decision.

2 268 NLRB 493 (1984).

3 221 NLRB 999 (1975).

4 *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) (2-1 decision), cert. denied 106 S.Ct. 313, 352 (1985).

5 Id. at 942, 948.

6 Id. at 948 fn. 46.

7 Id. at 957.

8 On 27 September 1985 the Respondent filed a motion to stay further consideration of the case pending the U.S. Supreme Court's disposition of a petition for writ of certiorari filed by the Respondent. On 4 November 1985 the Court denied certiorari. 106 S.Ct. 313, 352 (1985). In light of the Court's action, we deny the Respondent's motion.

The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

9 On 1 October 1985 the Auto Workers filed a motion for leave to file an amicus brief. We have granted the motion and have accepted the amicus brief.

10 The court also did not consider whether the Board's application of the *Meyers I* test to Prill's situation was supported by substantial evidence. 755 F.2d at 957 fn. 92. Because our understanding of the court's opinion is that the Board is faced with legal issues on remand, we find it unnecessary to give a detailed statement of the facts or to reiterate the Board's earlier discussion of the application of the *Meyers I* definition to those facts. Basically, there is no evidence in this case that employee Prill joined forces with any other employee or by his activities intended to enlist the support of other employees in a common endeavor. As a result, the Board found that Prill did not engage in concerted activities.

We also note that, in her closing argument, the General Counsel did not contend that Prill's actions constituted concerted activity under "traditional concepts"; rather, she relied on the Board's "expanded" concept of "concertedness" in *Alleluia* and its progeny.

11 The court's remand calls for an illumination of our reasons for adopting the *Meyers I* definition apart from the concerns raised by the rejection of the *Alleluia* standard. For this reason, we have refrained from repeating here why the *Alleluia* standard was rejected in *Meyers I.*

12 It reiterated this principle in *City Disposal*, the decision of greatest relevance here. 465 U.S. at 829-830.

13 465 U.S. at 834-835. As the Court also noted (id.), Congress had similarly sought to protect peaceful union activities from indiscriminate use of the antitrust laws through exemptions added to the Clayton Act in 1914. See generally H. Wellington, *Labor and the Legal Process* 38-43 (1968).

14 These findings echoed views of Francis Biddle (who was chairman of the first National Labor Relations Board, established under Public Resolution 44) in a speech that Senator Wagner placed in the Congressional Record not long after he introduced the bill that became the basis for the Wagner Act. In that speech, which Senator Wagner evidently saw as setting forth the theoretical underpinnings of his legislation, Francis Biddle explained:

For freedom to work and live decently no longer means the theoretical freedom of a man to make a contract with a steel corporation. There is no freedom of contract where power is all on one side and the choice is to take what you get or starve. Mr. John Lewis, with half a million miners behind him, can make a contract, because he, too, can say, "Take it or leave it." The forces are balanced; the game is even.

There are two theories about the relationship of capital and labor. One is the partnership theory, the other is the class-war theory....

....

There is, however, one real flaw in the argument that the relationship is one of partnership, which is usually overlooked. A partnership is the result of agreement and presupposes equality of bargaining. This condition does not, as we have already said, apply to an individual seeking a job. The partnership is created as the result of an agreement. Thus it becomes fair to describe the relationship as a partnership only after an agreement has been entered into by the parties

from some equality of bargaining power. Such agreements are collective bargaining agreements, signed by employer and union, and are real partnerships, which carry with them the joint good will and spirit of team play of real partnerships.

"Theory of Collective Bargaining—Address by Francis Biddle," reprinted in 79 Cong. Rec. 3183 (1935), and in I Leg. His. 1314, 1317-1318 (NLRA 1949).

15 Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U.Pa.L.Rev. 286, 338 (1981).

To give full meaning to the notion of liberty, of course, both avenues of recourse—individual action and group activity —are necessary and desirable. As de Tocqueville observed, a century and a half ago:

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty.

A. de Tocqueville, *Democracy in America* 98 (R. Heffner ed. 1956). In the Wagner Act, Congress sought to vindicate the exercise of associational rights for attaining improved wages and working conditions. See Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects*, 51 U.Chi.L.Rev. 1012, 1028-1029 (1984).

16 See, for example, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921)), in explaining the background of the Wagner Act ("[A] single employee was helpless in dealing with an employer.... [U]nion was essential to give laborers opportunity to deal on an equality with their employer"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (contrasting Title VII of the Civil Rights Act, concerned with "an individual's right to equal employment opportunities" with the "majoritarian processes" of the NLRA); *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984) (Sec. 7 embodies congressional intent "to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements"); *Metropolitan Life Ins. Co. v. Massachusetts*, 106 S.Ct. 2380, 2396-2398 (1985) (distinguishing minimum-labor-standard laws, which apply to all employees without regard to the collective-bargaining process, from the NLRA, with its protections for employee self-organization and collective bargaining).

17 268 NLRB at 495-496.

18 Id. at 494-495, 496.

19 465 U.S. at 830-831. It is also consistent with the analytical framework of *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), where the employees' distribution of a union newsletter was plainly "concerted activity," but the Court considered the separate question whether, given the subject matter of the newsletter, it could be said that the concerted activity was engaged in for "mutual aid or protection."

20 *Interboro Contractors*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

21 465 U.S. at 829.

22 Id. at 830 (citation omitted).

23 221 NLRB at 1000.

24 465 U.S. at 831.

25 Ibid.

26 Id. at 831-832.

27 Id. at 832.

28 Id. at 832-833.

29 Id. at 833 fn. 10.

30 Id. at 829 fn. 6. In *Meyers I* we specifically distinguished the issues presented by the *Interboro* doctrine from those presented here. 268 NLRB at 496. The Court in *City Disposal* agreed with that distinction, stating in fn. 6 of its decision, "The Board, however, distinguished that case from the cases involving the *Interboro* doctrine, which is based on the existence of a collective-bargaining agreement. The *Meyers* case is thus of no relevance here." The Court did, however, favorably cite *Meyers I* in its preliminary analysis of Sec. 7.

31 Id. at 831, 846-847.

32 Id. at 830-831. In this regard, the Court concluded first that asserting a collective-bargaining right was for "mutual aid or protection" before considering whether an individual who does so alone engages in concerted activity. If the Court did not consider the two concepts under lying Sec. 7 as distinct, then the Court's remaining analysis pertaining to the concept of "concerted activities" would have been superfluous.

33 268 NLRB at 497.

34 In *Charles H. McCauley Associates, Inc.*, 248 NLRB 346 (1980), enfd. 657 F.2d 685 (5th Cir. 1981), an employee spoke to his fellow employees and apprised them of his intention to seek improvements in certain working conditions. The employee then expressly informed the employer of his intended group action, i.e., to discuss these matters with his coworkers and, possibly, with a union. The employer forbade the employee to discuss these matters with his coworkers or with a union and terminated him. In *Hugh H. Wilson Corp.*, 171 NLRB 1040 (1968), enfd. 414 F.2d 1345 (3d Cir. 1969), cert. denied 397 U.S. 935 (1970), a group of employees attended an employer-sponsored meeting and vocally took issue with the employer's administration of an employee profit-sharing plan. The employees subsequently held a group discussion about the profit-sharing plan. In *Guernsey-Muskingum Electric Coop., Inc.*, 124 NLRB 618 (1959), enfd. 285 F.2d 8 (6th Cir. 1960), three employees made a common decision, following group discussions among all three, that each would take their complaint to a high management representative. In *Carbet Corp.*, 191 NLRB 892 (1971), enfd. 80 LRRM 3054 (6th Cir. 1972), an employee complained to management about the employer's inadequate ventilation system. The employee's complaints had been instrumental in bringing about a union campaign and the employee previously had spoken to other employees about the ventilation problem, one of whom had replied, "We've got to get a union, and maybe they could help us get it [an improved ventilation system]." 191 NLRB at 898.

35 See *Walter Brucker & Co.*, 273 NLRB 1306 (1984); *Advance Cleaning Service*, 274 NLRB No. 141 (Mar. 13, 1985); *Spencer Trucking Corp.*, 274 NLRB 942 (Mar. 29, 1985); *Dayton Typographical Service*, 273 NLRB 1205 (1984), enfd. in relevant part 778 F.2d 1188 (6th Cir. 1985).

36 272 NLRB 176 (1984).

37 270 NLRB 277 (1984).

38 See dissenting opinion of former Member Zimmerman in *Mannington*, 272 NLRB at 177-178.

39 According to Frie's version, which was not specifically credited, other employees may have indicated to him their objection to perform certain work. The Board was unwilling to equate possible declarations of this kind with authorization, formal or informal, to Frie to pursue the action that he took.

40 330 F.2d 683 (3d Cir. 1964).

41 755 F.2d at 955.

42 637 F.2d 840 (2d Cir. 1980). In this case, the Second Circuit found the action of an individual employee in walking off the job in protest of a work assignment was not concerted in the absence of evidence that other employees participated in or approved the walkout or evidence that the employee looked toward group action in walking off the job.

43 637 F.2d at 844-845 (quoting *Mushroom Transportation Co. v. NLRB*, supra, 330 F.2d at 685).

44 There was no question whether concerted activity was present in *Eastex*, since the activity there was employees' request that they be allowed to distribute on the employer's premises a union newsletter that discussed minimum-wage laws and a pending proposal concerning a state “right-to-work” law.

45 Prill filed a complaint with the Michigan Department of Labor alleging that his discharge violated the Michigan Occupational Safety and Health Act. On 5 November 1979 the Department dismissed Prill's complaint, finding he failed to satisfy his burden of establishing that his discharge violated the Michigan statute.

281 NLRB No. 118 (N.L.R.B.), 281 NLRB 882, 123 L.R.R.M. (BNA) 1137, 1986-87 NLRB Dec. P 18184, 1986 WL 54414