268 NLRB No. 73 (N.L.R.B.), 268 NLRB 493, 115 L.R.R.M. (BNA) 1025, 1983-84 NLRB Dec. P 16019, 1984 WL 35992

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

Meyers Industries, Inc.
And
Kenneth P. Prill.

Case 7-CA-17207
January 6, 1984

DECISION AND ORDER

**1 On 14 January 1981 Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed cross-exceptions with supporting briefs, after which the General Counsel filed a brief in response to the Respondent's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, [1] findings, [2] and conclusions only to the extent consistent with this Decision and Order. [3]

Relying on *Alleluia Cushion Co*., 221 NLRB 999, the judge concluded that the Respondent violated Section 8(a)(1) of the Act when it discharged employee Kenneth P. Prill because of his safety complaints and his refusal to drive an unsafe truck after reporting its condition to the Tennessee Public Service Commission. Upon careful consideration, and for the reasons set forth below, we reject the principles the Board adopted in *Alleluia*, and do not agree with the view of protected concerted activity which that decision and its progeny advance. We, therefore, find that the Respondent did not violate Section 8(a)(1) by discharging Prill.

I. THE CONCEPT OF PROTECTED CONCERTED ACTIVITY

The concept of concerted action has its basis in Section 7 of the Act, which states in relevant part:

> 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....

Although the legislative history of Section 7 does not specifically define “concerted activity,” it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal. The immediate antecedent of Section 7 was Section 7(a) of the National Industrial Recovery Act of 1933, [4] the purpose of which was, as then Congressman Boland

suggested, to "afford [the laboring person] the opportunity to associate freely with his fellow workers for the betterment of working conditions ... [and it] primarily creates rights in organizations of workers." [5]

A review of the language of Section 7 leads to a similar united-action interpretation of "concerted activity." The wording of that section demonstrates ***494** that the statute envisions "concerted" action in terms of collective activity: the formation of or assistance to a group, or action as a representative on behalf of a group. Section 7 limits the employee rights it grants to the examples of concerted activities specifically enumerated therein—"self-organization"; forming, joining, or assisting labor organizations; and bargaining collectively through representatives—and to engaging in "*other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." (Emphasis added.) Thus, the statute requires that the activities in question be "concerted" before they can be "protected." Indeed, Section 7 does not use the term "protected concerted activities," but only "concerted activities." [6]

****2** Consistent with this interpretation, the Board and courts before *Alleluia* generally analyzed the concept of protected concerted activity by first considering whether some kind of group action occurred and, only then, considering whether that action was for the purpose of mutual aid or protection. [7] In a 1951 case, *Root-Carlin, Inc*., [8] the Board addressed the issue of what was required in order for activity to be "concerted." The case involved only conversation among employees about the need for a union in their workplace. The *Root-Carlin* Board stated:

> 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. [Emphasis added. 92 NLRB at 1314.]

Significantly, the Board described concerted activity in terms of interaction among employees.

Several years later, the Board again considered what constituted concerted activity in *Traylor-Pamco*. [9] That case involved the discharge of two men who consistently ate their lunch in the "dry shack" even during a concrete pour, while everyone else ate in the less pleasant surroundings of the tunnel so as to minimize "downtime." The trial examiner, with Board approval, declined to find the employees' refusal to eat in the tunnel to be concerted, stating: "There is not even the proverbial iota of evidence that there was any consultation between the two in the matter, that either relied in any measure on the other in making his refusal, or that their association in refusing to eat in the tunnel was anything but accidental." 154 NLRB at 388. Thus, in *Traylor-Pamco*, the Board continued to define concerted activity in terms of employee interaction in support of a common goal.

Thereafter, the Board decided in Continental Mfg., [10] in which employee Ramirez prepared and signed, on her own, a letter that she handed to respondent's owner. The letter stated that a majority of employees were disgusted with their treatment, that a supervisor played favorites, and that a janitor was needed for the women's bathroom. The letter concluded, "We all want to continue working here with you; please help us to improve our working conditions." The Board reversed the trial examiner's finding that Ramirez' letter constituted concerted activity, stating:

> The letter, which was directed only to the Respondent, was prepared and signed by Ramirez acting alone. She did not consult with ... any other employee, or the Union about the grievances therein stated or her intention of sending the letter to DeSantis [an owner of respondent]. There is no evidence that the criticisms in the letter reflected the views of other employees, nor is there evidence that the letter was intended to

> enlist the support of other employees. This letter received no support from union representatives.... [155 NLRB at 257.]

****3** Once again, the Board defined concerted activity in terms of interaction among employees. [11]

In recent years, but before *Alleluia*, the Board often decided the circumstances under which apparently individual activity may properly be characterized as "concerted." One of these cases, *G. V. R., Inc*., [12] is factually indistinguishable from *Alleluia*, but equivocal in its reasoning. Glace and Curry were two employees who reported to the United States Army and the Department of Labor that their employer forced them to "kick back" portions of their wages. The judge found that Glace and Curry were discharged in violation of Section 8(a)(1) of the Act because they concertedly made complaints to United States agencies about ***495** their wages, hours, and working conditions. [13] At footnote 2 of its decision, the Board majority noted:

The Administrative Law Judge found, in substance, that even in the absence of concerted activity, "Public policy would be frustrated if employees ... could not, with full protection of the Act, make complaints to public agencies about wages, hours, etc., without fear of reprisals."

The Board majority specifically disavowed the judge's language, stating:

> We do not adopt this improper extension of our enunciated principle that it would be contrary to public policy to hold that the making of complaints to public authorities *in the course of concerted activity* removes the protection of the Act from the concerted activity.... [201 NLRB 147 at fn. 2.]

Despite the Board's rejection of the judge's extension of the concept of concerted activity, the Board majority stated:

> We also find, in *addition* to these reasons [the evidence of Glace's and Curry's actual concerted activities], that *an employee* covered by a federal statute governing wages, hours, and conditions of employment who participates in a compliance investigation of his employer's administration of a contract covered by such a statute, or who protests his employer's noncompliance with the contract, is engaged in concerted activity for the mutual aid and protection of all the employer's employees similarly situated. [Emphasis added. 201 NLRB at 147.] [14]

Thus, with *G. V. R*., the Board apparently declined to extend its concept of concerted action as a matter of policy, but did so as a matter of law. The distinction is a difficult one to discern.

II. ALLELUIA, ITS PROGENY, AND THE DEVELOPMENT OF THE PER SE STANDARD OF CONCERTED ACTIVITY

With *Alleluia*, the transformed concept of concerted activity was at last revealed. In that case, maintenance employee Jack Henley registered safety complaints with respondent. Henley was later transferred to another facility, [15] where he encountered similar safety problems. Not satisfied with Alleluia's response to these problems, Henley wrote a letter of complaint to the California OSHA office (Occupational Safety and Health Administration), with a copy to the respondent. The Board found no evidence that, before complaining to respondent or writing to California OSHA, Henley discussed the safety problems with other employees, sought their support in remedying the problems, or requested assistance in preparing the letter. Henley accompanied the OSHA inspector on a plant tour and was discharged the following day.

****4** The judge dismissed the complaint in its entirety, finding no outward manifestation of group action. The Board disagreed and found concerted activity. The Board reasoned from the premise that "[s]afe working conditions are matters of great and continuing concern for all within the work force." In support of that premise, the Board noted that both the Federal Government and the States had made known their concern with this area of industrial life through occupational safety and health legislation. The Board, therefore, reasoned that because Congress and the States made manifest the apparent national will in the area of industrial safety, "the consent and concert of action emanates from the mere assertion of such statutory rights."

Under the *Alleluia* approach, an observable manifestation of "group will" *in the workplace* (as distinguished from the legislature) was no longer required to find concert of action. The existence of relevant legislation and its invocation by a solitary employee became sufficient to find concerted activity. The practical effect of this change was to transform concerted activity into a mirror image of itself. Instead of looking at the observable evidence of group action to see what men and women in the workplace in fact chose as an issue about which to take some action, it was the Board that determined the existence of an issue about which employees *ought* to have a group concern. Stated another way, under the *Alleluia* analytical framework, the Board questioned whether the purpose of the activity was one it wished to protect and, if so, if then deemed the activity "concerted," without regard to its form. This is the essence of the per se standard of concerted activity. We emphasize that the Board, in *Alleluia*, presumed to divine the relevance of the safety issue to the "theoretical" employee group by pointing to the existence of legislation in the health and safety area. *Alleluia's* progeny, however, dropped even the requirement of legislative action, and the Board ultimately decided ***496** what ought to be the subject matter of working persons' concern when the statutory manifestation of such "group concern" was slim or nonexistent. [16]

Another aspect of the *Alleluia* doctrine warrants scrutiny. Perhaps in an attempt to retain some element of the previous requirement of observable evidence of group support, the Board stated:

> Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, *in the absence of any evidence that fellow employees disavow such representation*, we will find an implied consent thereto and deem such activity to be concerted. [Emphasis added. 221 NLRB at 1000.]

****5** This is yet another mirror image turn that the definition of concerted activity has taken. In the past, we required the General Counsel to prove support by other employees in order to find activity concerted. With *Alleluia*, the Board seemed to require a respondent to submit evidence that other employees disavowed the activity to prove that it was not concerted. This is a clear shift in the burden of proof, not countenanced by either the legislative history or judicial interpretation of Section 7. [17]

The courts of appeals that have reviewed the post-*Alleluia* cases have rejected the per se standard of concerted activity. [18] In *Krispy Kreme*, the Fourth Circuit summarized the response of the courts as follows:

> The Board cites no circuit decision supporting its theory of presumed "concerted activity" in this case. The only courts which have considered it have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws 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. [635 F.2d at 309.]

For all the foregoing reasons, we are persuaded that the per se standard of concerted activity, by which the Board determines what *ought to be* of group concern and then artificially presumes that it *is* of group concern, is at odds with the Act. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both "concerted" and "protected." A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7. [19]

III. INTERBORO DISTINGUISHED FROM ALLELUIA

The Board's decision in *Interboro Contractors* [20] holds that actions an individual takes in attempting to enforce a provision of an existing collective-bargaining agreement are, in effect, grievances within the framework of that agreement. [21] It is not our intention to set forth the parameters of *Interboro* in this case, but rather to distinguish *Interboro* from *Alleluia*.

The focal point in *Interboro* was, and must be, the attempted implementation of a collective-bargaining agreement. By contrast, in the *Alleluia* situation, there is no bargaining agreement, much less any attempt to enforce one, and we distinguish the two cases on that basis.

IV. DEFINITION OF CONCERTED ACTIVITY

****6** Based on the foregoing analysis, we hold that the concept of concerted activity first enunciated in *Alleluia* does not comport with the principles inherent in Section 7 of the Act. We rely, instead, upon the "objective" standard of concerted activity—the standard on which the Board and courts relied before *Alleluia*. Accordingly, we hereby overrule *Alleluia* and its progeny.

Although the definition of concerted activity we set forth below is an attempt at a comprehensive ***497** one, we caution that it is by no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law. 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. [22] Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [23]

We emphasize that our return to a pre-*Alleluia* standard of concerted activity places on the General Counsel the burden of proving the elements of a violation as set forth herein. It will no longer be sufficient for the General Counsel to set out the subject matter that is of alleged concern to a theoretical group and expect to establish concert of action thereby.

We also emphasize that, under the standard we now adopt, the question of whether an employee engaged in concerted activity is, at its heart, a factual one, the fate of a particular case rising or falling on the record evidence. It is, therefore, imperative that the parties present as full and complete a record as possible.

V. APPLICATION OF THE DEFINITION OF CONCERTED ACTIVITY TO THE FACTS OF THE INSTANT CASE

As the judge found, Charging Party Kenneth P. Prill drove trucks for a number of years and was an owner-operator for the 4 years before his employment by the Respondent. The Respondent assigned Prill to drive what was described as the "red Ford truck" and its accompanying trailer, with which he hauled boats from the Respondent's facility in Tecumseh, Michigan, to dealers throughout the country. Prill's equipment, particularly the brakes and steering, gave him difficulty on a number of occasions, and he often lodged complaints with the Respondent concerning malfunctions.

Although the red Ford truck and trailer were assigned to Prill on what might fairly be described as a permanent basis, during the first 2 weeks of June 1979 Prill's fellow employee, Ben Gove, was assigned that equipment while Prill was absent from work. On a trip to Sudberry, Ontario, Gove experienced steering problems which nearly caused an accident. On Gove's return, he informed Supervisor Dave Faling of difficulties with the truck. Prill, who had by then returned to work, was also in Faling's office to receive paperwork for an upcoming trip. Prill was present when Gove told Faling that he "wouldn't take the truck as far as Clinton and back, until they had done some repair on it. Until someone repaired it. I [Gove] didn't care who done it, but I wasn't going to drive it no farther."

****7** The Respondent's mechanic, Buck Maynard, made an unsuccessful attempt to correct the problems. Thereafter, on a trip to Xenia, Ohio, during which the brakes malfunctioned, Prill voluntarily stopped at an Ohio State roadside inspection station where the trailer was cited for several defects, some relating to the brakes. Prill forwarded the citation to the Respondent's officials.

In July 1979, while driving through Tennessee, Prill was involved in an accident caused by the malfunctioning brakes. Prill telephoned the Respondent's president, Alan Beatty, who instructed Prill to have a mechanic look at the equipment, but to get it home as best he could. The following morning Prill again called Beatty. The Respondent's vice president, Wayne Seagraves, joined the conversation on an extension telephone. Both Beatty and Seagraves were upset with Prill for not having left Tennessee, and a decision was made to send Maynard to Tennessee to examine the equipment.

Thereafter, Prill, of his own volition, contacted the Tennessee Public Service Commission to arrange for an official inspection of the vehicle. The following morning a citation was issued, and the unit was put out of service due to bad trailer brakes and damage to the hitch area of the truck. The citation mentioned several Department of Transportation regulations, including 49 C.F.R. § 396.4, which prohibits the unsafe operation of a vehicle. A commission representative instructed Prill that certain repairs would have to be made before the vehicle could be moved.

When Maynard arrived in Tennessee, Prill showed him the citation. Maynard called Beatty, and it was decided to sell the trailer for scrap. Prill then drove the truck back to Tecumseh.

The judge found that when Prill reported in on 5 July 1979 he turned in his paperwork and was summoned ***498** to Seagraves' office. Seagraves questioned him about the accident and the damage to the truck. He asked why Prill did not chain the truck and trailer together and drive back. Prill responded that he did not believe it was safe to drive the vehicle. Seagraves then said that Prill would be terminated because "we can't have you calling the cops like this all the time." Beatty, who had entered the office during the conversation, also asked why Prill did not chain the truck and trailer. Prill responded that it would have been unsafe and unlawful in view of the citation.

The judge concluded that Prill was discharged for two reasons: (1) his refusal to drive an unsafe vehicle after filing the report with the Tennessee Public Service Commission, and (2) his earlier safety complaints, including a complaint to Ohio authorities. The judge held that Prill's discharge was unlawful, relying on *Alleluia*, which he noted, "established a presumption that an individual employee engages in concerted activity where his conduct arises out of the employment relationship and is a matter of common concern among all employees." (Decision of the administrative law judge, sec. II,B, par. 2.) [24] The judge further noted in support of his *Alleluia* analysis that Prill's refusal to drive the equipment was mandated by Department of Transportation regulations, which require that an inspection be made after an accident to determine the extent of damage, and also that a vehicle cited as unsafe not be operated until it is repaired. [25]

****8** The judge found that Prill, by contacting local authorities and refusing to drive the vehicle, was enforcing the cited provisions of the national transportation policy, and that his invoking the Tennessee Public Service Commission's inspection apparatus was the legal equivalent of a safety complaint to OSHA. See *Alleluia*. The judge concluded his analysis by stating that the Respondent was "free, under *Alleluia Cushion*, to rebut the inference that Prill's activity inured to the benefit of all employees. It could have been shown, for example, that Prill's protests and complaints were not made in good faith or were simply the idiosyncrasies of a super sensitive individual whose concerns could not have been shared by other truckdrivers in similar circumstances. This Respondent failed utterly to accomplish." (ALJD, sec. II,B, par. 10.)

Rejecting, as we do, the judge's reliance on *Alleluia* we find that the Respondent did not violate Section 8(a)(1) of the Act when it discharged Prill for refusing to drive his truck and trailer and for contacting state authorities. Prill alone refused to drive the truck and trailer; he alone contacted the Tennessee Public Service Commission after the accident; and, prior to the accident, he alone contacted the Ohio authorities. Prill acted solely on his own behalf. It follows that, without the artificial presumption *Alleluia* created, the facts of this case do not support a finding that Prill engaged in concerted activity.

There is one other point that warrants consideration. The judge stated that "Prill's complaints about the trailer brakes prior to the accident were clearly concerted since they were joined by driver Gove who made similar complaints, in Prill's presence, to management officials about the safety of Prill's vehicle when he, Gove, was assigned to drive it for 2 weeks." (ALJD, sec. II,B, par. 8.) It is not certain whether the judge cited this evidence in support of his *Alleluia* analysis, or in support of an alternative pre-*Alleluia* rationale. To the extent that the judge appears to have concluded that this record evidence would lead to a finding of concerted action under a pre-*Alleluia* analysis, we reject his conclusion.

The record is clear that Prill merely overheard Gove's complaint while in the office on another matter, and there is no evidence that anything else occurred. The record reflects, and the judge found, only that Prill stood by when Gove made his complaint; the judge correctly made no factual finding that Prill and Gove in any way joined forces to protest the truck's condition. Indeed, the most that can be inferred from this scenario is that another employee was individually concerned, and individually complained, about the truck's condition. Taken by itself, however, *individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert of action.

****9** In this regard, the *Alleluia* presumption has only engendered analytical confusion. Thus, under *Alleluia*, concern is *presumed* unless otherwise rebutted; to affirmatively show that another employee is individually concerned, or even lodges a complaint, adds not one whit to an *Alleluia* analysis. Yet, evidence of individual concern by more than one employee has come to be viewed as evidence of concert itself, and has so blurred the distinction between the two types of evidence that the Board has lost sight of what is required of a pre-*Alleluia* analysis.

In its pre-*Alleluia* days the Board had, in fact, considered factual patterns similar to that presented herein and had declined to find concerted activity. See, e.g., *Traylor-Pamco* and *Continental Mfg*., discussed above. As with the employees who ate their ***499** lunch together in *Traylor-Pamco*, there is no evidence here that there was any concerted plan of action between Gove

and Prill, or that either relied in any measure on the other when each refused to drive the truck. In addition, as in *Continental Mfg*., there is no support for a finding that either Gove's or Prill's refusal was intended to enlist the support of other employees. Prill's refusal to drive the truck and trailer and his report to the Tennessee Public Service Commission were made by himself and for himself alone, and thus cannot be deemed concerted.

One might nonetheless fairly argue that Prill's situation is a sympathetic one that should cause us concern. We do not believe, however, that Section 7, framed as it was to legitimize and protect group action engaged in by employees for their mutual aid or protection, was intended to encompass the case of individual activity presented here. Although it might be argued that a solitary over-the-road truckdriver would be hard pressed to enlist the support of coworkers while away from the home terminal, the Board, to paraphrase former Chairman Edward Miller's dissent in *G. V. R.*, is neither God nor the Department of Transportation. Outraged though we may be by a respondent who—at the expense of its driver and others traveling on the nation's highways—was clearly attempting to squeeze the last drop of life out of a trailer that had just as clearly given up the ghost, we are not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws.

In conclusion, we acknowledge that there are few areas of the law that are entirely free of uncertainty or disagreement. We are persuaded, however, that *Alleluia* and its progeny have been an unfortunate deviation from the objectives and purposes of the Act, as defined by its legislative and judicial history, and it will not serve us well, nor those whom we are charged to protect, to continue to adhere to *Alleluia's* precepts.

****10** Accordingly, based on all the foregoing reasons, and the record as a whole, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

****11** My colleagues today reject the theory of implied concerted activity developed in *Alleluia Cushion Co*., 221 NLRB 999 (1975). Their ruling allows the Respondent to lawfully discharge employee Prill for filing a complaint with the Tennessee Public Service Commission (Tennessee Commission) after having an accident due to faulty brakes. My colleagues admit there may be something outrageous about an employer who is willing to endanger its employees by attempting to force the use of a trailer which had "clearly given up the ghost." They also concede that a solitary over-the-road truckdriver would be hard pressed to enlist the support of coworkers while away from the home terminal. Nevertheless, they find this employee unprotected by the Act because no other employee expressly joined him in lodging the complaint with the Tennessee Commission.

My colleagues report today that the Board is not God. If only their expectation of employees covered by this Act were equally humble. Protection for such employees, they now announce, will be withheld entirely if in trying to ensure reasonably safe working conditions they happen not to be so omniscient as to rally other employees to their aid in advance. No matter that the conditions complained of are highly hazardous, or that they are a potential peril to other employees, or that they are the subject of Government safety regulation. This is a distortion of the rights guaranteed employees by the Act. The historical roots of "concerted activity" lie in the movement to shield organized labor from the criminal conspiracy laws and the injunctive power of the courts. It goes against the history and spirit of Federal labor laws to use the concept of concerted activity to cut off protection for the individual employee who asserts collective rights. It is my colleagues who use mirrors on Section 7 and not the Board which decided *Alleluia Cushion Co*.

I. THE ALLELUIA DECISION IS BASED ON TWO RATIONALES

Alleluia involved the discharge of an employee for filing a complaint with the California office of the Occupational Safety and Health Administration (OSHA). It was undisputed that the employee acted alone in protesting the lack of safety precautions. The Board nevertheless found this individual action to be concerted and protected by the Act on the ground that it must be presumed that other employees shared the interest in safety and supported the single employee's complaint. The Board's decision contains two rationales for the presumption of concerted action. First, reference is made to safe working conditions as "matters of great and continuing concern for all within the work force" [1] and occupational safety is identified as "one of the most important conditions of employment." [2] In addition, ***500** the Board emphasized that the nature and extent of the employee's complaints demonstrated that while the employee was concerned for his individual safety, his object also encompassed the well-being of his fellow employees. Second, the Board pointed to the public policy enunciated in the Occupational Safety and Health Act and made the following analysis:

****12** [S]ince minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted. [3]

The two rationales are discrete: the first presumes concert from the presence of a matter of "great and continuing concern" to the work force and requires an analysis of the specific complaint to determine whether it goes beyond individual concerns; the second presumes concert from the legislative declaration of public interest in a matter relating to the workplace and requires the assertion of a statutory right. Neither rationale was articulated with precision. Though these two approaches are different, the *Alleluia* decision intertwined them, treating them as one. This mixture of rationales undoubtedly created conditions for court opposition to the concept of concerted activity in *Alleluia*. Criticism of the opinion is therefore understandable. But that alone is not sufficient ground for rejecting the principles established in the decision.

The case before us involves only one of the principles embodied in *Alleluia*—that an employee's assertion of an employment-related statutory right can be presumed to be activity covered by the NLRA. As such it requires no consideration of general arguments concerning a presumption of concert in the assertion of a matter of common concern to the work force.

I would find in this case, as did the Board in *Alleluia*, that the presumption of concert in the assertion of an employment-related statutory right is proper and valid. This position is based on the Board's recognized authority to apply presumptions and on the finding that the presumption of concerted activity in the individual assertion of a statutory right concerning the workplace is consistent with the legislative history of Section 7 of the Act, is supported by the policies of the Act, and fulfills the Board's responsibility to accommodate the Act to other employment legislation.

II. THE POLICIES OF THE ACT AND THE HISTORICAL USE OF THE TERM "CONCERT" INDICATE THAT SECTION 7 PROTECTS THE INDIVIDUAL ASSERTION OF A WORK-RELATED STATUTORY RIGHT

The central purpose of the Act is to avoid or minimize industrial strife which interferes with the normal flow of commerce. Section 1(b) of the Labor Management Relations Act (29 U.S.C. 141(b)) asserts that this purpose can be achieved if employers, employees, and labor organizations "each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest." Section 1 of the Act further declares that it is "the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce ... by protecting the exercise by

workers of full freedom of association ... for the purpose of ... mutual aid or protection." Section 7 of the Act then sets forth the boundaries of employees' protected rights, establishing the right "to engage in other concerted activities for the purpose of ... mutual aid or protection."

**13 There is no question that the assertion of a work-related statutory right by two or more employees falls within the above-described policies and protections of the Act. It involves association for the purpose of mutual aid or protection and opposes an act or practice by the employer which may jeopardize public health, safety, or interest. However, an individual employee's assertion of such a statutory right raises a question concerning the applicability of the Act because it is not taken in physical and simultaneous concert with at least one other employee and the language of Section 7 specifically mentions "concerted activity."

Opposing courts have taken the view that "concerted" means literal group action. The legislative history of the Act neither supports nor refutes this interpretation. It is virtually silent as to the precise meaning and applicability of "concerted activities." But the likely explanation for this silence is that, in view of the history leading up to enactment of Section 7, there existed, at the time of enactment, no need for precise definition of the term.

*501 A. *The Earliest Use of the Term Concerted was in Opposition to the Application of the Doctrine of Criminal Conspiracy to Employees' Organizing Efforts*

The earliest attempts of American labor to organize in order to improve working conditions were met by judicial application of the doctrine of criminal conspiracy as established in England in the 18th century. [4] That doctrine permitted individual conduct, but proscribed the same conduct by two or more persons acting together:

As in the case of journeymen conspiring to raise their wages; each may insist on raising his wages if he can; but if several meet for the same purpose, it is illegal and the parties may be indicted for a conspiracy. *Rex. v. Mawbey*, 6 T.R. 619, 636 (1796).

In a 19th century case, Justice Holmes noted the anomaly which allowed individual action but found criminal the same action taken collectively by a group. He took issue with the conspiracy doctrine in a dissenting opinion in *Vegelahn v. Gunter*: [5]

But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle.

Despite use of the conspiracy doctrine and the attendant labor injunction, the movement toward organized labor continued and eventually made an impact on the legislative process. Some of the earliest labor legislation was directed toward insulating organized labor from the criminal conspiracy doctrine and the injunctive power of the courts. It is in this context that the term "concert" first appeared. The Clayton Act of 1914 provided that "no ... injunction shall prohibit any person or persons, whether singly or in concert, from ... ceasing to perform any work or labor...." [6] The term appeared again in the Norris-LaGuardia Act both in a clause prohibiting injunctions [7] and in a clause which is similar to the language used in Section 7 of the Act: "it is necessary that [the individual unorganized worker] shall be free from the interference, restraint or coercion of employers ... in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...." [8] Identical language was used in Section 7(a) of the National Industrial Recovery Act, [9] and subsequently in Section 7 of the NLRA, providing that "concerted activities for the purpose of collective bargaining or other mutual aid or protection" shall not be interfered with. It thus appears that the concept of concerted activities which first emerged in the Clayton Act of 1914 as a check against the use of the criminal conspiracy doctrine was picked up, without comment, in subsequent labor legislation.

B. *"Concerted Activities" May Reasonably be Contrued as Supplementing an Individual Employee's Rights*

****14** Given this history, it is reasonable to construe the term "concerted" in the Act as expanding preexisting employee rights concerning the workplace, assuring that acts lawfully undertaken by an individual could not be deemed unlawful when undertaken as a group. While the Act focuses on collective action, there is no indication that the term applies only to literal collective action or was intended by Congress to limit the assertion of employee rights. [10] Rather, the term appears to limit only the assertion of individual rights which have no relationship to any collective effort to improve working conditions or to extend aid or protection to fellow workers.

C. *The Assertion of a Work-Related Statutory Right Falls Within the Meaning of "Concerted Activity"*

A work-related statutory right is not in essence an individual right; instead, it is a right shared by and created for employees as a group through the legislative process at the Federal or state level. In such a case, the legislature determines that maintenance or establishment of a particular condition of employment is in the public interest. The statute is addressed to the needs of employees as a class or strata within the society at large. When viewed against the historical background of the Act, an individual employee's assertion of this type of statutory right is fully consistent with the literal group action of employees requesting higher wages for ***502** all. In both instances, the action concerns employees as a group constituting an opposing force to the economic power of employers, the very type of action that the earliest uses of the term "concerted" were designed to protect.

III. THE SUPREME COURT HAS LONG ACKNOWLEDGED THE BOARD's AUTHORITY TO USE PRESUMPTIONS IN ADMINISTERING THE ACT

The *Alleluia* decision makes the presumption that the individual assertion of an employment-related statutory right is a concerted act. The creation of presumptions by the Board based on the realities of the workplace is not a unique phenomenon. In 1945 the Supreme Court approved the Board's use of such a presumption in *Republic Aviation Corp*. [11] That case involved the presumption that a rule prohibiting union solicitation by employees outside of working hours is an unreasonable impediment to self-organization and hence unlawful. In rejecting the attack on the Board's use of this presumption, the Court stated:

An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which led to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. [Citations omitted.] [12]

****15** The Court found no error in the Board's adoption of the presumption, noting that it was "the product of the Board's appraisal of normal conditions about industrial establishments. Like a statutory presumption or one established by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred." [13]

Here, it is undisputed, and therefore proven, that a right concerning the workplace has been established by a legislature and an individual has suffered adverse consequences from asserting that right. Unlike my colleagues, I would infer that the assertion of the right is, at its core, a concerted act. Thus, a matter concerning conditions of employment which legislatively has been deemed in the public interest may certainly be presumed a matter of concern to all the employees for whom the statute has been enacted. [14] For the reasons set forth in section II, this inference of concert is one rationally drawn from the proven facts and is, therefore, valid under the standards of *Republic Aviation Corp*.

IV. THE INFERENCE OF CONCERT IN THE INDIVIDUAL ASSERTION OF A WORK-RELATED STATUTORY RIGHT IS SUPPORTED BY THE ACT's POLICIES AND THE BOARD's MANDATE TO ACCOMMODATE OTHER EMPLOYMENT LEGISLATION

As shown above, there is a rational connection between the assertion of a statutory right governing the workplace and the inference that all employees whose rights are protected by the statute support the individual assertion of those rights. Not only is this presumption of concerted action supported by the historical use of the term "concerted," but also by the Act's policies and by the Board's mandate to administer the Act in accommodation with other employment legislation.

The Act specifically states that the purpose of avoiding and minimizing industrial strife can be achieved if employers, employees, and labor organizations "above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest." [15] The Act therefore contemplates a concern by employees for matters affecting the public health, safety, or interest. Further, the Board has been admonished to recognize the purposes of other employment legislation and to construe the Act in a manner supportive of the overall statutory scheme. The Supreme Court stated in *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942):

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

****16** ***503** Given these policies and admonitions, it is reasonable to presume that when an individual employee invokes a statute governing a condition in the workplace he is within the scope of employee action contemplated by the Act (i.e., a challenge to an employer's practice concerning the public health, safety, or interest). Further, it would be incongruous with the public policy embedded in employment-related legislation—and indeed inconsistent with the very act of passage—to assume that, in the absence of an express manifestation of support, other employees do not collectively share an interest in an attempted vindication of the statutory right created for their benefit. Presuming concert in the individual assertion of an employment-related statutory right running to all employees, therefore, accommodates the Act to the overall legislative policy regarding the workplace and working conditions.

Conclusion

For all the reasons set forth above, it is appropriate to presume that the individual assertion of an employment-related statutory right is concerted. Making this presumption does not end the matter; it merely shifts the burden to the employer to show that, in a particular case, the employees, for whatever reasons, opposed the individual's assertion of that interest or that the individual specifically acted in his own interest. [16] The presumption is no less valid, and the employer's burden no heavier, than in cases involving, as did *Republic Aviation*, solicitation rules.

Considering the facts of this case, as found by the judge, I conclude that Prill was discharged in violation of Section 8(a)(1). The judge found that Prill was discharged because of his complaints about the safety of equipment he was required to drive, including a complaint to the Tennessee Commission following an accident, and because of his refusal, for safety reasons, to drive the equipment following the accident. By reporting to the Tennessee Commission, Prill invoked laws regulating motor carriers, and initiated an investigation which resulted in issuance of a citation by the Tennessee Commission based on Department of Transportation regulations. I would find that in resorting to this legislation Prill engaged in concerted activity.

Although the Department of Transportation regulations concern the safety of public highways generally, they also regulate, among other things, the safety of equipment that drivers for motor carriers are required to operate and the obligations of drivers in

case of accidents. Since the highways they regulate are the workplace of commercial drivers, they, in effect, concern conditions of employment for such drivers of motor carriers. In these circumstances, it is appropriate to presume that other drivers support the assertion of those regulations.

The presumption is validated by the record. Employee Gove drove Prill's regularly assigned truck and trailer for a 2-week period while Prill was absent. Prill was present when Gove reported problems with the steering and told Supervisor Faling that he would not drive the truck until someone repaired it. It is, therefore, indisputable that two employees were concerned with the safety of the truck and trailer and tried to do something about it. It is certainly valid to presume, at the very least, that Gove supported Prill's complaint to the Tennessee Commission. Yet my colleagues allow Prill's fate to be dictated by such happenstance as the failure to make a phone call. If, after the accident in Tennessee, Prill had phoned Gove, discussed the problem, and received his likely approval to contact the Tennessee Commission, his action would have been concerted and he would be working today. Because he failed to make such a call, and instead individually invoked regulations designed to protect commercial drivers as a group and others using the highways, his case is dismissed. Surely the concerted activity provision in Section 7 was not intended to produce such anomalous results when the safety of employees' working conditions is at issue.

****17** My colleagues' concern with the need to draw a line in this area is, like the criticism of *Alleluia*, understandable. But, wherever the line should be drawn it assuredly should not be drawn at such a point where it creates a safe zone for employers to retaliate against employees who protest over matters which strike at the heart of the economic relationship between employer and employee. To do so runs against one of the central aims of the National Labor Relations Act: to guarantee that employees do not lose their jobs because they challenge an employer on a matter concerning group wages, hours, or terms and conditions of employment. The use of the term "concerted" in this arena merely ensures that collective action cannot be subject to charges of criminal conspiracy and that the Act's protection extends only to matters addressed to employees as a class or group. I dissent from my colleagues' use of the term to distort the fundamental principles of the statute they are charged to enforce.

***504** DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge:

****18** This case was tried in Adrian, Michigan, on August 1, 1980. The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by discharging truckdriver Kenneth Prill because he engaged in protected concerted activity, i.e., making complaints about the safety of his trailer, contacting the Tennessee Public Service Commission about the safety of his vehicle after it was involved in an accident, which contact resulted in the issuance of an out-of-service notice, and refusing thereafter to drive the vehicle. The Respondent denies the essential allegations in the complaint. The Respondent and the Charging Party filed briefs.

Based upon the entire record in this case, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Michigan corporation, is engaged in the manufacture, sale, and distribution of aluminum boats, canoes, jeep tops, and related products at several locations in Michigan. Its principal office and place of business is located at 9133

Tecumseh-Clinton Road in Tecumseh, Michigan, the only facility involved herein. During a representative 1-year period, the Respondent manufactured, sold, and distributed at its Tecumseh, Michigan facility products valued in excess of $2 million, of which products valued in excess of $500,000 were shipped from its Tecumseh facility to points located outside the State of Michigan. Accordingly, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Facts*

Kenneth Prill was hired by the Respondent on April 24, 1979, as a skilled driver. He had driven trucks for a number of years before being hired. He was an owner-operator for the 4 years prior to his employment by the Respondent. His employment application notes that he had "good driving experience" and had 2 years of schooling as a mechanic.

Prill was assigned to drive what was described as the red Ford truck and its accompanying trailer. He hauled boats from the Respondent's facility in Tecumseh, Michigan, to dealers throughout the country. His supervisor, Dave Faling, had no complaints about Prill's work and he testified that Prill took "very good care of his equipment." Prill was never given a disciplinary warning during his employment with the Respondent which lasted until his discharge on July 5, 1979. [1]

Prill experienced a number of problems with his equipment. The most significant problem was the failure of the brakes on the trailer to operate properly. On one trip, as he was driving through Chicago, Prill experienced a brake failure which almost caused an accident. Prill also noticed a steering problem on his equipment. Fellow driver Ben Gove drove Prill's equipment for the first 2 weeks in June 1979. Gove noticed the steering problem on a trip to Sudberry, Ontario. The steering problem nearly caused an accident on that trip. When Gove returned, he told Faling about the problem and stated, in Prill's presence, that he would not take the truck out again until it was repaired. Faling promised to make the needed repairs.

****19** Prill made numerous complaints about the deficiencies in his equipment. He made these complaints to President Alan Beatty, mechanic Buck Maynard, and his supervisor, Dave Faling. Faling corroborated Prill's testimony that he made complaints to Faling. Faling transmitted these complaints to Maynard. Maynard also corroborated Prill's testimony that complaints concerning the brakes on the trailer were made to him.

During his employment, Prill made 11 trips in his truck and he complained after several of them. Most of his problems were with the trailer's brakes. He testified credibly and in detail about each of these complaints. Buck Maynard made some repairs on the brakes after one of Prill's complaints, but the problem was still not fully resolved. Maynard told Prill that the axles were so old that replacement parts could not be secured. Prill insisted that new parts should be purchased. On Prill's next trip, the brakes continued to give Prill trouble, to the point of causing him to take longer on the trip than planned even because he had to drive slower. Prill asked Faling when the brakes would be repaired but Faling simply referred him to Maynard.

On a subsequent trip to Xenia, Ohio, the brakes continued to be inoperative. Prill stopped at a roadside inspection conducted by the Ohio State Highway Patrol. As a result of that inspection, the truck was issued a citation for a number of defects, including problems with the brakes. Prill turned the citation in to the Respondent's officials.

The brake problem was never resolved and the truck continued to give its driver problems.

In late June 1979, Prill was assigned to drive a load to Jacksonville, Florida. The brakes gave him trouble on that trip. He described them as inoperative. On the return trip with an empty trailer, he had an accident in Athens, Tennessee.

The accident took place on Sunday, July 1, 1979. It was caused when a pickup truck struck the left rear of Prill's trailer causing it to jackknife. Prill's trailer ended up off the road and immobile. The Respondent concedes that the accident was not Prill's fault and was not a consideration in his discharge. The equipment was towed to a nearby truckstop in Knoxville, Tennessee.

The night of the accident, Prill called the Respondent's president, Alan Beatty, at his home. Prill advised Beatty of the damage to the trailer, more specifically, the hitching areas of the truck and trailer. Beatty asked Prill ***505** to chain the tractor and trailer hitches together and to tow the trailer back to Tecumseh. Prill told Beatty that this would be dangerous since the hitch area was cracked. Beatty told Prill to have a mechanic in Tennessee look at the equipment but to get it home as best he could.

The following morning, Prill called Beatty again. Wayne Seagraves, the vice president of production, also got on the phone. They were upset with Prill for not having left Tennessee. Seagraves said, “Why in the hell haven't you come back?” Prill said that the vehicle was unsafe. He cited the brake problem and said the hitch was damaged. Toward the end of the conversation, Beatty and Seagraves decided to send mechanic Buck Maynard to Tennessee to look at the vehicle.

****20** After the phone call, Prill decided to call the Tennesee Public Service Commission and have an official inspection of the vehicle. The next morning, Tuesday, a Captain Charles Bain inspected the vehicle and issued a citation. The unit was put out of service because of the bad trailer brakes and the damage to the hitch area of the truck. The citation mentioned several Department of Transportation regulations, including 49 C.F.R. § 396.4 which prohibits the unsafe operation of a vehicle. Bain told Prill that, before the vehicle could be moved, certain repairs had to be made. Prill turned the citation over to the Respondent with is paperwork.

When Maynard arrived later in the day on Tuesday, Prill showed him the citation. Maynard called Beatty and they agreed that the trailer was not worth returning to Tecumseh or even being repaired. They decided to leave the trailer behind and sell it for scrap after removing the tires. Prill then drove the truck back to Tecumseh.

On Thursday, July 5, Prill reported for work and turned in the paperwork on his trip. Seagraves summoned Prill to his office. Seagraves questioned him about the accident and the damage to the truck. He asked why Prill did not chain the truck and trailer together and drive back. Prill responded that he did not believe it was safe to drive the vehicle. Seagraves then said that Prill would be terminated because “we can't have you calling the cops like this all the time.” Beatty, who had come into the office during the conversation, also asked why Prill did not chain the truck and trailer. Prill responded that it would have been unsafe and unlawful in view of the citation.

Beatty testified that he was not in Seagraves' office when Prill was terminated but he met Prill afterwards. He testified that they talked briefly about the incident but his version of their conversation is different from Prill's. To the extent that Beatty's testimony differs from that of Prill on this or any issue, I credit Prill. He impressed me as a candid and honest witness who testified in meaningful detail about all the issues in this case. His recollection was lucid and precise. Beatty, on the other hand, was not a reliable witness. He dissembled when he tried to intimate that Prill was both laid off and discharged. He exaggerated Prill's alleged work deficiencies in order to strengthen his case. On numerous occasions he went far beyond the scope of the question to denigrate Prill as an employee, even though there is no evidence of written reprimands against Prill. Moreover, he was unable to be specific when recounting Prill's alleged deficiencies. After stating that probationary employees, like Prill, are not issued written reprimands, he conceded that he himself had never even orally reprimanded Prill. Indeed, the Respondent's written rules provide for written reprimands and they make no exception for probationary employees. This is significant because there are specific references in the rules to permanent employees where such references are thought to be necessary. In my view, Beatty was unable to give objective testimony about Prill.

****21** Seagraves also gave a different version of the July 5 termination interview. To the extent his version differs from Prill's I also discredit Seagraves' testimony because I found him to be an unreliable witness. Seagraves testified that, after he terminated Prill, Prill asked him if he was being fired because "I called the cops." Seagraves said he was not, but he interjected, in his testimony, "I had no knowledge that he did call the police." Later, he conceded he told Prill he did not appreciate him calling the police but it was not the reason for his termination. Actually it is quite likely that Seagraves did know that Prill notified the police in Tennessee. Mechanic Maynard testified he told Beatty about the citation and it is reasonable to assume that Beatty spoke to Seagraves prior to Prill's discharge. Significantly, Seagraves did not tell Prill that he and Beatty had decided, before Prill's trip to Jacksonville, to terminate him. This lack of candor was reflected in Seagraves' testimony. Moreover, Seagraves attempted to show that he orally reprimanded Prill. But he was not specific in his testimony. In contrast, Prill was candid and detailed in his testimony. In these circumstances, I credit Prill over Seagraves where their testimony conflicts.

The same day that Prill was discharged, the Respondent hired Glenn Bolduc as a driver. Bolduc did not take his first trip until about a week and a half later.

In late July, Faling had a conversation with Beatty about Prill's termination. Faling, who was returning from a 2-week layoff, asked where Prill was. Beatty said he had "let him go." Faling asked the reason for the termination. He testified that Beatty said "he had an accident or what had happened, and he was a little upset because he had to send another man down there to get the equipment." Beatty also said that Prill refused to drive the truck back to Tecumseh. [2]

B. *Discussion and Analysis*

It is well settled that an employer violates Section 8(a)(1) of the Act when he discharges an employee for engaging in protected concerted activity within the meaning of Section 7 of the Act. Protected activity includes a refusal to work in protest of a working condition. *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1961). In such cases the Board does not inquire into the reasonableness of the work-related complaint. It only requires that the complaint or protest be undertaken in ***506** good faith. See *E. R. Carpenter Co*., 252 NLRB 18 (1980).

Although concerted activity is often undertaken by a group of employees [3] or by a single employee enforcing a collective-bargaining agreement which is the ultimate result of concerted group action, [4] the Board has also held that even the activity of a single worker may be concerted if it inures to the benefit of all employees. Thus, a single employee's refusal to work to protest a change in terms and conditions of employment for all employees may be concerted notwithstanding that other employees do not join in that refusal. See *Ontario Knife Co*., 247 NLRB 1288 (1980); *Steere Dairy*, 237 NLRB 1350 (1978). The Board has established a presumption that an individual employee engages in concerted activity where his conduct arises out of the employment relationship and is a matter of common concern among all employees. *Alleluia Cushion Co*., 221 NLRB 999 (1975). Indeed, in a decision which is almost on all fours with the instant case, the Board found that an employer who discharges a single employee for refusing to drive an unsafe vehicle, about which he and other employees had complained, violates Section 8(a)(1) of the Act. See *Pink Moody, Inc*., 237 NLRB 39 (1978).

****22** The following is an excerpt from the *Pink Moody* decision (237 NLRB 39-40):
In *Alleluia Cushion, supra*, we held that where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find implied consent thereto and deem such activity to be concerted. In *Air Surrey, supra*, we found as concerted activity an employee's individual inquiry at his employer's bank as to whether the employer had sufficient funds on deposit to meet the upcoming payroll, because the matter inquired into by the employees was of vital concern to all employees. And in *Dawson Cabinet Company, Inc*., 228 NLRB 290 (1977), we extended the *Alleluia Cushion* principle in order to find as

concerted activity a female employee's individual refusal to perform a certain job unless she was paid the same wages as a male employee doing the same job, because the employee was attempting to vindicate the equal pay rights of the female employees. [1]

In the instant case, the facts clearly establish that Salinas' refusal to drive truck 25 on March 5 was concerted activity within the meaning of *Alleluia Cushion, Air Surrey*, and *Dawson Cabinet*. Respondent acknowledged its own concern over the brakes on truck 25 when it took the truck out of service for a few nights in January after the brakes had malfunctioned while Salinas was driving his route. In March, Respondent became aware that other drivers besides Salinas were concerned about the malfunctioning brakes on truck 25. Thus, on March 3, Salinas had a telephone conversation with Horn, who had driven truck 25 that day and had experienced the malfunctioning brakes. Horn stated that he (Horn) would not drive truck 25 again. The next day, when directed by Respondent to drive truck 25, Horn refused. Nothing happened, however, because another truck became available before Horn started his run. The very next day, Salinas refused to drive truck 25 back to the garage when ordered to do so by Respondent. Thus, at the time Respondent suspended Salinas, it was on notice that on successive days two of its drivers had refused to drive truck 25 because of the brake problem.

In addition, compliance with an order to drive a motor vehicle with malfunctioning brakes would clearly violate traffic regulations, [2] and thus any benefits resulting from Salinas' refusal to drive such an unsafe vehicle would inure to the benefit of all of Respondent's drivers.

In light of these facts, it is clear that Salinas' actions on March 5 were part of a continuing effort by Salinas and at least one other employee to have Respondent repair the brakes on truck 25, that Respondent was fully aware of such effort as well as the specific problem with the brakes on truck 25, and, thus, that Salinas' activity was concerted. Inasmuch as Respondent suspended Salinas for engaging in protected concerted activities, we find that his suspension violated Section 8(a)(1) of the Act.

****23** Applying these principles and the Board's reasoning in *Pink Moody* and *Alleluia Cushion*, I find that the Respondent's discharge of Prill was violative of Section 8(a)(1) of the Act.

The General Counsel has made a prima facie showing that Prill was discharged for refusing to drive his truck and trailer back to Tecumseh, Michigan, and, by his insistence that the truck was unsafe to drive, causing the Respondent to dispatch its mechanic to Knoxville, Tennessee. This finding is supported by the uncontradicted testimony of Supervisor Dave Faling. Faling testified that President Alan Beatty said that this was the reason for the termination. He mentioned no other reasons. This admission by the highest ranking official of the Respondent is confirmed by the circumstances of Prill's termination. He was fired the day after he reported to work following his return from Knoxville, Tennessee. He was told by Seagraves that the Respondent could not have him “calling the cops all the time,” an obvious reference to the fact that Prill had asked local authorities in Tennessee to inspect the vehicle which resulted in a citation being issued that prevented the trailer from being moved. The timing of the discharge makes it clear that what happened in Tennessee precipitated the discharge. The Respondent conceded that Prill was not discharged because of the accident itself. Seagraves and Beatty were clearly insistent on Prill's driving the vehicle back to Tecumseh ***507** and were upset when Prill balked. In these circumstances, the inference is clear that Prill was fired for refusing —for safety reasons—to drive the truck and trailer back to Tecumseh. The credited testimony also shows that the Respondent was concerned with Prill's earlier safety complaints, including a complaint to Ohio authorities which resulted in a citation of the vehicle for safety violations, and that this too formed a basis for the discharge. Thus, Seagraves told Prill, when he fired him, “we can't have you calling the cops like this *all the time*” (emphasis added). In view of the many earlier problems with the trailer brakes which were not satisfactorily resolved and of the citation of the Tennessee authorities directing that the trailer not be moved unless repaired, Prill's refusal to drive the equipment back to Tecumseh was made in good faith.

At the hearing, the Respondent attempted to show, through the testimony of Seagraves and Beatty, that it decided to lay off Prill for economic reasons prior to the Jacksonville trip and that he was fired for being a poor employee. Apart from the inconsistency and contradiction of these two reasons, they fly in the face of the uncontradicted testimony of Supervisor Faling which made it clear that Beatty conveyed the view to him that Prill was fired for refusing to drive the truck back to Tecumseh. Beatty did not mention any other reasons to Faling. Moreover, the reasons related at the hearing are based on the discredited testimony of Beatty and Seagraves. I have discussed some of this testimony above as well as my reasons for discrediting it. In addition, the assertion that Prill was to be laid off for economic reasons prior to the Jacksonville trip is implausible. Why would an employer who has allegedly decided to lay off a particular employee send him on a lengthy trip without even telling him he was going to be laid off? And why would an employer then hire another driver the same day Prill was discharged and not give Prill the opportunity to handle the job? As I have indicated, the testimony concerning Prill's alleged poor work performance was unreliable. Prill received no written warnings although the Respondent's rules require written warnings before a discharge. Probationary employees are not excluded from such rules. Beatty did not even orally reprimand Prill. There is no evidence that Faling, his immediate supervisor, ever did. Seagraves' testimony as to oral warnings was undetailed and ambiguous. The testimony was pointedly and credibly rebutted by Prill. Faling's testimony also controverts Seagraves since he had no problems with Prill.

****24** In these circumstances, I find that the Respondent's reasons for the termination, advanced by its officials at the hearing, were pretexts. The Respondent has thus failed to rebut the General Counsel's evidence or show that Prill would have been discharged notwithstanding his safety complaints and his refusal to drive an unsafe vehicle after reporting its condition to the Tennessee Public Service Commission.

The question then becomes whether Prill's safety complaints and his refusal to drive an unsafe vehicle in the circumstances of this case constituted protected concerted activity under Section 7 of the National Labor Relations Act. Prill's refusal to drive the vehicle was mandated by Department of Transportation regulations which require that an inspection be made after an accident to determine the extent of damage and also require that a vehicle cited as unsafe not be operated until it is repaired.[5] Prill was, by contacting local authorities and refusing to drive the vehicle, enforcing these provisions of the national transportation policy. This policy obviously reflects concern not only for the safety of the general driving public but also for particular drivers. Obeying the Respondent's orders to drive an unsafe vehicle would have caused a violation of DOT regulations. Moreover, Prill's refusal to drive the vehicle was also based, in part, on his earlier experience which had resulted in numerous complaints about the inoperative trailer brakes on this same vehicle. The Tennessee citation mentioned the inoperative trailer brakes as one of two deficiencies which rendered the vehicle inoperable. Prill's complaints about the trailer brakes prior to the accident were clearly concerted since they were joined by driver Gove who made similar complaints, in Prill's presence, to management officials about the safety of Prill's vehicle when he, Gove, was assigned to drive it for 2 weeks. These concerted complaints were thus a sufficient basis on which a refusal to drive the truck could be made. See Pink Moody, above.

Prill's effort to have the Tennessee Public Service Commission to inspect the damaged trailer was the equivalent of a safety complaint to OSHA. Indeed, the application of Department of Transportation regulations in this respect is mandatory. After an accident, a driver must report the accident, and, if a citation is issued which states that the truck not be driven, the citation must be complied with. In contrast, the processes of OSHA are voluntary: An employee may or may not take a work-related safety complaint to OSHA. Furthermore, the safety of a driver's vehicle is at least the equivalent of a workplace safety problem which affects all employees. A truckdriver's place of work is behind the wheel of a truck just as the manufacturing employee's place of work is the plant environment. An employee who complains about the safety of a particular truck speaks for the safety of any employee who may drive that truck ***508** and for any employee who has an interest in the safety of his vehicle. It is not a remote inference that an employer who seeks to have one driver drive an unsafe vehicle may do likewise with another driver or another vehicle. Indeed, the evidence in this case shows that the Respondent had dispatched another driver, Gove, to operate Prill's vehicle. Gove expressed his reluctance to drive the vehicle in the future. Thus, under the rationale of *Alleluia Cushion*

and *Pink Moody* employee Prill's refusal to drive an unsafe vehicle was, tantamount to making a work-related safety complaint which would inure to the benefit of all employees and the activity of Prill was thus presumptively protected.

****25** The Respondent was, of course, free, under *Alleluia Cushion* to rebut the inference that Prill's activity inured to the benefit of all employees. It could have shown, for example, that Prill's protests and complaints were not made in good faith or were simply the idiosyncrasies of a supersensitive individual whose concerns could not have been shared by other truckdrivers in similar circumstances. This the Respondent failed utterly to accomplish. Indeed, three witnesses, Maynard, Faling, and Gove, essentially corroborated Prill on the safety problems of the vehicle Prill was driving. The Respondent did not even attempt to return the trailer from Tennessee, thus confirming Prill's judgment and that of the Tennessee Public Service Commission that the vehicle was unsafe. In these circumstances, I find that the Respondent has not rebutted the presumption that Prill's safety complaints and refusal to drive an unsafe vehicle inured to the benefit of all employees and thus constituted protected concerted activity. [6]

CONCLUSIONS OF LAW

1. By discharging employee Kenneth Prill for engaging in protected concerted activity, the Respondent committed an unfair labor practice in violation of Section 8(a)(1) of the Act. [7]

2. This unfair labor practice affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in the unfair labor practice set forth above, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The Respondent will be ordered to reinstate Kenneth Prill to his former job or, if that job no longer exists, to a substantially equivalent job, and to make him whole for any losses of wages and other benefits he may have suffered as a result of his unlawful discharge. Such losses are to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corp*., 231 NLRB 651 (1977). [8]

[Recommended Order omitted from publication.]

Footnotes

1 On 4 November 1980, after the hearing and before the judge's decision, the General Counsel, with the Charging Party's concurrence, moved to amend the complaint to include an additional allegation that the unlawful nature of Prill's discharge is supported by Sec. 502 of the National Labor Relations Act. The relevant portion of that section states:

> [N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

The judge, after considering the arguments of all parties, denied the General Counsel's motion by telegram of 11 November 1980. The General Counsel and the Charging Party cross-except. We note that counsel for the General Counsel engaged in lengthy argument at the hearing concerning the theory of her case both before as well as after the

presentation of evidence, but gave no indication that Sec. 502 formed the basis for any portion of the General Counsel's case. In addition, although counsel for the Charging Party took the position at the hearing that Sec. 502 was applicable, counsel for the General Counsel thereafter reiterated that the theory of her case rested on *Alleluia Cushion Co*., 221 NLRB 999 (1975), and at no time adopted the Charging Party's position. Thus, although we agree with the judge that the General Counsel's motion to amend the complaint should be denied, we do so for the reason that the General Counsel neither raised nor litigated the Sec. 502 issue at the hearing. Accordingly, we affirm the judge's ruling and therefore do not reach the issue discussed in fn. 6 of the attached decision of whether Sec. 502 protects an employee in the circumstances of this case.

2 The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also asserts that the judge's decision is the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co*., 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." See generally *Jack August Enterprises*, 232 NLRB 881 (1977).

3 The Charging Party urges, as part of its cross-exceptions, that it be awarded a reasonable attorney's fee for this litigation. When a respondent's defense is dependent upon resolutions of credibility and hence is "debatable" rather than "frivolous," the Board has consistently refused to award litigation costs, even if the respondent has "engaged in clearly aggravated and pervasive misconduct,' or in the 'flagrant repetition of conduct previously found unlawful.' " *Heck's Inc*., 215 NLRB 765, 767 (1974); see also *Tiidee Products*, 194 NLRB 1234 (1972). Upon a review of the record, we cannot say that the Respondent's defenses were frivolous. Accordingly, we deny the Charging Party's request for reasonable attorney's fees.

4 48 Stat. 195, 198.

See also § 2 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 102. The Supreme Court has stated that "Congress modeled the language of § 7 after that found in § 2 of the Norris-LaGuardia Act ... which declares that it is the public policy of the United States that 'workers shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of ... representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....' " *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 fn. 14 (1978).

5 79 Cong. Rec. H 2332 (daily ed. Feb. 20, 1935) (statement of Rep. Boland), reprinted in 2 Leg. Hist. of the National Labor Relations Act of 1935, at 2431-32 (1935).

Boland's analysis of the "collectivist" antecedents of what became Sec. 7 of the Act was recognized by others. See, e.g., William H. Spencer, *Collective Bargaining Under Section 7(a) of the National Industrial Recovery Act* 3-6 (1935).

6 The Act does not protect all concerted activity. It is not a violation of the Act to restrain or coerce an employee because he engages in concerted activity that is not protected—either, for example, because such activity contravenes another section of the Act or another statute, or because it was not engaged in "for the purpose of collective bargaining or other mutual aid or protection." See *Eastex*, 437 U.S. at 568 fn. 18. See generally Gregory, *Unprotected Activity and the NLRA*, 39 Va. L. Rev. 421 (1953).

7 See, e.g., *Texas Textile Mills*, 58 NLRB 352 (1944); *Lion Brand Mfg. Co*., 55 NLRB 798 (1944), enfd. in relevant part 146 F.2d 773 (5th Cir. 1945); *Globe Co*., 54 NLRB 1 (1943); *M. F. A. Milling Co*., 26 NLRB 614 (1940), enfd. in relevant part 115 F.2d 140 (8th Cir.).

8 92 NLRB 1313 (1951).

9 154 NLRB 380 (1965).

10 155 NLRB 255 (1965).

11 The Board's analysis of the facts in *Continental Mfg*., which were similar to those in *Alleluia*, was directly contrary to the *Alleluia* Board's reasoning.

12 201 NLRB 147 (1973) (former Chairman Edward Miller dissenting).

13 The judge and the Board majority found evidence that Glace and Curry had actually acted in concert during the course of the investigation.

14 The "contract" referred to in the decision was not a collective-bargaining agreement, but a contract for services entered into between respondent and the United States Army.

15 The transfer was not at issue.

16 In *Air Surrey Corp*., 229 NLRB 1064 (1977), enf. denied 601 F.2d 256 (6th Cir. 1979), and *Pink Moody, Inc*., 237 NLRB 39 (1978), *Alleluia* was expanded to include state banking statutes and motor vehicle laws, respectively.

In *Steere Dairy, Inc*., 237 NLRB 1350 (1978), and *Ontario Knife Co*., 247 NLRB 1288 (1980), enf. denied 637 F.2d 840 (2d Cir. 1980), the statutory element of *Alleluia* was not present, and individual conduct was deemed to be concerted solely on the theory that it involved a matter the Board considered to be of concern to the group.

17 *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 310 (4th Cir. 1980).

18 E.g., *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980); *NLRB v. Dawson Cabinet Co*., 566 F.2d 1079 (8th Cir. 1977).

19 *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), cited by the Board in *Alleluia*, is not to the contrary. That case involved a strike on board a ship moored in an American port. The strike, which was found to be in violation of the Federal mutiny statutes, would otherwise have been protected by the National Labor Relations Act. The Supreme Court resolved the conflict between the Act and the mutiny statutes by instructing the Board that it could not order the reinstatement of strikers who, under the circumstances, had engaged in a criminal act. In short, the Board was required to accommodate its own mandates to those of another statutory scheme. Such accommodation, we emphasize, had the effect of *narrowing* the scope of the National Labor Relations Act. The "accommodation" the *Alleluia* decision compelled, however, involved nothing less than using other statutes to create rights that do not exist under the Act.

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

21 The issue of the validity of the *Interboro* doctrine is presently pending before the Supreme Court. *City Disposal Systems*, 256 NLRB 451 (1981), enf. denied 683 F.2d 1005 (6th Cir. 1982), cert. granted 51 U.S.L.W. 3703 (U.S. Mar. 28, 1983) (No. 82-960).

22 See *Ontario Knife Co. v. NLRB*; 637 F.2d 840, 845 (2d Cir. 1980); *Pacific Electricord Co. v. NLRB*, 361 F.2d 310 (9th Cir. 1966).

23 See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp*., 103 S.Ct. 2496, 97 LC ¶ 10,164 (1983).

Under this standard, an employee "may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated." *NLRB v. Condenser Corp. of America*, 128 F.2d 67, 75 (3d Cir. 1942). Thus, absent special circumstances like *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), there is no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an employee engaged in misconduct.

24 The judge additionally relied on *Ontario Knife Co*., 247 NLRB 1288 (1980), enf. denied 637 F.2d 840 (2d Cir.); *Steere Dairy*, 237 NLRB 1350 (1978); and *Pink Moody, Inc*., 237 NLRB 39 (1978).

25 Citing Federal Motor Carrier Safety Regulations, 49 C.F.R. § 396.4.

1 221 NLRB at 1000.

2 Id.

3 Id.

4 See generally Russell A. Smith, Leroy S. Merrifield, and Theodore J. St. Antoine, Labor Relations Law (4th ed. 1968) at 1-54 and Robert A. Gorman and Matthew W. Finkin, The Individual and the Requirement of "Concert" under the National Labor Relations Act, 130 U. Pa. L. Rev. 286.

5 167 Mass. 92, 44 N.E. 1077 (1896).

6 38 Stat. 738 (1914), 29 U.S.C. § 51 (1946).

7 47 Stat. 70 (1932), 29 U.S.C. § 104 (1946).

8 47 Stat. 70 (1932), 29 U.S.C. § 102 (1942).

9 48 Stat. 198 (1938).

10 Congressman Bolard's remarks, cited by the majority, provide no such indication, as they merely focus on the expansion of rights.

11 *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

12 Id. at 800.

13 Id. at 804-805.

14 See, e.g., *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F.2d 930, 937 (1st Cir. 1940), petition for cert. dismissed on motion of petitioner 312 U.S. 710 (1941) (involving unlawful interference with employee efforts to secure favorable workmen's compensation legislation).

15 29 U.S.C. 141(b)

16 See *Comet Fast Freight*, 262 NLRB 430 (1982), for an example of such a demonstration that the individual did not act in the interest of his fellow employees.

1 Thus, the Administrative Law Judge's conclusion that Salinas' refusal to perform his normal work tasks distinguished this case from the *Alleluia Cushion* line of cases is clearly incorrect.

2 An employer's ordering of a commercially licensed driver to violate traffic regulations and ordinances would be a matter of grave concern to all drivers.

1 It is uncontested that Prill never received a written warning. The Respondent's president, Alan Beatty, testified that he never orally reprimanded Prill. Vice President Wayne Seagraves testified that he did, but Prill credibly denied receiving any such oral warnings before his discharge.

2 The above is based on the credited testimony of Faling, a supervisor of the Respondent. Beatty did not contradict this testimony.

3 See *Washington Aluminum*, above.

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

5 The Federal Motor Carrier Safety Regulations provide, in 49 C.F.R., as follows:

Section 396.4 Unsafe operations forbidden.

No motor carrier shall permit or require a driver to drive any motor vehicle revealed by inspection or operation to be in such condition that its operation would be hazardous or likely to result in a breakdown of the vehicle nor shall any driver drive any motor vehicle which by reason of its mechanical condition is so imminently hazardous to operate as to be likely to cause an accident or a breakdown of the vehicle. If while any motor vehicle is being operated on a highway, it is discovered to be in such unsafe condition, it shall be continued in operation only to the nearest place where repairs can safely be effected, and even such operations shall be conducted only if it be less hazardous to the public than permitting the vehicle to remain on the highway.

Section 396.6 Damaged vehicles, inspection.

No motor carrier shall permit or require a driver to drive nor shall any driver drive a motor vehicle which has been damaged in an accident or by other cause until inspection has been made by a person qualified to ascertain the nature and extent of the damage and the relationship of such damage to the safe operation of the motor vehicle, nor shall such motor vehicle be operated until such person has determined it to be in safe operating condition.

6 The General Counsel and the Charging Party allege that the illegality of Prill's discharge is buttressed by reference to Sec. 502 of the Act which states, in pertinent part, “nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.” In my view, Sec. 502 has no applicability to this case which must be decided under Sec. 7 and Sec. 8(a)(1) of the Act. Sec. 502 offers no particular help in defining the contours of protected concerted activity in the circumstances of this case. Sec. 502 does not define either an unfair labor practice or concerted protected activity. And it adds nothing to the existing body of law interpreting the phrase “protected concerted activity.” Sec. 502 is, of course, useful in helping to determine the rights of employees who refuse to perform work in unsafe situations where a contractual no-strike provision would make such activity unprotected. Thus, in a case where an individual's refusal to work is prima facie protected and concerted because, under the *Interboro* rationale, he seeks to enforce a cnntractual provision, such as the specific provision that an employee may refuse to drive a vehicle he believes to be

unsafe, reference to Sec. 502 may rebut an employer's defense that such refusal is unprotected because it is a "strike" in violation of a contractual no-strike clause. See *Banyard v. NLRB*, 505 F.2d 342, 348 (D.C. Cir. 1974), citing *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974). The instant case is distinguishable. The protected concerted activity here is not based on the enforcement of a contractual clause under the *Interboro* rationale. Here there is no contract involved, no representative, and no no-strike clause. The concertedness of the activity must be established by reference to *Washington Aluminum, Alleluia Cushion*, and its progeny.

7 The Respondent alleged that the State of Michigan Department of Labor dismissed a complaint filed by Prill alleging that the discharge violated the Michigan Occupational Safety and Health Act. I have considered the evidence submitted by the Respondent in support of this allegation and I conclude that it does not detract from my findings in this case. The statutory procedure under which the Michigan Department of Labor operates does not result in a final determination which can be equated with the result obtained under the Labor Act. Indeed, the department essentially conducts investigation which may result in the issuance of a complaint which is then taken to a local court. No hearing was held. The department's standard for issuing a complaint is that the "over riding factor" in the employee's discharge be his "safety related" complaint. In these circumstances, the department's refusal to issue a complaint is of scant relevance in determining whether the General Counsel has proved, by a preponderance of the evidence, in an adversary hearing where an administrative law judge must assess the credibility of witnesses, that Prill was fired for engaging in activity which was, under the Labor Act, protected and concerted.

8 See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

268 NLRB No. 73 (N.L.R.B.), 268 NLRB 493, 115 L.R.R.M. (BNA) 1025, 1983-84 NLRB Dec. P 16019, 1984 WL 35992