Employee Protests Over Supervisory Changes: The NLRB Versus the Circuit Courts

The protection afforded workers by the National Labor Relations Act (NLRA) extends only to that class of workers defined by the Act as employees.[1] The term *employee* as defined by the Act specifically excludes "any individual employed as a supervisor."[2] The Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[3]

The original act, however, did not specifically exclude supervisors in its definition of the term *employee*.[4] Supervisors were excluded from the protection afforded workers by the Act as a result of the enactment of the Taft-Hartley Act in 1947.[5]

> The legislative reports make it clear that Congress wished in part to assure that rank-and-file employees could unionize and select their leaders free from undue influence by supervisors in the union, but more important to assure that supervisors—whether organized within a rank-and-file union or organized independently—would not fall into league with or become accountable to employees whom they are charged to supervise and

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1. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW ch. III (1976) (hereinafter cited as R. GORMAN). The present National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), had its beginning with the National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935). The 1935 Act was amended by the Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, 61 Stat. 136. The Act was further amended by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 257, 73 Stat. 519. A final amendment was the Act of July 26, 1974, Pub. L. No. 360, 88 Stat. 395. All subsequent references will be to "the NLRA" unless otherwise specified.
2. 29 U.S.C. § 152(11) (1976).
3. *Id.*
4. National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935).
5. Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, 61 Stat. 136.

thereby renounce the undivided loyalty due the employer.[6]

It has also been noted that the Taft-Hartley Act represented a response to "what many viewed as a tendency by the NLRB toward overzealous regulation of employer conduct through its unfair labor practice jurisdiction. . . . "[7] Thus,the policy behind excluding supervisors from the protection afforded workers by the Act was to allow employers freedom in the selection of their supervisory personnel. This policy is in jeopardy, however, as a result of the test applied by the NLRB when reviewing employee protests over supervisory changes.

Seventeen years ago, the Fifth Circuit stated in *Dobbs Houses, Inc. v. NLRB*[8] that "[i]n the absence of exceptional circumstances or conditions, it is the settled rule that concerted activity over a change in supervisory personnel is not protected."[9] Yet to be resolved, however, is what constitutes those exceptional circumstances and conditions to which this rule does not apply. This comment will examine the current conflict between the National Labor Relations Board and the circuit courts dealing with this subject. The particular area of conflict to be examined concerns the test that must be satisfied before an employee protest over a supervisory change will be deemed concerted activity within the meaning of Section 7 of the National Labor Relations Act.[10] As a by-product of the use of different tests by the NLRB and the circuit courts, there also exists a conflict between them as to how far these protests may reach within the supervisory structure of a given organization and, therefore, this area of conflict will be examined as well.

I. Measuring "Exceptional Circumstances and Conditions"

A. Circuit Court Test

The controversy surrounding the extent to which employees may protest changes in supervisory personnel and still be protected under the Act can be traced to the NLRB's decision in *Phoenix Mutual Life Insurance Co.*[11] The plaintiffs in *Phoenix* were insurance agents who had participated in the drafting of a letter to the management of their company in which they planned to protest the appointment of a new cashier for their branch office. Their complaint stemmed from the fact that four different cashiers had been appointed by the company within four years. The letter

6. R. Gorman, *supra* note 1, at 34.
7. *Id.* at 5.
8. 325 F.2d 531 (5th Cir. 1963).
9. *Id.* at 537.
10. 29 U.S.C. § 157 (1976).
11. 73 N.L.R.B. 1463, 20 L.R.R.M. 1116 (1947), *enforced*, 167 F.2d 983 (7th Cir. 1948).

was intended to inform the management of the company that as a result of these frequent changes in the cashier's position plaintiffs had been hampered in their efforts as salesmen for the company. Before plaintiffs had prepared a final draft of their letter, the manager of the branch office out of which they worked advised one of them not to sign the letter. The other plaintiffs were less fortunate in that they received no warning but instead received notices from the branch manager that their employment with the company had been terminated.

The Board in *Phoenix* agreed with the trial examiner's findings and ruled in favor of the plaintiffs. In reaching its decision, the Board noted: "This was reasonable and temperate conduct by employees who had a real cause for concern and was clearly within the scope of the kind of concerted activity protected by Section 7 of the Act."[12] Consequently, the Board held that the company had "interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, in violation of Section 8 (1) thereof."[13] The Board ordered the company, therefore, to cease and desist from the unfair labor practice and to reinstate the plaintaiffs who had been terminated.

The Seventh Circuit[14] granted the Board's petition for enforcement of its order, but in so doing it also established the test by which future employee protests over supervisory changes eventually would be measured by the majority of the circuit courts. In analyzing the *Phoenix* case, the court first looked to the nature of the matter being protested and concluded that the plaintiffs "were properly concerned with the identity and capability of the new cashier."[15] The court ruled, therefore, that "they had a legitimate interest in acting concertedly in making known their views to management without being discharged for that interest."[16] Having reached that conclusion, the court examined plaintiffs' method of making known their views to management and found that "[t]he moderate conduct of [plaintiffs] bore a reasonable relation to the conditions of their employment."[17] Plaintiffs' having satisfied these two criteria, the court held that the company's response constituted an unfair labor practice and thus, the court enforced the Board's order.

Since the Seventh Circuit's decision in *Phoenix*, no less than five circuit courts have adopted the criteria announced in that opinion as the standard by which an employee protest over a change in supervisory person-

12. *Id.* at 1464-65. The Board was referring to 29 U.S.C. § 157 (1976).
13. *Id.* at 1465. The Board was referring to 29 U.S.C. § 158(a)(1) (1976).
14. NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983 (7th Cir. 1948).
15. *Id.* at 988.
16. *Id.*
17. *Id.*

nel should be measured.[18] One of the first to do so was the Sixth Circuit when it rendered its decision in *NLRB v. Guernsey-Muskingum Electric Co-Operative, Inc.*[19] In *Guernsey*, the Sixth Circuit noted that there was a close parallel between the facts of the case before it and those existing in *Phoenix*.[20] The dispute in *Guernsey* arose over the appointment by the company of an inexperienced worker to the position of foreman over a particular project. The employees who were assigned to work under the new foreman contended that his inexperience would have the effect of making their jobs more difficult. No action was undertaken by the employees to demonstrate their concern other than to complain on an individual basis to a certain member of the company's managerial staff. Shortly thereafter, however, one of the employees was discharged by the company on the grounds of insubordination. Although the court did not specifically refer to the formulation of a particular test in *Phoenix*, it quoted from the Seventh Circuit's opinion in that case for support of the proposition that there were circumstances under which employees might be properly concerned with supervisory changes.[21] In addition, the court distinguished the case before it from other cases in which the reasonableness of the method of protest was an issue. In so doing, the court recognized that the reasonableness of the method of protest would be a relevant factor in the appropriate circumstances.[22]

In *Dobbs Houses, Inc. v. NLRB*,[23] the Fifth Circuit showed no reluctance in describing the criteria set forth in *Phoenix* as the test to be used when reviewing employee protests over supervisory changes. Plaintiffs in *Dobbs* had staged a walkout in protest over the discharge of the assistant manager of the restaurant where they worked. In ruling for the plaintiffs, the Board had relied upon the Seventh Circuit's decision in *Phoenix* for the proposition that when "the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on their performance of the work they are hired to do, they are legitimately concerned with his identity."[24] The Fifth Circuit conceded that plaintiffs' concern over the dismissal of the assistant manager "might be within the

18. *See* Abilities & Goodwill, Inc. v. NLRB, 612 F.2d 6 (1st Cir. 1979); NLRB v. Okla-Inn, 488 F.2d 498 (10th Cir. 1973); NLRB v. Plastilite Corp., 375 F.2d 343 (8th Cir. 1967); Dobbs Houses, Inc. v. NLRB, 325 F.2d 531 (5th Cir. 1963); NLRB v. Guernsey-Muskingum Elec. Coop., Inc., 285 F.2d 8 (6th Cir. 1960).

19. 285 F.2d 8 (6th Cir. 1960).

20. *Id.* at 12.

21. *Id.*

22. *Id.* at 13.

23. 325 F.2d 531 (5th Cir. 1963).

24. Dobbs Houses, Inc., 135 N.L.R.B. 885, 888 (1962), *enforcement denied*, 325 F.2d 531 (5th Cir. 1963).

realm of proper employee interest"[25] but concluded that the walkout "was an unreasonable way to make known their concern."[26] The court articulated this standard as being "the other test which must be met to determine the protected character of the employees' activity."[27]

The existence of a two-part test for measuring an employee protest over a supervisory change was also acknowledged by the Eighth Circuit in *NLRB v. Plastilite Corp.*[28] Although the court did not have to apply the test in reaching its decision, it noted that when the case was before the Board defendant had argued "that if the employees had a right to engage in the concerted activity, the means selected (a strike) was unreasonable."[29] The court did not take exception to defendant's assertion before the Board that employee protests over supervisory changes were subject to a reasonableness test. Instead, the court noted in a rather lengthy footnote the Board's opposition to such a test.[30]

The Tenth Circuit in *NLRB v. Okla-Inn*[31] also accepted the two part test. In *Okla-Inn*, the court was presented with the question of whether a walkout by motel maids in protest over the firing of their supervisor was protected concerted activity within the meaning of Section 7 of the Act. In reaching its decision, the court stated "[t]he test is the underlying reasons for the walkout and whether they are reasonable relative to the circumstances involved."[32] The court, however, also noted that the protests in *Muskingum* and *Phoenix* were held to be protected because those protests constituted "reasonable conduct under the circumstances that prevailed in those cases."[33] Thus, in ruling in favor of the maids, the court found it necessary to point out that it could not "accept the argument in this case that where a supervisory dispute results in a walkout, the activity is unreasonable, unprotected, and illegal *per se*."[34]

Finally, the First Circuit in *Abilities & Goodwill, Inc. v. NLRB*[35] not only accepted the additional requirement that the means of protest be reasonable but also attacked the Board's test in the process. Describing it as the "all-or-nothing test,"[36] the court concluded that the "approach adopted by the majority of the courts seems to us more reasonable than

25. 325 F.2d at 538.
26. *Id.* at 539.
27. *Id.* at 538.
28. 375 F.2d 343 (8th Cir. 1967).
29. *Id.* at 347.
30. *Id.* at 347 n.6.
31. 488 F.2d 498 (10th Cir. 1973).
32. *Id.* at 503.
33. *Id.*
34. *Id.*
35. 612 F.2d 6 (1st Cir. 1979).
36. *Id.* at 9.

that advocated by the Board and more consistent with the underlying purpose of the Act."[37] Furthermore, the court warned that "the Board's approach ironically could lead to precluding all forms of employee protest in situations where reasonable forms of protest might otherwise be allowed and protected."[38]

B. Board Test

When reviewing employee protests over supervisory changes, the NLRB has steadfastly refused to condition the protection afforded an employee under Section 7 of the Act upon the reasonableness of the method of protest. The Board's opposition to such a requirement was announced in its decision in *Plastilite*, in which the Board stated, "[W]e must respectfully disagree with any rule which would base the determination of whether a strike is protected upon its reasonableness in relation to the subject matter of the 'labor dispute.' "[39] Further clarifying its position, the Board went on to state, "We do not adopt the Dobbs Houses standard of reasonableness as declared by the Fifth Circuit. . . . "[40]

In support of its position that protection under the Act cannot be conditioned upon the reasonableness of the method of protest, the Board cited *NLRB v. Washington Aluminum Co.*[41] The employees in *Washington* had walked off their jobs in protest over the lack of heat in the building in which they worked. The outside temperature on the day the employees walked off their jobs ranged from a low of eleven degrees to a high of twenty-two degrees. The Fourth Circuit had held for the company on the grounds that the employees' actions did not qualify as concerted activity since they had "summarily left their place of employment"[42] without affording the company an "opportunity to avoid the work stoppage by granting a concession to a demand."[43] The Supreme Court rejected the Fourth Circuit's conclusion that there had been no concerted activity on the employees' part on the basis of the Board's finding that there was "a running dispute between the machine shop employees and the company over the heating of the shop on cold days."[44] The Court also rejected the contention that since "the company was already making

37. *Id.*
38. *Id.* at 10.
39. Plastilite Corp., 153 N.L.R.B. 180, 183, 59 L.R.R.M. 1401, 1403, (1965), *enforced*, 375 F.2d 343 (8th Cir. 1967).
40. *Id.* at 185, 59 L.R.R.M. at 1404.
41. 370 U.S. 9 (1962).
42. NLRB v. Washington Aluminum Co., 291 F.2d 869, 877 (4th Cir. 1961), *rev'd*, 370 U.S. 9 (1962).
43. *Id.*
44. 370 U.S. at 15.

every effort to repair the furnace and bring heat into the shop that morning"[45] no controversy in fact existed at the time of the walkout. In doing so the Court stated:

> At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not.[46]

The Board in *Plastilite* concluded from this statement that the reasonableness of the method of protest chosen by employees when protesting supervisory changes was irrelevant to the determination of whether they were entitled to protection under Section 7 of the Act.[47]

The conclusion drawn by the Board from *Washington* overlooks two important facts. First of all, the employees in *Washington* were not protesting a change in supervisory personnel but rather their working conditions. Secondly, the reasonableness test thrown out by the Supreme Court in *Washington* dealt with "the reasonableness of workers' decisions to engage in concerted activity."[48] The reasonableness test applied by the circuit courts, on the other hand, is directed to the reasonableness of the method of protest chosen by employees when demonstrating their concern over a supervisory change.

The deficiencies of its analysis of the *Washington* decision in *Plastilite* have gone unnoticed by the Board. Instead, the Board has repeatedly cited to its *Plastilite* decision when presented with cases dealing with employee protests over changes in supervisory personnel. Several Board decisions are illustrative. In *Okla-Inn*, the Board maintained that the following quotation from its *Plastilite* opinion articulated the standard by which it determined whether employee protests over supervisory changes were protected under Section 7 of the Act:[49]

> Each case must turn on its facts. Where, as here, such facts establish that the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on their performance of the work they are hired to do, they are legitimately concerned with his identity. Therefore, strike or other concerted action which evidences the employees' concern is no less protected than any other strike which employees may undertake in pursuit of a mutual interest in the improve-

45. *Id.* at 16.
46. *Id.*
47. 153 N.L.R.B. at 183-84, 59 L.R.R.M. at 1404.
48. 370 U.S. at 16.
49. 198 N.L.R.B. 410, 413 (1972), *enforced*, 488 F.2d 498 (10th Cir. 1973).

ment of their conditions of employment.[50]

In *Henning & Cheadle, Inc.*,[51] the Board cited its *Plastilite* decision for the proposition that "any rule which would base the determination of whether a strike was protected upon its reasonableness in relation to the subject matter of the 'labor dispute' is a rule with which we disagree."[52] Finally, in rendering its decision in *Puerto Rico Food Products Corp.*,[53] the Board drew upon both its *Plastilite* opinion and the Supreme Court's opinion in *Washington*. The *Plastilite* opinion was cited, for the reasons stated in *Henning* and the *Washington* decision, for the premise that "the application of Section 7 does not depend on the manner or method by which employees choose to press their disputes."[54]

The Board's refusal to condition the protection afforded workers under Section 7 of the Act upon the reasonableness of the method of protest gives rise to yet another conflict between the Board and the circuit courts. This conflict concerns how far employee protests may reach within the supervisory structure of a given organization.

II. Protests Over Changes In Top Level Management Personnel

Until recently, the traditional rule applied by both the Board and the circuit courts has been that employee protests over changes in supervisory personnel were limited to low level supervisors.[55] In *Abilities & Goodwill, Inc.*,[56] however, the Board abandoned this rule and held that an employee protest over the dismissal of the second highest ranking officer in defendant's corporation was protected under Section 7 of the Act. Enforcement of the Board's order was denied by the First Circuit,[57] thus adding yet another area of conflict between the Board and the circuit courts.

Plaintiffs in *Goodwill* had staged a "sick out" in protest over the firing of the company's Director of Rehabilitation, Patrick Eisenhart. Eisenhart had charged the Executive Director of the company with "mismanagement, lack of ability, and dishonest practices."[58] In response to a request

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50. *Id.*

51. 212 N.L.R.B. 776, 86 L.R.R.M. 1692 (1974), *enforcement denied*, 522 F.2d 1050 (7th Cir. 1975).

52. *Id.* at 777, 86 L.R.R.M. at 1694.

53. 242 N.L.R.B. No. 126, 101 L.R.R.M. 1307 (June 8, 1979), *enforcement denied*, 619 F.2d 153 (1st Cir. 1980).

54. 101 L.R.R.M. at 1309.

55. 612 F.2d at 8.

56. 241 N.L.R.B. No. 5, 100 L.R.R.M. 1470 (Mar. 15, 1979), *enforcement denied*, 612 F.2d 6 (1st Cir. 1979).

57. 612 F.2d at 6.

58. *Id.* at 7.

by the President of the Board that he document his charges, Eisenhart called a meeting of the company's employees at his home. At that meeting, Eisenhart informed the employees of the situation and asked them "to compile any grievances relating to their particular programs."[59] Shortly thereafter, Eisenhart was fired by the Executive Director. At a subsequent meeting of the employees at Eisenhart's home, the employees decided to stage a "sick out" and to use the time they were not at work to prepare a report for the Board of Directors outlining their complaints with the company. When the employees attempted to return to work two days later, they were turned away by their supervisors. Thereafter, a group of the employees met with the President of the Board and delivered an ultimatum to him that they would not return to work until Eisenhart was rehired. The President of the Board then informed them "that by making this ultimatum they were terminating their employment with Goodwill."[60] A week later, the employees retracted the ultimatum, but they were advised, nonetheless, "that they had been fired and would have to reapply for their jobs."[61]

In denying enforcement of the Board's order directing Goodwill to reinstate the employees with back pay, the First Circuit noted that "[t]raditionally, the interests of the employer in selecting its own management team has been recognized and insulated from protected employee activity."[62] The court also noted, however, the following exception to the traditional rule:

> [W]hen the particular management official involved is a low level foreman or supervisor who deals directly with the employees, and the employees' concern with the identity of that person is directly related to the terms and condition of their employment, both the Board and the courts have found that employee protests over changes in supervisory personnel may be protected.[63]

In the court's view this exception existed because, "[w]ith a low level supervisor, the employer's interest in having unfettered control over his selection is reduced while the nexus between his identity and the employees' work conditions is greater."[64] Nonetheless, the court maintained that "[n]o court has ever held that the Act protects employee protests over changes in top level management personnel, nor has the Board previously

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59. *Id.*
60. *Id.* at 8.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 8-9.

advocated such a rule."[65]

Strong support for the First Circuit's contention that the Board's position in *Goodwill* represents a departure from the rule it had previously advocated can be found in the Board's *Plastilite* decision. In *Plastilite*, the Board stated, "[W]e do not hold that employees may act concertedly to protest the appointment or termination of every supervisor, even a top-level management representative."[66] The Board, however, has apparently retreated from this position since Eisenhart's employment with Abilities and Goodwill, Inc. certainly qualified him as a "top-level management representative."

III. Conclusion

In his dissent in *Phoenix*, Judge Major stated, "I would suppose under the holding of the majority that the salesmen would also be protected if they engaged in 'concerted activities' regarding respondent's president, its board of directors, its attorneys . . . all under the pretext that they had a 'legitimate interest' in such matters."[67] Although the circuit courts have taken a firm position not to extend the protection afforded an employee under Section 7 of the Act into those areas, the same cannot be said for the Board. This situation has been brought about, in part, by the inherent weakness of the Board's test for measuring those "exceptional circumstances and conditions" in which an employee protest over a supervisory change will be protected under the Act. By failing to condition the protection of Section 7 of the Act upon the reasonableness of the method of protest, the Board has inevitably reached the position, as it did in *Goodwill*, of sanctioning employee protests over top-level supervisory personnel. This situation has been brought about by the fact that the degree of contact between employees and supervisors varies from one company to another. When this contact is on a frequent basis, it is understandable that the employees involved may develop a "legitimate interest" in the individuals who occupy supervisory positions within the company. It is also understandable that in a relatively small company the degree of contact between the employees of the company and its top-level management personnel may be such that the employees have a legitimate interest in the individuals who occupy those positions as well. Under the Board's test, however, no distinction is drawn between these two situations.

The additional test required by the circuit courts, that the method of protest be reasonable, not only alleviates the problems presented by the Board's test but also serves to maintain the fundamental distinction be-

65. *Id.* at 8.
66. 153 N.L.R.B. at 182, 59 L.R.R.M. at 1402.
67. 167 F.2d at 989.

tween employees and supervisors that is made by the Act itself. As has been previously noted, the legislative history of the Act reveals that Congress chose to exclude supervisors from the protection afforded workers under the Act so that they "would not fall into league with or become accountable to employees whom they were charged to supervise and thereby renounce the undivided loyalty due the employer."[68] By affording the protection of Section 7 of the Act to employees who are "properly concerned with the identity and capability"[69] of their supervisors, the circuit courts are recognizing that there are situations in which supervisory changes may have a direct impact on an employee's working conditions. But by conditioning the protection of Section 7 of the Act upon the reasonableness of the method of protest, the circuit courts are also recognizing management's interest "in selecting its own management team."[70] Thus, the circuit courts' test serves to balance two competing interests, whereas the Board's test appears to be a return to the "overzealous regulation of employer conduct"[71] by the NLRB that Congress sought to curb by the passage of the Taft-Hartley Act in 1947.

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68. R. GORMAN, *supra* note 1, at 34.
69. 167 F.2d at 988 (Major, J., dissenting).
70. 612 F.2d at 8.
71. R. GORMAN, *supra* note 1, at 5.