PROTECTED CONCERTED ACTIVITY AND INDIVIDUAL ACTION UNDER SECTION 7: WILL *ALLELUIA CUSHION* RESURFACE?

by Ellis Boal

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PREFACE

In 1984, the Reagan Board's decision in *Meyers Industries* overruled the Nixon Board's *Alleluia Cushion* doctrine when it held that a Michigan employer was privileged under the National Labor Relations Act to discharge a nonunion truck driver for refusing to drive an unsafe truck.

In *Meyers,* the company's red Ford truck had almost killed driver Kenneth P. Prill and another driver in 1979 on an interstate highway in Tennessee. The accident occurred because the truck's steering and brakes would not allow Prill to control the rig in an emergency. He had previously complained to the company about the truck, and turned in an Ohio violation on it. In Prill's presence, another driver, Ben Gove, had also told the company he would not drive the truck because of the steering and the brakes. After the Tennessee accident, Prill called the authorities who looked at the rig and tagged it out of service. The company scrapped the truck and fired Prill.

Prill complained first to Michigan OSHA. Investigators visited the company where executives told them the accident had been Prill's fault. They also informed the investigators that Prill had been laid off, not fired. They produced a tampered seniority list on which the name of another driver, hired to fill Prill's position the day Prill was fired, had been whited out. OSHA dismissed Prill's complaint on credibility grounds. Investigators never interviewed him for his side of the story.

Prill then filed a charge with the NLRB. Initially, the ALJ ruled in his favor based on *Alleluia Cushion.* Three years later, the Board overruled *Alleluia.* It agreed that Prill had been fired for reporting the truck and refusing to drive it. However, because Prill acted alone, and not with or on the authority of other drivers, his action was not "concerted." Thus, Section 7 of the NLRA afforded him no protection.

The same year as *Meyers,* the NLRB won the *City Disposal* case in the Supreme Court. The Court held that Section 7 protected a lone unionized driver protesting an unsafe truck. Because the union contract afforded him that right, the NLRB and Supreme Court reasoned, the driver acted in concert with all drivers who through their union had negotiated the contract. Brown's action was concerted and, thus, protected.

Prill appealed, questioning why Section 7 didn't protect both union and nonunion drivers in the same situation. In *Prill I,* the DC Circuit remanded, instructing the NLRB that the *Meyers I* concertedness holding was not legally mandated. In *Meyers II,* the NLRB reaffirmed *Meyers I,* this time as a matter not

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of law but of policy. Subsequently, in *Prill II*, the DC Circuit affirmed, holding that both *Alleluia* and *Meyers* were reasonable constructions of the NLRA, and that the NLRB was privileged to choose either as the basis of its decision. Prill lost.

The DC Circuit left the NLRB free to change its mind in some future case. Today, the NLRB is considering overruling *Meyers* and reinstating *Alleluia*. Pending before it is *Myth Inc.* In *Myth*, the General Counsel alleges a nonunion employee acting alone was fired in part for filing a wage complaint with the Colorado Labor Department. The wage claim related to herself and other employees.

The following is a speech, here annotated, delivered by Ellis Boal to the 1997 Bernard Gottfried Memorial Labor Law Symposium, in Detroit, on October 16, 1997. Boal presented the labor and employee perspective on concertedness under *Meyers, Alleluia Cushion,* and *City Disposal.*

Robert P. Hunter, a member of the NLRB when *Meyers* was first decided, and now a member of the Michigan Civil Service Commission and Director of Labor Policy for the Mackinac Center for Public Policy, presented management's perspective.

Boal's talk is dedicated to the memories of Ernest Goodman and Bernard Gottfried.

I. INTRODUCTION

It is easy to ridicule the Board's decision in *Meyers Industries,* and elsewhere I do ridicule it. After all, Ken Prill is who one hopes one's child will grow up to be. He had the presence of mind to stand up to a greedy corporation and say no. He deserved a pat on the back and the day off.

Instead he got a kick in the teeth, first from Meyers Industries, then from Michigan OSHA,[1] and finally from the NLRB.[2]

Commentators everywhere, including the editors of the Christian Science Monitor,[3] the Bergen Record,[4] and the New York Times,[5] as well as Matthew Finkin,[6] co-author with Robert Gorman of the influential article[7]— relied on by the Supreme Court[8] and cited by the Board's brief five times[9] in *City Disposal*— denounced the NLRB's decision.

So, it's easy to get excited. But there are also plaintiffs' lawyers out there who, though outraged at what happened to Prill, still feel workers are better off with the

[1] *Prill v. Meyers Industries,* Determination D9-174-1 (1979), aff'd on other grounds, MIOSHA Appeal Docket MI-DI-80-45 (1981); Respondent's Exhibit 2, *Meyers Industries,* infra.

[2] *Meyers Industries Inc,* 268 NLRB 493, 115 LRRM 1025 (1984) ("*Meyers I*"), remanded sub nom. *Prill v. NLRB,* 755 F2d 941, 118 LRRM 2649 (CADC, 1985) ("*Prill I*"), cert denied sub nom. *Meyers Industries v. Prill,* 474 US 971, 120 LRRM 3392 (1985), decision on remand 281 NLRB 882, 123 LRRM 1137 (1986) ("*Meyers II*"), affirmed 835 F2d 1481, 127 LRRM 2415 (CADC, 1987) ("*Prill II*"), cert denied sub nom. *Meyers Industries v. NLRB,* 487 US 1205, 128 LRRM 2664 (1988). Cf. *GVR Inc,* 201 NLRB 147, 82 LRRM 1139 (1973) (Miller dissenting).

[3] "Hear that whistle blow . . .," Editorial, Christian Science Monitor, 10/ 8/ 86.

[4] "A bad, dangerous ruling," Editorial, Bergen Record, 1/12/84.

[5] "Close this safety loophole," Editorial New York Times, 10/ 18/ 86.

[6] Matthew W. Finkin: "Labor Law by Boz-A Theory of *Meyers Industries, Sears, Roebuck,* and *Bird Engineering,*" 71 Iowa L Rev 155 (1985).

[7] Robert Gorman and Matthew W. Finkin: "The Individual And The Requirement of 'Concert' Under The National Labor Relations Act," 130 U Pa L Rev 286 (1981).

[8] *NLRB* v *City Disposal Systems,* 465 US 822, 835, 104 S Ct 1505 (1984).

[9] The brief cited pages 331-38 and 354-56 of the article. Cf. *Retail Clerks* v *Schermerhorn,* 373 US 746, 756, 83 S Ct 1461 (1963).

decision. They note if it had gone the other way, that would have meant NLRA preemption of wrongful discharge damage suits by individuals.[10]

But Prill himself had no common law wrongful dismissal claim,[11] and due to the vagaries of state laws, similar workers in other states are similarly without remedy. As the Dunlop Commission's 1994 Fact Finding Report noted, individual access to legal relief is not uniform. High-paid executives and professionals have the cases plaintiffs' lawyers are most likely to take. Jury verdicts are often high, but the overall pattern shows a "lottery-like" response to problems.[12] And there will still be federal preemption of wrongful discharge cases where plaintiffs do meet the *Meyers* test.

So the answer to workplace problems is not individual litigation.

II. *ALLELUIA CUSHION* IS BACK ON THE TABLE

Fortunately, *Alleluia Cushion*[13] is back on the table. Until it was overruled, *Alleluia,* decided by the Nixon Board, held that workers complaining about conditions of concern to others were protected, even if they acted alone. The DC Circuit said:

> the statute could be read to support either the *Alleluia* or *Meyers* interpretation. . . . [In *Meyers II*] the NLRB has adopted a reasonable—but by no means the only reasonable—interpretation of Section 7.[14]

The Second Circuit agrees.[15] Chairman Gould and former Member Browning have questioned *Meyers'* continuing vitality and validity.[16] The General Counsel is starting to authorize complaints,[17] all of which gives us the opportunity to reflect on the protection at the heart of national labor policy which has aroused such passionate and widespread debate. Ironically, the rhetoric of *Meyers Industries*—though not the holding—helps us to do that.

III. CONFUSION AT THE MACKINAC CENTER

Taking an opposing view today is Robert Hunter, a member of the NLRB when *Meyers I* was decided, and currently representing the Mackinac Center. Today, Hunter attacks the National Labor Relations Act itself. In a Mackinac Center publication this year he said:

> Unions grew in power and influence until employers and unions were negotiating on a fairly level field. . . . With the passage of the Railway Labor Act in 1926, as well as the National Labor Relations Act in 1935, union leadership was able to employ government—the law—as an ally instead of as an impartial arbiter.[18]

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[10] Neal Orkin and Steven Orova: "*Meyers Industries* and Its Effects on Nonunion Employees' Rights in the Workplace," Labor Law J 659, 665 (September, 1990).

[11] *Ohlsen* v *DST Industries,* 111 Mich App 580, 314 NW2d 699, 702 (1981); *Prill I,* 755 F2d at 966-67 n 11 (Bork dissenting). Cf. MCLA 15.361 et seq; 49 USC 31105; *Sventko* v *Kroger Co,* 69 Mich App 644, 245 NW2d 151, 115 LRRM 4613 (1976); *Trombetta* v *Detroit T & I RR,* 81 Mich App 489, 265 NW2d 385, 115 LRRM 4361 (1978).

[12] "Fact Finding Report of the Commission on the Future of Worker-Management Relations," pp 109, 112-13, (May, 1994) ("Dunlop Report").

[13] 221 NLRB 999, 91 LRRM 1131 (1975).

[14] *Prill II,* 835 F2d at 1483, 1484.

[15] *Ewing* v *NLRB,* 861 F2d 353, 359, 129 LRRM 2853 (CA2 1988).

[16] *Liberty Natural Products,* 314 NLRB 630 n 4, 146 LRRM 1307 (1994), enforced 73 F3d 369 (CA9 1995); *KNTV Inc,* 319 NLRB No. 66, 150 LRRM 1281 n 11 (1995); *Neff-Perkins Co,* 315 NLRB 1229, 1229 n 1, 148 LRRM 1103 (1994).

[17] *Myth Inc d/b/a Pike's Peak Pain Program,* NLRB Case No 27-CA-14384 (ALJ decision 6/ 16/ 97). The employer has requested oral argument

[18] "Interview with Robert Hunter," *Michigan Privatization Report* (Winter, 1997).

Few today would agree with this assertion. As to the Railway Labor Act, Hunter is to the right of even the railroads. Railway management told the Dunlop Commission the primary purpose of that Act has been satisfied, and if it isn't broke don't fix it. The railway unions agreed.[19]

With respect to the NLRA, Hunter does not merely state the traditional employer position that the Wagner Act was bad until 1947 when the Taft-Hartley amendments restored balance. A sidebar with the interview claims the pro-union government tilt continues "today."

A second Mackinac Center publication, authored anonymously by Hunter, anticipates today's discussion. It is also perplexing because in it he struggles to explain the central point of *Meyers,* that workers must work in concert, with or on the authority of others, for protection. Hunter writes:

> The federal law protects your ability to organize, form, join, or assist labor organizations, to bargain collectively, to engage in other *related* activities *with* other employees for mutual aid or protection, or to refrain from any of these activities.[20]

"Concerted" activities has become "related" activities. Also, a worker must act "with" another worker; acting "on the authority of" others, which *Meyers* protected, no longer suffices. This is hopelessly confusing from one of the decision's authors.

IV. THE IDEOLOGY OF *MEYERS*

Before going on, though, I want to reflect on an ironic and positive ideological aspect of *Meyers.* In an important sense, it brings us back to our roots because it gets us thinking about what Congress really meant when it passed the Wagner Act in 1935.

The more we re-read *Meyers'* modern invocation of the NLRA's declaration of policy[21] denouncing "inequality of bargaining power" between organized employers and unorganized workers, and the more we re-read that the policy of the law is to

> restor[e] equality . . . by encouraging the practice . . . of collective bargaining and by protecting the exercise by workers of . . . self organization . . . for the purpose of negotiating . . . or other mutual aid or protection,[22]

and the more we hear that repeated with a straight face by people like Hunter, the more we realize those precepts are alive today, and that they unsettle the right wing. Witness tomorrow's general strike in Windsor, Ontario.[23]

Thus, I have cited *Meyers* often[24] in the fight to preserve Section 8(a)(2)—the most important protection in the Act—now under attack from the Mackinac Center[25] and others.[26]

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[19] Dunlop Report, opt cit, p 98.

[20] Mackinac Center: "Freedom from Bad Labor Advice, Q-A, Straight Answers to Common Questions about Labor Unions and Employee Rights," p 2 (emphasis added).

[21] 29 USC 151.

[22] 29 USC 151.

[23] "Protest paralysis, Labor promises to widen offensive," Windsor Star, 10/18/97.

[24] "A Critique Of S 669 And HR 1529, The Proposed Teamwork For Employees And Management Act (TEMA)," Submission to Dunlop Commission, Labor Notes (10/1/93), p 26 n 63; Amicus Brief of LERP to NLRB in *Electromation,* pp 8 n 6, 12, filed 12/17/91; Amicus Brief of Labor Notes and United Electrical Workers to Seventh Circuit in *Electromation* v *NLRB,* pp 9-10, filed 6/ 16/ 93.

[25] George C. Leef: "Should Good Relations with Employees Be an Unfair Labor Practice?" Viewpoint on Public Issues No 96-35, Mackinac Center (12/ 9/ 96).

[26] TEAM bill, S 295, HR 634.

Let me explain, first by capsulizing Section 8(a)(1). That section protects disorganized efforts—leafletting, one-on-one encounters, and other embryonic rank-and-file activity—from employer interference. *Meyers I* and *II* argued that such activity deserved protection *because* it is the predicate for unionization:

> 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.[27]

So, *Meyers supports* unionization. Why? Because a union is the matured and sophisticated development of disorganized rank-and-file activity into a mass form which is alone capable of opposing capital and making a better life.

Section 8(a)(2) rightly gives unions and worker groups even greater protection than 8(a)(1) gives to one-on-one encounters. Unions are protected not just from interference but from cooptation: employers cannot legally dominate them.

And, unlike company-dominated committees, unions are democratic. They are so democratic that they embrace the ideals of the Landrum-Griffin Act's bill of rights for union members[28] in their governing documents.[29] They are so democratic that they withstand the scrutiny of free-speech suits brought by members. I know. I bring many of them.

Corporations lack this confidence. If one owns shares of a corporation and doesn't have the votes to carry one's position, one just calls up one's broker and buys some more. If corporations had to be democratic, they would collapse on the spot.

Dominated committees likewise cannot abide free speech. When Polaroid was told in 1992 that its employee committee for 46 years *might* have to elect officers by secret ballot, it dissolved the committee in a week.[30]

Meyers tells workers to unite and fight when there is a common problem. Together with *City Disposal,* which protected an individual unionized employee protesting a contract violation, the net effect of the Reagan NLRB was to tell them to do that by joining a union and getting a contract.

This is an important lesson. It was a similar return to basics that obliged the Reagan-Bush Board, against all of its instincts, to uphold Section 8(a)(2) in *Electromation.*[31] It was such a pleasure to read these people quoting Senator Wagner saying things like:

> Genuine collective bargaining is the only way to attain equality of bargaining power. . . . [E]mployer-dominated unions . . . [make] a sham of equal bargaining power. . . . [O]nly representatives who are not subservient to the employer . . . can act freely. . . .[32]

Employers went crazy when they read this. By my count, employer amici filed 403 pages of briefs and attachments with the Board. Two of the signers were Don Zimmerman, the dissenter in *Meyers I,* and Hunter. Then employer amici filed 117

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[27] Quoting *Root-Carlin, Inc,* 92 NLRB 1313, 1314, 27 LRRM 1235 (1951).

[28] See e.g., UAW Constitution, Ethical Practices code; AFSCME Constitution, Bill of Rights for Union Members; Mineworkers Constitution, Article 12, Rights and Duties of Members.

[29] 29 USC Section 411.

[30] *Scivally* v *Graney,* 143 LRRM 3043, 3045, (D Mass, 1993), aff'd 21 F3d 420, 146 LRRM 2832 (CA1, 1994). Cf LMRDA Section 3(i), 29 USC 402(i); OLMS Interpretive Manual § §030.601 et seq, esp § §030.603, 610-29.

[31] 309 NLRB 990, 142 LRRM 1001 (1992), aff'd 35 F3d 1148, 147 LRRM 2257 (CA7, 1994).

[32] "Legislative History of the National Labor Relations Act of 1935," 15-16 (GPO, 1949), as quoted in *Electromation,* 309 NLRB at 992.

more pages of briefs with the Seventh Circuit in an attempt to try to convince it that the case was important for cooperative labor relations. How silly.

The *Electromation* story did have a happy ending. After the case, an authentic movement then came to flower. The Teamsters won the election rerun. Soon the workers and management had a contract.[33]

The case is a textbook example of the law working as it should. *Meyers* was right to say the principal purpose of the NLRA was to empower workers collectively.

But that is not solely what the law is about. Controversial cases rarely deal with the issues which are obvious. It is those in the margins and interstices which attract attention, and that is where we find ourselves in today's discussion.

V. THE NLRA AS A CIVIL RIGHTS LAW

There is one more Mackinac Center position I will cite. Surprisingly, it helps lead us out of the mess. One of its brochures identifies the Center's central ideas, and second from the top is:

> Helping workers exercise their *civil rights* in relationships *with their employers* and their labor unions.[34]

What "civil rights" against "employers" could the Center be talking about so positively? In Hunter's interview already cited,[35] the only federal law he cites is the National Labor Relations Act as interpreted in *Communications Workers v. Beck*.[36]

Now *Beck* is not our topic today. But I do want to appreciate the unusual insight, today so often forgotten, that the National Labor Relations Act is a civil rights statute. Today for instance, the ACLU recognizes the rights to organize and strike as civil liberties.[37] Within a few years of the NLRA's passage, industrial espionage, professional strikebreaking, antiunion private police, industrial munitioning, and discrimination against union members were eliminated or reduced. For those living around Detroit today we still see that kind of thing in the newspaper strike/lockout.[38] But in general,[39] the departure of these tactics has been a great victory for civil liberties.

Thus, in *City Disposal* the Supreme Court cited 15 pages of Gorman and Finkin's celebrated article explaining that the concertedness language of Section 7 is just surplusage. In a detailed study of the legislative history Gorman and Finkin explain why:

> [O]ne of the objectives of the NLRA was to take the same forms of [individual and group] conduct which the Clayton[40] and Norris-LaGuardia Acts[41] had declared protected against governmental sanction and declare them as well to be protected against private sanction through employer coercion and discipline.
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> . . .

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[33] Teamsters Brief to NLRB in *Electromation*, p 5 n 2, filed 8/ 27/ 91.

[34] Mackinac Center: "Cultural Advancement Through Policy Innovation" (emphasis added).

[35] Hunter, op cit.

[36] 487 US 735, 487 S Ct 2641 (1988).

[37] ACLU policies ##48, 49.

[38] See generally the weekly coverage in the *Detroit Sunday Journal*, 450 W Fort, Detroit, MI, 48226, 313/964-5655.

[39] Irving Bernstein: *The Turbulent Years, A History of the American Workers, 1933-41*, p 788 (Houghton Mifflin Co, Boston, 1971).

[40] 29 USC 52.

[41] 29 USC 102, 104, 113(c).

> The appeal to individual *civil rights* [made in those acts] was made even more strongly in the debate over the NLRA; but now the argument was for *civil rights* at the workplace rather than freedom from judicial control.
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> . . .
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> [A]t the core of the freedom of the individual to protest in a group necessarily lies the freedom of the individual to protest at all.[42]

These Court-approved passages show that separating individual activity from group activity creates a false dichotomy. Indeed, one of the reasons the National Association of Manufacturers opposed the NLRA in 1935 was *because* it created new civil rights and allowed the NLRB to adjudicate them. Quoting from the testimony of James A. Emery, NAM's principal spokesman:

> It is intended to determine by this board whether or not there has been a violation of a *fundamental right* of an employee by an employer. . . . These are *fundamental civil rights of liberty* and of property and of contract.[43]

On this count at least, NAM was right.

From this starting point it takes little imagination to see that protection of individual civil rights will lead to encouragement of group activity to make those rights stick. Unions fought to preserve *Alleluia* for nonunion workers. The UAW told the DC Circuit in 1987, quoting the Sixth Circuit:

> Organized and protected complaints will often develop from the dissatisfaction of an individual employee; the employee's initial protestations do not forfeit protection under the Act merely because they precede union involvement or concerted activity.[44]

VI. WHERE DO WE GO FROM HERE?

Prill convinced the DC Circuit and the Board that the *Meyers* test is not mandated as a matter of *law*. When the case came back to the Board, Hunter was no longer on it. Liberated from legal error, we can hope that now, unlike the Board, as a matter of *policy* he will support the civil rights law before us.

Let me suggest some ways to chip away at *Meyers*. I start with technical points.

> 1. In *Electromation*, I was surprised to see animated disagreement between concurring members Raudabaugh and Devaney whether "representation" is a necessary element of the definition of a labor organization. Curiously, Raudabaugh, the more conservative member, argued it was not. Intuitively, Devaney's view is appealing. The majority took no position though, and the issue is not resolved at the Board today. But if it is arguable that a labor organization—the matured form of concerted activity for mutual aid or protection—need not represent anyone, I suggest this undercuts *Meyers'* alternative requirement that a worker must act "on the authority of" others to be protected.

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[42] Gorman and Finkin, op cit, 130 U Pa L Rev at 338, 343, 345 (footnotes in original omitted, statute citations and emphasis added).

[43] "Legislative History of the National Labor Relations Act Volume II," 1630, 2236-39, 2243 (NLRB, 1985) (emphasis added).

[44] UAW Brief in *Prill II*, p 19, filed 7/30/87 (quoting *McLean Trucking* v *NLRB*, 689 F2d 605, 608, 111 LRRM 3185 (CA6, 1982)).

2. If "concerted activity" and "mutual aid or protection" are two separate and narrow tests, each to be met for protection, this has repercussions that should concern those like the Mackinac Center who support employee participation to achieve company goals. The Board held in 1992 that jealous managers are privileged to retaliate against worker efforts to press *for* participatory management. Why? Because improvements in productivity and profitability—construed narrowly—do not advance "mutual aid or protection" of workers as workers.[45]

3. The "logical outgrowth" doctrine, developed just after *Meyers II,* protects a sole employee taking individual action if it grew "logically" out of a prior group protest. Dissenting, Chairman Dotson considered this a resurrection of *Alleluia* and a betrayal of *Meyers.*[46] I agree with the "logical outgrowth" doctrine, and I agree that it betrays *Meyers.*

4. Recall that the purpose of the NLRA is to protect what the Clayton Act exempted from the Sherman Antitrust Act. The Sherman Act made agreements to restrain trade illegal.[47] Such agreements are redolent of "concerted activity," albeit among employers. So it may be instructive to examine Sherman Act cases and the doctrine of "conscious parallelism"[48] to determine the scope of the NLRA. Without much success, we argued in *Meyers II* that Prill and the other driver who had refused to drive the truck were equally in concert as a couple not touching is dancing. We hope that a new Board will be attracted by the logic, and the poetry, of the "conscious parallelism" approach.

5. The Reagan Board was not above making its own fictional inferences when it suited its purposes. A month after *Meyers I* for example, it held that picket line threats unaccompanied by physical gestures warranted denial of reinstatement to strikers, regardless of whether targets of the threats were actually intimidated *or not.*[49] Why? Because the NLRB makes its own "objective" assessment. If so, other "objective" inferences can be made. As ALJ Robert Giannasi noted in *Meyers,* action to correct safety problems, unlike payment of wages for example,[50] is legally mandated.[51] So, viewed "objectively," in a safety case like Prill's, Prill acted "on the authority" of *every* other driver.

6. The discharge of one employee is no less an exercise of autocratic power than the discharge of two. Even if Prill's act is itself not within Section 7, surely a discharge like his would chill others considering a similar action, but in a group. He should be protected because of the chilling effect on others.

7. In their amicus brief to the Board in *Electromation,* Newt Gingrich, Richard Armey, Cass Ballenger, and seven other Congressmen broadly as-

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[45] *Harrah's Lake Tahoe Resort Casino,* 307 NLRB 182, 140 LRRM 1036 (1992); cf *Hancor Inc,* 278 NLRB 208, 121 LRRM 1311 (1986).

[46] *Every Woman's Place,* 282 NLRB 413, 124 LRRM 1001 (1986), aff'd 833 F2d 1012, 128 LRRM 2296 (CA6, 1987); *Jhirmack Enterprises,* 283 NLRB 609, 125 LRRM 1010 (1987); *Salisbury Hotel,* 283 NLRB 685, 125 LRRM 1020 (1987).

[47] 15 USC 1, 2.

[48] Donald F. Turner: "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to deal," 75 Harvard L Rev 655, 656 (1962).

[49] *Clear Pine Mouldings,* 268 NLRB 1044, 115 LRRM 1113 (1984), enf'd 765 F2d 148, 120 LRRM 2631 (CA9, 1985); *Roto Rooter,* 283 NLRB 771, 125 LRRM 1055 (1987); *Tube Craft Inc,* 287 NLRB 491, 127 LRRM 1234 (1987); but see *Land Air Delivery Service,* 286 NLRB 1131, 130 LRRM 1015 (1987), review denied 82 F2d 354, 130 LRRM 2118 (CADC, 1988), cert denied, 493 US 810 (1989).

[50] *GVR Inc,* 201 NLRB 147, 82 LRRM 1139 (1993).

[51] 49 CFR 396.4; cf ALJ decision in *Meyers,* p 9 n 5; 29 USC 143.

serted that the Board should reverse longstanding prior precedent because new politicians were in power and

> [t]he impact of . . . shifts [in the fortunes of the political parties] on Board decisionmaking has long been recognized by Board observers.[52]

If these conservatives are right, the fact of new Board personnel today is sufficient reason to take another look at *Meyers*.

VII. CONCLUSION

I agree with the newspaper editors. Noting *Alleluia* for example, the New York Times editor wrote:

> The nation's basic labor law ought to protect workers for reporting violations of law, whether they act as a group or individually.[53]

It is just a matter of simple justice. Simple justice—or civil rights—is one of the reasons we have the law.

I have not ridiculed the *Meyers* Board in this talk, but I close with a vignette found by Finkin[54] which does. Finkin discounts politics as an explanation for the Reagan Board decisions. His view is comedic. He says the legal reasoning in this and other cases was slipshod, pettifogging, and perverse to the point that it could only be animated by the ghost of Charles Dickens, returned to haunt us labor practitioners for amusement.

Finkin recites an episode in *Oliver Twist*. Some may recognize it. The setting is the evening meal at the parish workhouse—a starvation diet of thin gruel—where the nine-year old Oliver and his mates are housed:

> The gruel disappeared; the boys whispered to each other, and winked at Oliver, while his next neighbours nudged him. . . . He rose from the table; and advancing to the master, basin and spoon in hand, said, somewhat alarmed at his own temerity:
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> "Please, sir, I want some more."
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> The master was a fat, healthy man; but he turned very pale.
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> . . .
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> "What!" said the master at length, in a faint voice.
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> "Please, sir," replied Oliver, "I want some more."
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> . . .
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> The board were sitting in solemn conclave, when Mr. Bumble rushed into the room in great excitement, and addressing the gentleman in the high chair, said, "Mr. Limbkins, I beg your pardon, sir! Oliver Twist has asked for more!"
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> . . .
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> "For *more*!" said Mr. Limbkins.
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[52] Brief of US Representatives Gunderson, Gingrich, Goodling, Ritter, Henry, Armey, Boehner, Edwards, Klug, and Ballenger to the NLRB, in *Electromation*, p 7 n 9, filed 1/31/92, citing Cornelius J. Peck, "A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making," 117 U Pa L Rev 254, 254 (1968).

[53] New York Times, op cit.

[54] Matthew Finkin, op cit, 71 Iowa L Rev at 156-57.

"That boy will be hung," said the gentleman in the white waistcoat. "I know that boy will be hung."[55]

Well Oliver wasn't hanged. But today, were he an employee pleading earnestly "I want some more," he could be fired for impertinence. This is fundamentally wrong in so many different senses.

We await the day when the Board—and civil rights advocates everywhere—will agree.

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[55] Charles Dickens: *Oliver Twist*, p 11 (K Tillotson ed. 1966).